



CENTER FOR CAPITAL MARKETS
C O M P E T I T I V E N E S S

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September 15, 2017

The Office of Exemption Determinations
Employee Benefits Security Administration
Attention: D-11712, 11713, 11850
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—Extending the Transition Period by Amending the Applicability Dates of Certain Provisions in the Best Interest Contract Exemption, the Class Exemption for Principal Transactions, and Prohibited Transaction Exemption 84-24

To Whom It May Concern:

The U.S. Chamber of Commerce is the world’s largest business organization representing the interests of more than 3 million businesses of all sizes, sectors, and regions. Our members include sponsors of employee benefit plans seeking advice on behalf of their plan participants as well as financial institutions providing advice in the best interest of retirement savers. As a result, 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 comment on the Department’s Proposal extending the Rule’s Transition Period (“Proposal”) by changing the applicability dates of certain provisions in the Best Interest Contract Exemption (“BIC

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

Exemption”); the Class Exemption for Principal Transactions, and Prohibited Transaction Exemption 84–24 (“PTE 84-24”) from January 1, 2018, to July 1, 2019.

We commend the Department for recognizing the significant harm to retirement investors that would result from a failure to extend the Transition Period. Further, we applaud the Department for proposing an extension that is similar to the recommendation we made in our July 21, 2017, comment letter responding to Question 1 of the Department’s Request for Information (“RFI”).² As we explained in more detail in that letter, an extension of at least 18 months is essential to allow the Department time to complete its review of the Rule; to coordinate with the Securities and Exchange Commission (“SEC”), the Financial Industry Regulatory Authority (“FINRA”), state insurance commissioners and other state and Federal regulators; and to avoid the serious costs and confusion that would otherwise harm retirement savers if the deferred provisions of the remaining exemptions became applicable.

Executive Summary

As we have long pointed out to the Department in many comment letters and other correspondence, the academic predictions on which the Department relied in promulgating the Fiduciary Rule in April 2016 were fundamentally flawed, overstating the benefits of the Rule and dramatically understating its harm to retirement investors, especially to small plans and to small account balance or beginning retirement savers. Instead of these flawed guesses, we now have actual data regarding the effects of the Rule since it became applicable on June 9, 2017. That data shows that what we predicted all along has, unfortunately, come true—the Rule is limiting access to investment advice and investment products for retirement savers.

We are pleased that the Department issued the RFI to properly inform its review of the Rule ordered by President Trump,³ and we believe the Proposal extending the Transition Period is an essential step forward in properly assessing and beginning to undo the harm caused by the Rule. In our comment letters responding to the RFI, we indicated that the Chamber had commissioned a survey of financial institutions and the changes they adopted in response to the Rule, and we provided some preliminary findings. We have since completed this review, and attach a report of its findings. This empirical data clearly show that the unintended consequences of the Rule are increased costs, reduced access to investment advice, and reduced access to the full range of investment products for too many retirement savers.

² 82 Fed. Reg. 31,278 (Jul. 6, 2017).

³ See, President’s Memorandum, 82 Fed. Reg. 9675 (Feb 7, 2017).

This situation will grow considerably worse if the Department does not extend the Transition Period by at least the Proposal's 18 months, and as much longer as needed to fix problems in the Rule and to provide for an orderly transition. This is because some of the most burdensome requirements of the Rule—requirements that impose significant costs on retirement savers but offer no additional benefit—are poised to become applicable on January 1, 2018.

Accordingly, we urge the Department to adopt a “tiered-approach” to extending the Transition Period—the later of July 1, 2019 or 12 months following the promulgation of a final rule amending the Fiduciary Rule and its associated exemptions. This tiered approach will ensure that there is sufficient time to complete the review of the Rule; to properly coordinate with other regulators; to promulgate changes to the Rule and exemptions; and to provide for an orderly transition to the new regulatory environment.

1. Regulatory Uncertainty is Harming Retirement Savers

As our survey data shows, despite the very high levels of compliance activity leading up to and during the Transition Period, the considerable uncertainty about the future of the Rule is reducing access to advice and investment products for retirement investors as financial institutions struggle to develop compliance strategies that require months or years of lead time to implement. The enormity of the regulatory change that began on June 9, 2017, is currently scheduled to be followed by another massive change on January 1, 2018, just seven months later. This has substantially complicated compliance efforts and resulted in a broad range of differing interpretations and decisions in the services and products available to retirement savers.

While we are pleased that the Department has recognized the problems with the Rule and has begun a regulatory process to consider them, the reality is that this process creates even more uncertainty, as the changes in January would likely be followed by further material changes (for example, the Department wrote in the Preamble to the Proposal that it likely “will propose in the near future a new and more streamlined class exemption.”)⁴ The Transition Period must be extended to avoid costly and confusing change that will further harm retirement investors, providing a period of regulatory stability and an orderly process for reviewing and improving the Rule.

⁴ 82 Fed. Reg. 41,371.

2. A Properly Structured Tiered Approach Best Serves Retirement Savers

The Proposal asks for comments on various approaches to structuring the end date for the Transition Period extension. The Department proposes a direct, date certain extension from January 1, 2018 to July 1, 2019, but describes alternative approaches.

The alternatives identified by the Department include:

- an “event”-based approach linking the end of the Transition Period to a step in the regulatory process, such as the completion of the Department’s review of the Rule;
- a tiered approach in which the Transition Period ends either on a date certain or on the completion of an action by the Department; or
- A Transition Period with new exemption conditions that must be met by a financial institution as an alternative to the “full” BIC Exemption or the revised PTE 84-24. An example provided by the Department illustrating this approach referenced the use of “clean shares” as a condition.

The Chamber supports the 18 month extension period, and the Department’s date certain approach would provide needed regulatory certainty. However, the Chamber believes a properly constructed tiered approach would best serve retirement savers. Specifically, we recommend the Department adopt a final extension that is the later of July 1, 2019 or 12 months following the promulgation of a final rule amending the Fiduciary Rule and its associated exemptions. This approach not only provides short-term certainty of at least 18 months, but it ensures that any material changes as a result of the Department’s review will have at least a 12 month implementation period. This provides some needed guidance relating to expectations on the timing of long-term changes that might result from the Department’s review.

The “event”-based approach should not be adopted by the Department as it results in the same harmful uncertainty the Proposal seeks to eliminate. There would be no certain compliance deadline, resulting in an undefined time period based on when the Department completes some future act. As the Department itself cannot say with any certainty when it will complete its review, the event-based approach should be avoided. Further, selecting this particular event would not leave time for

the Department to act upon its decisions resulting from the review, as there would be no time built in the for regulatory notice and comment process.

The Chamber also objects to introducing any new conditions into the Transition Period exemption requirements. As a matter of regulatory process, any new conditions would have to be the result of notice and comment rulemaking, something the Department could not complete before January 1, 2018, in any event. New conditions could not be promulgated in the final version of this Proposal without having been first proposed themselves. Further, such conditions must be clearly defined—vague requirements such as “clean shares” are not specific enough to form the basis of a prohibited transaction exemption. Finally, clean shares would be a solution limited essentially to mutual funds—such a condition would not be applicable to the broad array of retirement investment products utilized by retirement investors.

3. The Department Should Extend the Enforcement Policy

The Department requested comment on extending its enforcement policy along with the Transition Period. The Chamber believes the Department should extend the applicability of Field Assistance Bulletin 2017-02 from January 1, 2018, until the end of the Transition Period. Accordingly, the FAB should adopt the tiered approach we recommend above to ensure the policy mirrors the Transition Period.

The need for the enforcement policy does not end on January 1, 2018. The extremely broad scope of the Rule and the significant interpretive issues that remain make it important that the Department continue to work collaboratively with financial institutions that make good faith compliance decisions. Training and optimization of compliance policies and procedures will continue beyond January, and the FAB is valuable in assisting with these efforts that ultimately benefit retirement investors.

4. The Transition Period Must be Extended to Provide for a Thorough, Well-Coordinated Review of all the Rule’s Issues

The Chamber also provided in response to the RFI a list of issues of concern with the Fiduciary Rule, only some of which relate to the exemptions. We also believe that the Rule itself must be modified, and extending the Transition Period provides the time necessary to do so in a thorough and well-coordinated fashion.

Specifically, we recommended changes to incorporate the following:

- Sales activity with clear disclosure should not be fiduciary advice;
- The BIC Exemption should be replaced with a streamlined exemption modeled on the Transition version of the BIC Exemption;
- The Transition version of PTE 84-24 (the version adopted in 2006 with the addition of the Impartial Conduct Standards) should be the final version;
- A broad, clear and comprehensive grandfather provision that will fully-exempt from the rule all transactions entered into prior to any delayed applicability date as well as post-applicability date advice regarding any assets acquired prior to that date.
- “Roll-in” (plan-to-plan transfer) recommendations, and all contribution recommendations (whether and how much to contribute to a qualified plan or IRA) should not be fiduciary advice; and
- Recommendations to reinvest Required Minimum Distribution proceeds should not be fiduciary advice.

5. Conclusion

The deferred provisions the Proposal would extend offer no benefit to retirement savers but do impose significant costs, offsetting any marginal gain in conflict mitigation benefit. Small plans and small investors are already experiencing reduced access to advice and increased costs, and a failure to extend the Transition Period would exacerbate this problem.

The Department must materially change the exemptions and definitions in the Rule to prevent further harm, and adopting the Proposal with the revisions we recommend is the essential first step. The next step is for the Department to collaborate with the SEC and FINRA to modify the Rule in the ways we suggest, ensuring a coordinated set of regulations protecting retirement investors.

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The Department has the opportunity to fix the Rule, and we commend you for proposing to extend the Transition Period. We appreciate the opportunity to provide these comments and would be happy to answer any questions you may have.

Sincerely,

A handwritten signature in black ink, consisting of stylized initials and a long horizontal flourish extending to the right.

Fiduciary Rule: Initial Impact Analysis

September 7, 2017

Presented To:



Study Objectives and Methodology



Ongoing Monitoring of Fiduciary Rule

The U.S. Chamber of Commerce has committed to monitoring the Department of Labor’s Fiduciary Rule and its impact on investors. As part of this ongoing effort, the initial research included outreach to **14 financial advisory companies**—insurance companies, financial product manufacturers, and broker-dealers. Collectively, these companies represent a significant portion of the retirement savings and financial advisory market in the U.S. They are responsible for nearly \$10 trillion in assets under management (AUM) out of \$16.9 trillion in the market, and they guide the financial future of nearly 26 million investment accounts.

Data illustrating the concrete steps taken by these firms in implementing the Rule were gathered through a collection of methods, including an online survey and one-on-one interviews conducted in July 2017.

The results highlighted in this report represent not only the actions taken by the industry in the implementation of the rule, but also the practical, real-life consequences being felt by retirement savings investors.

Executive Summary

Implementation of the Fiduciary Duty Rule has led to unintended consequences that significantly impact investors



Investors Will Be Worse Served

The unanimous view from the financial advisory companies participating in the research is that investors will be worse served by the full implementation of the Rule and that small investors will not have the same access to advice as other investors. Industry experts predict the greatest long-term implication of the Rule is that investors will put off saving for retirement.



The Elimination of Products

13.4 million accounts will lose access to products. Companies are taking a range of actions in response to the Fiduciary Rule. While some companies are operating in a holding period leading up to the currently scheduled January 1, 2018, implementation date, most companies participating in the research have already eliminated products during the transition period.



Restrictions on Providing Advice to Investors

There is a high level of uncertainty over what constitutes new advice for investors under the grandfather provision. This has, in turn, created a point of confusion for advisors and by extension the clients they service as the industry makes sense of what the new environment will look like depending on the outcome of the Rule.



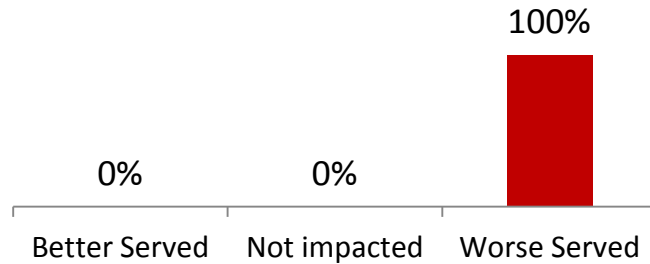
A Change in Fee Structures

The Fiduciary Rule has forced financial advisory companies to shift from a transactional-based model (or commission-based model) to a fee-based model. This transition impacts investors who work with advisors who no longer believe they can adequately provide services to accounts under this model. This structural change has also led to an increase in fees for certain clients, particularly low-balance investors.

Impact of the Fiduciary Rule on Investors



Survey participants believe investors will be worse served with the full implementation of the Fiduciary Rule



Financial advisory companies responsible for managing **nearly \$10 trillion in assets under management (AUM)** and **nearly 26 million investor accounts** believe when the Fiduciary Rule is fully implemented, small retirement savings investors will be **worse served**.

Eliminating Products	Increasing Fees	Setting Account Minimums	Switching to a Fee-Based Model
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“What we’ve seen on the retail side as a distributor is that we’ve had to **restrict product offerings on our shelf.**”

“Firms have had to basically levelize the commissions regardless of the underlying type of asset, equity, or fixed-income product. Investors who are in fixed-income **products actually could see their costs go up.**”

“Traditionally, we didn’t have account minimums on the brokerage side of our business. Today, we’ve had to **put in place account minimums.**”

“I think it will ultimately result in people moving away from a commission-based model. I think that advisors are just going to gravitate toward fee-based. And I think **fee-based isn’t always the best for the client.**”

Total AUM Data: \$9.9 trillion AUM represented in this response
 Total Accounts Data: 26 million accounts represented in this response
 Worse Served=significantly worse + somewhat worse served/Better Served=significantly better + somewhat better served



Participants believe smaller investors will be most harmed by the Fiduciary Rule

Advisors will be unwilling to take on risk

“Advisors aren’t going to want to take the risk of serving a small account based on the additional paperwork and time involved given the extra steps under the best interest conduct standard.”

Advisors will no longer service certain accounts

“We have seen an increasing number of what the industry calls resignations from accounts that historically have been serviced by broker-dealer firms. But due to any number of factors, generally for smaller accounts, they’ve made a decision to resign from those accounts.”

This will push small investors to accounts with no advice

“The small retirement investor is going to get hurt with full implementation of the Rule. In order to be able to service clients who have small account balances and to supervise and implement the full fiduciary standard with private right of action, I think it’s going to push a lot of clients out of full-service broker-dealer firms. Those clients are going to find themselves in self-directed situations or without access to advice because of the cost of doing business to the advisor.”

Thereby, investors will not receive adequate retirement advice

“Many firms, including us, are sending them to self-directed, right? So they will no longer get advice. They will be on their own to save for retirement. The [DOL] intended for small clients to get better advice. And unfortunately the cost to provide advice doesn’t allow many firms to give it.”



Investors will now face less access and fewer choices in financial products

13.4 million accounts have lost access to financial products



Financial advisory companies responsible for managing nearly \$4 trillion in AUM and 13.4 million investors have eliminated certain products as a result of the Fiduciary Rule

“I think the firms are paring back their investment services, what products they’re able to offer their clients. So, it’s just another way that this is narrowing the range of options and choices available to clients.”

“To date, we’ve largely eliminated products that were expressly prohibited by the principal trade exemption.”

“The variable annuity industry has been declining. I think that’s a shame because these are products that America needs and we’re making it harder for consumers to buy them.”



A range of products are being eliminated by firms, primarily mutual funds and variable annuities

Mutual Funds

“We had more than 120 mutual fund/direct mutual fund providers. But I think we dropped 70 initially because it just didn't make sense. It really wasn't in the best interest.”

“We are in the process of dropping down to 20 direct mutual fund providers.”

Variable Annuities

“We've closed, for example, many share classes in our variable annuity line. We've closed some share classes in our mutual fund line. So, they're just not available any longer.”

“We've had approximately 150 asset management companies represented, 170-plus, in our retirement space before the DOL [Rule]. We now have approximately 20. We have a much wider universe in the non-qualified space where clients and advisors have access to many more funds and fund companies. We've narrowed our annuity universe from 17 annuity manufacturers to six in the variable annuity space.”

Fixed Annuities

“Fixed index annuity: I think that they're going to go down because that's a product that's largely been sold outside of the broker-dealer community.”

Exchange Trade Funds/ETFs

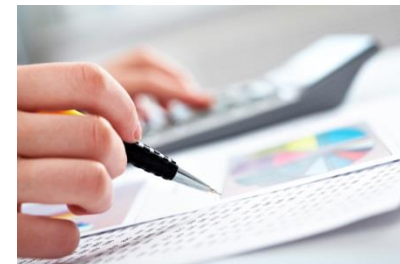
“We no longer allow IRA clients to buy individual stocks, including individual ETFs, inside of a brokerage account.”

With changes in fee structures, retirement services will be more expensive for low-balance investors



6 Million

Investor client accounts work with companies that are increasing their fees in response to the Fiduciary Rule



“I would say that, for the industry as a whole, since many people are shifting toward a fee-based model, that’s going to have an adverse impact on low-balance investors. This is because it’s uneconomic to serve those customers, so they will either have to **pay a higher fixed fee or a higher percentage than they are paying today.**”

“There will be advisors who move to fees and may not deliver the full service model on a fee-based platform. **And the client is paying more for, in effect, the same level of service** that he/she got in commissions, which is not really in their best interest.”

“Generally, you see tiered advisory fees by account size. The highest advisory fees are generally found at the lower account sizes. That just continues to drain their account value more than higher account sizes given smaller advisory fees. So, we feel like even if an advisor takes on a small account, it is **most likely that the annual advisory fee is going to be higher just based on the industry standards.** That’s going to further negatively impact the client’s account over time. “

AUM Data: \$1.5 Trillion AUM represented in this response
Accounts Data: 9.4 million accounts represented in this response



U.S. Chamber of Commerce
Standing Up for American Enterprise

The DOL's grandfather provision* creates confusion for both advisory firms and investors



4.4 million accounts have had to be moved into a different service not requested by the investor

“What becomes very confusing for a client is to call his agent or broker, one of these grandfathered clients, and say, hey, what do you think? Should I take my money out of the markets? Now they’re no longer asking for advice. If the Rule were in effect, it would no longer be grandfathered, if you will. Now they have to fall under that advice law.”

“If we could continue and say that all accounts are grandfathered, we could help—as long as they were issued prior to the Rule, we grandfather them, they’re not affected by the Rule. Whatever you do with respect to that contract will not make you a fiduciary because we don’t have a whole system complying with BICE and because we got rid of that whole book of business. Complying with that exemption is very burdensome, very expensive, and there’s no reason for us to do it.”

“The grandfathering provision allows us to do certain things up until the point where new advice is provided. But once new advice is provided, we would lose the grandfathering. And we’d have to be in full compliance. And for certain product types we’re just not able to do that.”

*The grandfather provision under the DOL Rule allows for the continued receipt of existing commissions and trails and the ability to provide limited advice relative to the investment positions that are in place prior to the June 9, 2017, Applicability Date without compliance with the full provisions of the BICE.





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