



August 7, 2017

Office of Exemption Determinations
Employee Benefits Security Administration
Attention D-11933
U.S. Department of Labor
200 Constitution Avenue, NW, Suite 400
Washington, D.C. 20210

Re: Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions – RIN 1210-AB82 - 82 Fed. Reg. 31278 (July 6, 2017)

Dear Madam/Sir:

We¹ appreciate the opportunity to respond to the Request for Information (“RFI”) cited above, which seeks input on the Department of Labor’s (“DOL”) fiduciary duty rule and accompanying exemptions (“PTE”s), including the Best Interest Contract Exemption (“BICE”) (collectively the “Rule,” unless otherwise noted). Specifically, the RFI seeks input on the “advisability” of further delaying various provisions scheduled to go into effect on January 1, 2018. In addition, the DOL seeks input that could form the basis for three possible steps: (1) changes to the Rule; (2) changes to one or more of the exemptions; (3) new, streamlined exemptions for some products that some advisers are reportedly developing.

In this comment letter—

- We reiterate our strong opposition to any delay in the implementation of any aspect of the Rule;
- We reject the notion that the Rule warrants any revisions, especially in light of the thorough rulemaking that DOL followed and in light of the fact that the Rule has not yet even gone entirely into effect;

¹ Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system, one that protects and promotes Americans’ jobs, savings, retirements, and more.

- We oppose some of the particular suggestions in the RFI, which are unwarranted and unwise; and
- We again offer caveats about the process that the DOL must follow as it examines the rule and contemplates revisions: It must discount bogus industry studies, expand the scope of the economic analysis as necessary to encompass the full range of costs to retirement savers arising from conflicts of interest, and afford ample notice and opportunity to comment.

If the DOL fails to weigh and implement all of these considerations appropriately, and if it revises the Rule or the PTEs so as to weaken them, its actions will be subject to legal challenge as arbitrary and capricious.

1. DELAY IS UNWARRANTED.

On July 21, 2017, we submitted a comment letter strongly opposing any delay of the provisions that are scheduled to become effective on January 1st. There is in fact no basis for delay, as the industry will have had ample time to prepare for compliance—over a year and a half. Their claimed need for more time to develop “innovative” new products is unpersuasive. The industry may of course seek to develop investment products that better serve investors and facilitate compliance with applicable laws and rules, but it is a non-sequitur—arbitrary and capricious, in fact—to suggest that while such industry evolution takes place, investors should continue to suffer without the full measure of protection that Congress intended and that the DOL meticulously designed in the form of the Rule and the PTEs.

The most damaging impact of any delay will be felt most acutely by Individual Retirement Account (“IRA”) owners. Among the most important provisions in the BICE scheduled for implementation on January 1st is the contract requirement for advisers to IRA owners and the general requirement that advisers adopt policies and procedures designed to ensure compliance with the Impartial Conduct Standards. Without both of these measures in place, IRA owners will have no recourse for breaches of the fiduciary duty, and advisers will have comparatively weak incentives to comply with the Rule and the terms of the BICE. Because the DOL’s estimates of harm flowing from conflicts of interest under the old rule, as set forth in the Regulatory Impact Analysis (“RIA”), were based solely on losses suffered by IRA owners, it stands to reason that without these strong compliance incentives and remedies, which especially benefit IRA owners, a very significant portion of the multi-billion dollar annual cost to retirement savers will continue unabated until the full array of BICE provisions is in place.

Thus, further delay will inflict significant harm on investors, without any credible justification or need. Such a step would be arbitrary and capricious.

2. **AS A GENERAL MATTER, THERE ARE NO JUSTIFICATIONS FOR REVISIONS TO THE RULE.**

In light of the exhaustive rulemaking process followed by the DOL; the well-designed provisions of the Rule resulting from that process; the reasonable accommodations that the DOL has already made for the industry; the complete vindication by the courts of every aspect of the Rule; and recent events showing that the Rule is eminently workable for industry, there is no basis for any revisions to the Rule. Moreover, the President's Memorandum provided no basis for believing that the Rule fails to comport with any of the broad "priorities" listed in the Memorandum. The Memorandum was a purely political gesture, aimed at appeasing the shrinking but still powerful and vocal members of the adviser industry who would ardently prefer to maintain the status quo, under which they profit handsomely at the expense of retirement savers.

A. **The rulemaking process was extraordinarily thorough and inclusive.**

The Rule resulted from one of the most lengthy, data-driven, and open rulemakings in history. It included years of consultation with industry and public interest stakeholders; a robust economic analysis detailing the costs and benefits of the Rule; over 100 days of public comment; the consideration of over 3000 comment letters and 30 petitions containing over 300,000 submissions; and four full days of hearings at which over 75 speakers testified. The comments received and carefully reviewed by the DOL came from a broad spectrum of stakeholders, including consumer groups, plan sponsors, financial service companies, academics, elected government officials, trade and industry associations, and others. The DOL carefully evaluated every aspect of the Rule and every remotely credible comment urging alternative approaches. The decisions it made were rational, well-justified, and fully explained in the accompanying release and the RIA. It is incredible for anyone now to suggest that the Rule requires re-examination or amendment only two months after the core provisions went into effect, before many of the protections in the Rule are even in place, and following such an exhaustive rulemaking process.

B. **The DOL generously accommodated the industry in the final Rule by granting discretionary exemptions, accepting many of their suggestions in the process, and affording ample time to comply.**

The final Rule reflected significant accommodations to industry. Most significantly, it created a generous exemption in the form of the BICE. The Employee Retirement Income Security Act of 1974 ("ERISA") flatly prohibits the conflicts of interest that arise from adviser recommendations incentivized by the prospect of commission payments. However, rather than simply implementing that statutory ban, the DOL exercised its broad discretion and fashioned a new exemption allowing such commission-based sales to continue, provided advisers adhere to the fiduciary standard and comply with other reasonable requirements.

Moreover, the DOL made significant changes in the proposed rule in response to the input it received from industry and others. For example, in the BICE alone, it simplified the

disclosure requirements, eliminated the written contract requirement for ERISA plan owners, and eliminated the list of permissible investment products—requirements that were eminently justifiable and could very reasonably have been retained. In the Rule itself, the DOL expanded the exclusion for sellers and the broadened the education exclusion. Finally, the DOL provided ample time for the industry to comply, allowing a full year before the core requirements of the Rule would take effect, and an additional eight months, until January 1, 2018, as a grace period before the requirements would become fully applicable.

C. The Rule has been upheld by every court to consider it.

The Rule has survived fully intact after a series of court challenges advancing a wide range of legal theories. Every one of the three federal district courts to reach the merits has rejected all of the legal attacks advanced by the industry plaintiffs and their trade association representatives. And they have specifically addressed and put to rest the three concerns listed in the President’s Memorandum, finding that the Rule will not restrict access to advice or products, disrupt the industry to the detriment of investors, increase litigation risk to the point of forcing increases in the price of advice.² On three separate occasions, those district courts, along with one federal appellate court, have also rejected attempts to enjoin the Rule pending litigation or appeal. In the words of the United States District Court for the District

² See, e.g., Better Markets “Comment Letter on Definition of the Term “Fiduciary” – Proposed Delay of Applicability Date” (Apr. 17, 2017) at 12-16, available at <https://bettermarkets.com/sites/default/files/DOL-%20CL-%20Definition%20of%20the%20Term%20Fiduciary-Proposed%20Delay%20on%20Applicability%20Date-%2020170417.pdf>. On these and all other issues raised in the RFI, we refer the DOL to all of our prior comment letters, which we incorporate by reference as if fully set forth herein. See, e.g., Better Markets “Comment Letter on Definition of the Term “Fiduciary”; Conflict of Interest Rule – Retirement Investment Advice” (July 21, 2015), available at <https://bettermarkets.com/sites/default/files/Better%20Markets%20Comment%20Letter%20-%20DOL%20Fiduciary%20Duty%20Rule%207-21-15.pdf>; Better Markets “Comment Letter on Definition of the Term “Fiduciary”; Conflict of Interest Rule – Retirement Investment Advice” (Sept. 24, 2015), available at <https://bettermarkets.com/sites/default/files/DOL%20-%20CL%20-%20Definition%20of%20the%20Term%20Fiduciary%20-%20Conflict%20of%20Interest%20Rule%20-%20209-24-2015.pdf>; Better Market “Comment Letter on Definition of the Term “Fiduciary” – Proposed Delay of Applicability Date” (Mar. 17, 2017), available at <https://bettermarkets.com/sites/default/files/DOL-%20CL-%20Definition%20of%20the%20Term%20Fiduciary-Proposed%20Delay%20on%20Applicability%20Date-%2020170317.pdf>; Better Markets “Comment Letter on Definition of the Term “Fiduciary” – Proposed Delay of Applicability Date” (Apr. 17, 2017) available at <https://bettermarkets.com/sites/default/files/DOL-%20CL-%20Definition%20of%20the%20Term%20Fiduciary-Proposed%20Delay%20on%20Applicability%20Date-%2020170417.pdf>; Better Markets “Comment Letter on Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions” (July 21, 2017), available at <https://bettermarkets.com/sites/default/files/DOL-%20CL-%20Request%20for%20Info%20Regarding%20the%20Fiduciary%20Rule%20and%20PTes-%2020170721.pdf>.

of Kansas in the *Market Synergy* case, “Any injunction will produce a public harm that outweighs any harm that plaintiff may sustain from a rule change.”³

D. Recent events show that the Rule is eminently workable.

Large segments of the financial services industry either already operate under the fiduciary standard or are prepared to embrace the Rule and to ensure that their advisers provide advice that is solely in their clients’ best interest. Major sectors of the adviser industry have, through their public statements, advertisements, and actions, clearly indicated that the Rule is eminently workable and in fact, good for business. Some firms are planning to maintain commission-based accounts, in conformity with the Rule. Some are shifting to fee-based accounts, while reducing account minimums and fees so they can serve even the most modest retirement savings. Some are simply reducing their fee and cost structures on existing products to be more competitive. In addition, firms are evolving new product lines that will enhance the role of commission-based accounts under the Rule. These include new classes of mutual fund shares that reduce loads and help minimize conflicts of interest in compensation structures. And even in the litigation challenging the Rule, affidavits from some members of the insurance industry conceded that insurance firms and Independent Marketing Organizations (“IMOs”) were taking steps to comply with the Rule. Plainly, the industry will adapt, and retirement savers will benefit from ample access to vastly better investment advice.

3. THE RULE CHANGES UNDER CONSIDERATION AND REFERENCED IN THE RFI ARE UNJUSTIFIABLE AND UNWISE.

A. Concerns raised in the general questions regarding access to advice and the costs and benefits of the exemptive conditions are groundless.

The RFI poses a series of general questions focused on whether the Rule properly balances investors’ need for advice and products with their need for protections against

³ See *Chamber of Commerce v. U.S. Dep’t of Labor*, No. 17-10238, 2017 WL 1284187 (5th Cir. Apr. 5, 2017) (“*Chamber III*”) (denying appellants’ motion for injunction pending appeal and for expedited appeal); *Chamber of Commerce v. Hugler*, No. 3:16-cv-1476-M, 2017 WL 1062444 (N.D. Tex. Mar. 20, 2017) (“*Chamber II*”) (denying appellants’ motion for injunction pending appeal); *Mkt. Synergy Grp., Inc. v. U.S. Dep’t of Labor*, No. 16-CV-4083-DDC-KGS, 2017 WL 661592 (D. Kan. Feb. 17, 2017) (“*Market Synergy II*”) (granting summary judgment to the Department of Labor); *Chamber of Commerce v. Hugler*, No. 3:16-cv-1476-M, 2017 WL 514424 (N.D. Tex. Feb. 8, 2017) (“*Chamber*”) (granting summary judgment to the Department of Labor); *Mkt. Synergy Grp., Inc. v. U.S. Dep’t of Labor*, No. 16-CV-4083-DDC-KGS, 2016 WL 6948061 (D. Kan. Nov. 28, 2016) (“*Market Synergy I*”) (denying plaintiff’s motion for preliminary injunction); *Nat’l Ass’n for Fixed Annuities v. Perez*, 219 F. Supp. 3d 10 (D.D.C. Nov. 23, 2016) (“*NAFA II*”) (granting motion for expedited ruling and denying plaintiff’s motion for preliminary injunction); *Nat’l Ass’n for Fixed Annuities v. Perez*, 217 F. Supp. 3d 1 (D.D.C. Nov. 4, 2016) (“*NAFA I*”) (granting summary judgment to the Department of Labor).

conflicts of interest.⁴ It further inquires about the costs and benefits of the various conditions for exemptions.⁵

As to the first question, there is in reality no tension between the protections in the Rule and investors' access to advice and products. On the contrary, the Rule ensures that investors will have much greater access to higher quality advice untainted by conflicts of interest, at affordable prices. Nor will the Rule narrow the scope of available investment products; all manner of products will continue to be available, but advisers will no longer be permitted to recommend high-cost, poor performing investments that are not in their clients' best interest. In short, the notion that the Rule would constrict access to advice or products is a myth concocted by opponents, without any credible factual basis, solely for the purpose of weakening or rescinding the Rule. And of course, all of these issues and concerns were fully addressed by the DOL in the rulemaking process, and considered and rejected by the courts evaluating the multitude of legal challenges to the Rule.

Similarly, the costs and benefits of the various conditions attached to the exemptions were fully evaluated by the DOL, as well as the courts, and the benefits were found to justify the costs. On this subject, it bears noting yet again that Congress established the criteria that the DOL must satisfy before adopting any exemptions from the legislative prohibitions governing retirement advice fiduciaries. Any exemptions must above all protect plan participants and beneficiaries, and they must be administratively feasible for the DOL to implement and oversee. Nowhere did Congress require the DOL to assess the costs and benefits of the conditions for exemptions, nor did it specify that accommodating the adviser industry or sparing it the burdens of the conditions was to be a factor—something that Congress often does but deliberately chose not to do in this instance given the extraordinary importance of Americans' retirement assets.

B. The contract requirement in the BICE is essential, and it will not impose litigation risk that interferes with access to advice.

The RFI acknowledges that the contract and warranty requirements in the BICE will motivate compliance and provide IRA owners with a means of enforcing the protections afforded by the Rule.⁶ But it also notes that some commenters believe those provisions will have “negative implications” for “investor cost and access to advice.” In reality, these are baseless concerns. Removing those powerful compliance incentives and robbing IRA owners of their only meaningful form of redress for violations of the fiduciary standard would inflict far more harm than good on investors. Moreover, thus gutting the BICE under the specious banner of protecting investors from higher costs and limited access to advice would be irrational. And, in response to the RFI, we note that there is no adequate substitute for these provisions—they must be preserved.

⁴ RFI at 31279.

⁵ *Id.*

⁶ RFI at 31279-80.

Of particular importance is the class action waiver ban in the BICE. It ensures that groups of retirement savers harmed by widespread abuses committed by an adviser have a meaningful remedy for their losses. This provision also benefits investors by more strongly motivating firms to comply with the Rule. And none of the hyperbolic objections to contractual liability through individual arbitrations or class action lawsuits have any basis.

Some in the industry have claimed that the Rule will trigger an onslaught of litigation, threatening potentially devastating liability. This is unfounded. As a threshold matter, Congress clearly intended retirement savers to have meaningful remedies in court when ERISA fiduciaries violate applicable standards of conduct. The Congressional declaration of policy in ERISA expressly provides that the law is designed to protect plan participants and beneficiaries by “establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, **and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.**”⁷

Apart from legislative intent, the Proposed Rule embodies an important limitation based on the nature of the inquiry that will determine an adviser’s liability: As explained earlier in the rulemaking process, recommendations are assessed for compliance with the best interest standard based on the circumstances prevailing at the time advice is rendered—not based on future performance of the product sold. This limits the opportunity for any investor to seek unfair redress for losses that arise from market performance rather than adviser misconduct.

In addition, the BICE allows advisers to force their clients into mandatory **individual** arbitration. Thus, advisers have little to fear from litigation under the BICE, as the arbitration forum favors industry and dampens the frequency and magnitude of recoveries by investors.

While the BICE preserves the right of an investor to bring or participate in class actions, this right would not pose a significant liability threat to advisers. For years, procedural hurdles have made class action lawsuits a difficult undertaking. For example, they cannot be brought where the particular facts and circumstances surrounding each investor’s claims must be individually analyzed—as in typical cases involving breach of fiduciary standards. On the other hand, if an adviser were to engage in the type of systemic misconduct under the Rule that would lend itself to class action resolution, then it would be highly appropriate—not an unfair burden—for investors to have recourse via a class action suit.

Finally, industry’s predictions about litigation liability also lack empirical support. Advisers who already abide by the best interest standard have not been subject to unreasonable litigation liability.

By raising the specter of burdensome litigation, opponents of the Rule are in effect saying that they refuse to be accountable. This is no reason to reject or weaken the Rule. Litigation is an appropriate and necessary mechanism for allowing victims of misconduct,

⁷ 29 U.S.C. § 1001 (emphasis added).

including breaches of the fiduciary duty, to obtain fair redress for their damages. The simple solution to fears about litigation is for an adviser to comply with the regulatory standards that govern adviser conduct for the protection of investors. If advisers either cannot or will not adhere to those standards, the appropriate response is to deny them the privilege of being an adviser, not dilute the Rule.⁸

C. Streamlined exemptions are unnecessary and potentially harmful.

It is unnecessary and potentially harmful to create additional, streamlined exemptions under the Rule. The suggestion is plainly counterproductive to the extent it is being advanced as an excuse to justify further delay of the Rule and the PTEs. As a matter of substance, there is no need to fashion new exemptions to accommodate “innovative” new products. If those products are engineered to eliminate impermissible conflicts of interest, then they require no further exemptive relief. If, on the other hand, they pose less intense conflicts of interest but conflicts of interest nonetheless, then they should still be subject to the full array of protective conditions in the applicable exemption. And presumably, the simpler design of such products would make compliance with the exemptions easier and less burdensome for industry.

Finally, exemptions are notoriously prone to becoming loopholes in any regulatory scheme, and that risk cannot be justified on the basis of some marginal benefit to industry in the form of incrementally reduced compliance burdens—something Congress never established as a priority in the statutory framework for exemptions under ERISA or the Internal Revenue Code. And it should be obvious that designing a “streamlined” exemption in reliance on a model set of policies and procedures **produced by industry**, as suggested in the RFI, would be a mistake.⁹

D. Reliance on any expected fiduciary standard the SEC may someday develop for financial advisers is legally untenable and unwise.

The RFI asks whether the DOL could fashion a streamlined exemption based upon compliance with “updated standards of conduct” applicable to retail investment advice that the SEC or other regulators might adopt.¹⁰

As a legal matter, this suggestion makes little sense, as the DOL and the SEC operate under separate statutory regimes with distinct purposes. The SEC has no legal authority to issue or update any rules implementing ERISA. Congress gave that responsibility to the DOL, recognizing the unique importance of tax-advantaged retirement assets and the need to protect them under a separate regime applying the highest possible standards of loyalty and

⁸ Unfortunately, the Department of Justice (“DOJ”) has made clear that it will no longer defend the class action waiver ban in the BICE, based upon the position it has taken on a related issue in another case. However, as made clear by the American Association for Justice in its amicus filings, *see, e.g., Chamber III*, the DOJ’s position actually conflicts with the weight of legal authority, as the class action waiver ban can be harmonized with the Federal Arbitration Act and applicable precedent.

⁹ RFI at 31280.

¹⁰ *Id.*

care. Furthermore, the SEC lacks any authority to regulate advice about investments that are not securities. Yet, retirement accounts routinely include a variety of non-securities investments, including insurance products, real estate, and even commodities. Unlike the SEC, the DOL has broad authority over all of these assets as well as any “moneys or other property” of a plan.

As a practical matter, forcing the DOL to wait for the SEC means indefinite delay, lasting years at a minimum. Literally for decades, the SEC has been content to allow financial advisers at broker-dealers to exploit an exemption in the Investment Advisers Act, depriving untold investors of the protections of the fiduciary standard. And even after Congress expressly gave the SEC authority to impose a best interest standard on those brokers, it failed to take meaningful action, notwithstanding the conclusions and recommendations of its own staff that the SEC **should** adopt such a rule. While former SEC chair Mary Jo White attempted to move the agency forward on this front, she had no success. And although the SEC has solicited public input about possible approaches to a new standard for financial advisers, it is not at all clear if or when the agency will ever take action and whether the outcome would ultimately be a bona fide fiduciary standard, or, as many fear, a diluted standard that represents little more than suitability combined with additional disclosure obligations—something far short of what Congress intended and mandated in ERISA.

In short, on legal and practical grounds, there is no justification for relying on the SEC to provide a reliable standard that could serve as the basis for exemptive relief by the DOL.

E. The disclosure requirements in the Rule are appropriate and necessary and should not be diluted.

The RFI seeks input on the possibility of a simpler disclosure requirement for purposes of satisfying the exemptions.¹¹ We urge against such an approach. Enhanced disclosure is an important safeguard that is necessary to offset the heightened risks to investors arising from the conflicts of interest that would persist under the exemptions in the Rule. Moreover, the DOL has already scaled back those requirements in the BICE, for example, in response to industry concerns expressed during the rulemaking process.

All of the required disclosures in the BICE are material, appropriate, and necessary to ensure that clients fully understand the conflicts of interest that are influencing any adviser relying on the BICE exemption. Those disclosures must provide, directly or through web links, information about conflicts of interest, the costs of investments, and adviser compensation, all clearly appropriate subjects for disclosure.

To the extent the RFI is suggesting the development of more clear, intelligible, and timely disclosure, that would be positive. It is widely acknowledged that disclosures do little to protect investors if they are not clear and intelligible; prominently displayed; delivered in a timely fashion; and unaccompanied by disclaimers or qualifiers that negate their impact.

¹¹ RFI at 31280.

But none of this would justify making disclosures leaner so that they deprive investors of important information.

Much of the opposition to the disclosure requirements in the BICE is based on the exaggerated premise that disclosure requirements impose too much cost on industry. But in this information age, such claims are not credible, and they mask an underlying fear that clear and generous disclosure would actually assist investors in better avoiding advisers that exact huge costs on their clients though conflicted investment advice. In reality, with the help of technology, massive amounts of data can be assembled, disseminated, revised, and updated with relative ease.

Finally, we also caution against any over-reliance on disclosure under the BICE. The DOL's RIA, as well as years of independent studies, note that "disclosures often fail to make investors aware of their advisers' conflicts, let alone understand their nature and potential implications." The RIA cites several studies finding that "for many investors, the fact that they were given disclosures was seen as meaningless," and that disclosure can even "backfire" because advisers feel they may act outside of their clients' interest so long as their clients have been warned.

But even if disclosures could somehow be made flawlessly clear, timely, and intelligible, they would fall far short of what retirement savers need and what Congress intended in ERISA. As quoted above, Congress recognized that to adequately protect investors from the powerful conflicts of interest that often arise among advisers, the establishment of affirmative duties and proscriptions were essential. In fact, throughout ERISA, Congress recognized the need to impose conduct standards **in addition to mandatory disclosures**. The declaration of policy alone repeatedly articulates the goals underlying the statute: that "safeguards be provided" in addition to disclosures; "that minimum standards be provided;" and that "standards of conduct, responsibility, and obligation for fiduciaries" be established.¹²

Thus, relying on disclosures in place of the strong standards in the Rule and the BICE would conflict with Congress's clear intent in enacting ERISA. Worse, it would leave investors at the mercy of advisers who, having gone through the disclosure ritual, would be free to put their own interests ahead of what's best for their clients. The status quo would persist, and millions of retirement savers would continue to be victimized. Disclosure is an unacceptable alternative to a strong, broadly applied fiduciary standard.

F. Other suggestions in the RFI raise serious concerns.

The RFI includes a number of other questions suggesting that the DOL might be considering some counterproductive revisions to the Rule. We briefly canvass them here.

¹² 29 U.S.C. § 1001.

- An adviser's recommendation to increase contributions to a plan or IRA should not be excluded from the definition of investment advice.¹³ Such an exclusion would create a dangerous loophole, especially if it were to facilitate evasion of the restrictions in the grandfather clause. In the end, what constitutes "investment advice" will be a function of all the facts and circumstances and a bright line exclusion for recommendations to increase the amount invested is unwarranted.
- An exemption for bank products is unwarranted.¹⁴ Such products are not securities, so they come with comparatively few protections under the law. In addition, such an exemption would rest on the erroneous assumption that the small banks offering investments for retirement accounts are less affected by conflicts of interest, yet no data supports that view.
- The grandfather clause in the BICE should not be expanded.¹⁵ The grandfather clause in its current form is objectionable because it permits advisers to continue receiving compensation from investment recommendations regardless of whether and to what extent those recommendations were in the best interest of the client. Any further relaxation of the grandfather clause would only expand this loophole, allowing advisers to be rewarded for recommendations that may have done significant harm to their clients.
- The independent fiduciary exclusion should be narrowed, not expanded.¹⁶ The Rule currently excludes communications with independent fiduciaries with financial expertise, provided certain conditions are met. Eligible for the exclusion are independent fiduciaries who manage or control at least \$50 million. Far from being expanded, this exclusion should be narrowed by raising the \$50 million threshold significantly. That dollar amount is a poor metric for determining the requisite sophistication on which the exclusion is based. In reality, many fiduciaries who manage \$50 million, and far more, are not able to fend for themselves and most certainly need the protections of the Rule.

¹³ RFI at 31280.

¹⁴ RFI at 31280-81.

¹⁵ RFI at 31281.

¹⁶ *Id.*

4. **DOL MUST ADHERE TO THE BOUNDARIES SET BY THE EXECUTIVE MEMORANDUM AND THE APA.**

A. **Any proposed revisions to the Rule will require findings in accordance with the President's Memorandum.**

Under the explicit terms of the Memorandum, the re-examination of the Rule must remain focused on whether the Rule may adversely affect the ability of Americans to gain access to “retirement information and financial advice.”¹⁷ And the DOL’s authority to rescind or revise the Rule is contingent on a finding that the Rule will either (1) interfere with such access to information and advice, or (2) undermine the ability of Americans to “make their own financial decisions,” to “save for retirement,” and to build “individual wealth.”¹⁸ Far from undermining or interfering with any of these goals, the Rule is essential to their fulfillment. Therefore, under the explicit terms of the Presidential Memorandum, no basis exists for any changes to the Rule. Any proposed revisions to the Rule or the PTEs would require well-supported findings that these interests are in jeopardy—which they are not. A mere desire to streamline the Rule or alleviate some industry burdens would not suffice.

B. **DOL must view industry data with appropriate skepticism and it must, as necessary, expand its economic analysis to encompass all harms arising from adviser conflicts of interest.**

During the pending comment period and in response to any future proposal to repeal, amend, or delay the Rule, industry proponents can be expected to submit comment letters offering supposedly fresh evidence to support their arguments. We reiterate our prior comment that often, such evidence is wholly unreliable, coming in the form of biased, paid-for studies; based on selective and incomplete data sets; and relying on hidden or erroneous assumptions. If the record in any future rulemaking is similarly infused with such meaningless support for amendment or delay, the DOL must closely scrutinize and discount it.

Furthermore, it will be critical for the DOL to develop a more complete economic analysis, both as to the Rule overall and as to each of the three questions, if opponents of the Rule purport to show that the costs of the Rule outweigh its benefits, in whole or in part. In short, the DOL must fully examine, describe, and quantify **all** of the investor harms that would flow from a delay, repeal, or dilution of the Rule, in addition to the damaging effects on IRAs already examined at length in the RIA. Such an analysis would have to include a quantified assessment of all costs associated with all types of conflicts of interest, exacted from all types of retirement accounts, from the sale of all types of investment products. Only

¹⁷ Presidential Memorandum, at Section 1, para. (a).

¹⁸ *Id.* at para. (b) (referring to priorities referenced in a preceding section).

then would the DOL have a sufficiently complete and accurate cost-benefit analysis with which to evaluate any changes or further delays of the Rule.¹⁹

The DOL's RIA in support of the Rule has always been extraordinarily conservative, focusing solely on one type of conflict of interest, in recommendations for one type of product, as applied to one type of account (IRA owners). Without question, conflicts of interest have a much broader and deeper impact on retirement savers, and any delay in the application of the Rule or weakening of its protections would pose a commensurately greater threat to investors. These additional losses are enormous, not just minor adjustments to the estimates already used to quantify the benefits of the Rule.

And the DOL must adequately account for qualitative harms that will arise from delay or dilution of the Rule. E.O. 12866 makes clear that such unquantifiable costs or benefits are "essential to consider," and it requires agencies to evaluate them in any cost-benefit analysis.²⁰ In this context, the non-monetary costs of delaying implementation of the Rule include a wide variety of very real and damaging effects on quality of life arising from a shortage of adequate resources in retirement. Among them are poor nutrition; loss of access to medical care and medication; anxiety and depression; impaired self-esteem; guilt and remorse stemming from reliance on family members for basic needs; substandard housing; inadequate day-to-day care that is commonly essential in the later years of life; and many others.

C. **Finally, the DOL must afford ample notice and opportunity to comment on any proposed changes to the Rule, in keeping with the patient and inclusive process that the agency followed during the rulemaking.**

The Presidential Memorandum also expressly preserves applicable law, including the provisions defining the OMB's role in the rulemaking process and the requirements of the APA. For example, it states that—

- (a) Nothing in this Presidential Memorandum shall be construed to impair or otherwise affect:
 - (i) The authority granted by law to an executive department or agency, or the head thereof; or
 - (ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

¹⁹ In addition, because any repeal, revision, or further delay of the Rule would likely be economically significant under Section 3(f)(1) of E.O. 12866, the DOL must also develop and provide to OIRA an "assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation . . . and an explanation why the planned regulatory action is preferable to the identified potential alternatives." E.O. 12866 at § 6(3)(C)(iii).

²⁰ E.O. 12866 at § 1(a).

(b) This Presidential Memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

Accordingly, any “implementation” of the Presidential Memorandum through the promulgation of a new rule must still be reviewed by OMB to ensure that it satisfies the criteria set forth in various executive orders, including the duty to ensure that any such rule can be justified in terms of its net benefits. This language from the Presidential Memo is also a reminder that any rulemaking arising from the re-examination must conform to “applicable law,” including the provisions of ERISA that clearly define those who become fiduciaries by virtue of giving advice about retirement assets.²¹ Leaving the old rule intact would clearly violate applicable law, the executive order requirements, and the Presidential Memorandum itself. And weakening the Rule on the pretext of protecting access to advice or sparing industry some “disruption,” while ignoring the enormous net benefits it will confer on retirement savers, would violate the core requirements of reasoned decision making as well as the executive order requirements pertaining to cost-benefit analysis.

Finally, the Presidential Memorandum makes very clear that any proposal to rescind or revise the Rule must be published “for notice and comment.”²² Thus, the public must have an adequate opportunity to evaluate and comment on whatever the DOL may propose to do with the Rule.²³ So far in the re-examination process, the DOL has failed to provide adequate notice and opportunity to comment. The previous delay rule was subject to a mere 15 days of public comment on a proposal that will end up costing American savers millions of dollars in lost retirement savings, arising just from the 60-day delay. That comment period was simply inadequate to allow everyone with a stake in the Rule to develop and submit meaningful and comprehensive input on a proposal that was fraught with deficiencies. The 45-day comment period on the issues raised in the Presidential Memorandum was also inadequate. That release actually invited comment not only on the three substantive issues raised in the Presidential Memorandum, but also on virtually every other aspect of the Rule and the RIA: “The Department invites comments that might help inform updates to its legal and economic analysis, including **any issues** the public believes were inadequately addressed in the RIA and particularly with respect to the issues identified in the President’s Presidential Memorandum.”²⁴

²¹ See also Presidential Memorandum, Section 1, para. (b) (any proposed rule rescinding or amending the Rule must be “appropriate and as consistent with law”).

²² *Id.* at Section 1, para. (b).

²³ See E.O. 12866, which obligates agencies to “afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include **a comment period of not less 60 days.**” E.O. 12866 at § 6(a)(1) (emphasis added).

²⁴ Definition of the Term “Fiduciary” – Proposed Delay of Applicability Date, RIN 1210-AB79, 82 Fed. Reg. 12319 (Mar. 2, 2017) (including a full page of specific questions) (emphasis added).

These periods were also grossly out of proportion to the extensive comment period that the industry opponents of the Rule insisted upon, and that the DOL provided, after it proposed the Rule.

CONCLUSION

Throughout the long process that culminated in the Rule, industry opponents insisted that the DOL strictly adhere to all of the substantive and procedural requirements applicable to agency rulemaking. They caviled with everything from the length of the comment period to the basic provisions of the Rule, even though the comment period was extraordinarily generous and the provisions of the Rule were the epitome of rational rulemaking in accordance with applicable law. And they brought multiple lawsuits to challenge the outcome. The court decisions discussed above confirm that the industry's arguments were meritless—in some instances even frivolous.

Those who support and defend the Rule will also hold the DOL to its obligation to abide by the law as it develops any proposal that would further delay, weaken, or rescind the Rule. If any such rulemaking follows a truncated process, or produces a result that conflicts with the law, does more harm than good, or otherwise constitutes arbitrary and capricious rulemaking, then it too will be subject to challenge in court.

Thank you for the opportunity to submit our views.

Sincerely,



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