



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

DAVID T. HIRSCHMANN
PRESIDENT AND CHIEF EXECUTIVE OFFICER

1615 H STREET, NW
WASHINGTON, DC 20062-2000
(202) 463-5609 | (202) 463-3129 FAX

March 13, 2017

Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Re: Definition of the Term “Fiduciary”—Delay of Applicability Date (RIN 1210-AB79)

Ladies and Gentlemen:

The U.S. Chamber of Commerce, the world’s largest business federation representing the interests of more than three million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations, and dedicated to promoting, protecting, and defending America’s free enterprise system.

Nearly all of our members are sponsors of employee benefit plans, and they take seriously their responsibilities as fiduciaries. It is because our members take these responsibilities seriously that the Chamber has consistently urged the U.S. Department of Labor (“Department”) to adopt significant modifications to the rule re-defining fiduciary investment advice under ERISA §3(21)(A)(ii) and the associated new and amended prohibited transaction class exemptions promulgated with it (collectively the “Fiduciary Rule”).¹ Due to the extraordinary breadth of the Fiduciary Rule and the magnitude of its changes, we have also consistently argued for a much longer implementation period than the 12 months provided in the final rule. Moreover, we have consistently argued that the Fiduciary Rule will significantly reduce much needed access to retirement products, education and advice, eroding retirement security for workers and their families.

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

Accordingly, the Chamber appreciates the opportunity to offer comments on the Department of Labor's proposed regulation (the "Proposal")² to delay the applicability date from April 10, 2017 to June 9, 2017 to facilitate a review of a rule as directed by the President's Memorandum of February 3, 2017. We strongly support delaying the applicability date by 60 days. In fact, we believe that a longer delay, such as a minimum of an additional one year, is necessary in order to allow the Department to fully consider comments it has requested on the substance of the Fiduciary Rule, and to draft a proposed regulation revising or rescinding the Fiduciary Rule as authorized in the President's Memorandum. Further, financial service providers and advisors must have a reasonable amount of advanced notice in order to implement compliance changes, and while delaying the applicability date is essential, a longer period of time than proposed is necessary.

Additionally, we note that it may be challenging for the Department to issue a final regulation delaying the applicability date before April 10. However, we believe the Department can do so and make it effective immediately upon publication in the Federal Register. We do not believe it is the Trump Administration's intended regulatory policy to allow a major regulation to become applicable, imposing massive costs and negative effects on retirement savers, only to substantively revise or repeal the rule at a later date. This is simply not efficient or proper use of the government's regulatory authority.

Therefore, we appreciate the Department issuing a non-enforcement policy during a potential gap period between April 10 and the date when the delay is issued, as well as a 30-day period to cure if the Department determines a delay is not appropriate. However, we ask that the Department also consider coordinating with the Treasury Department on a non-enforcement policy with respect to potential prohibited transactions affecting IRAs, or separately announcing a prohibited transaction class exemption to provide retroactive relief for all prohibited transactions resulting from the Fiduciary Rule after April 10th. These are some appropriate possibilities to ensure that procedural "red tape" does not cause real-world disruption and harm to retirement savers and the regulated community that serves them due to the temporary application of a rule the Department never intended to become applicable.

Overview:

² 82 Red. Reg. 12,319 (Mar. 2, 2017).

The real-world efforts to comply with and conform to the Fiduciary Rule have highlighted and justified our concerns that a 12 month implementation period is too short. The Fiduciary Rule is the most significant and far-reaching change in the regulation of retirement investment advice since the establishment of ERISA and IRAs in 1974. It was never prudent, responsible or realistic to provide only 12 months to understand and implement the changes necessitated by the Fiduciary Rule. The Department's failure to provide timely guidance and assistance in interpreting the many issues presented by the final rule has exacerbated these problems: for example, though we are only one month from the applicability date, there are still entire categories of advisors who will be unable to offer certain investment advice and products to their clients.

The rush to compliance has hurt the very workers and retirees the Department ostensibly sought to protect, reducing individuals' access to professional assistance with retirement savings and investment, increasing costs for advice, and needlessly increasing litigation risks and expenses. If the Department does not delay the applicability date of April 10, 2017, workers and their families will be harmed even further as the first steps towards compliance already causing harm turn into full-blown prohibitions on certain products, advice and services. The result will be reduced access to retirement advice and assistance for small plans and IRA owners, higher costs for advice for those who are able to get it, and fewer investment options as certain providers are unable to provide advice at all. Accordingly, we fully support an extended delay of the applicability date and the Department's review of the Fiduciary Rule ordered by President Trump in his Presidential Memorandum.

In the Chamber's previous comments and testimony, we expressed very serious concerns with the substance, economic analysis and regulatory process related to the Fiduciary Rule.³ We have also questioned various legal aspects of the rule. Following the publication of the final regulation, we initiated legal action in Federal District Court against the Department seeking to strike down the Fiduciary Rule. Our lawsuit is active and we have recently filed notice of appeal in the case.⁴ Even before we were provided the possibility of revising or withdrawing this rule, we sent a letter on September 26, 2016 to the Department asking that the applicability date be delayed because the 12 months provided to implement the final regulation was simply too short given the magnitude of the change; because the Department had not timely provided promised interpretive guidance; and because rushed implementation was already beginning to cause harm to workers and their families.

³ All Chamber comments and testimony can be found at <https://www.uschamber.com/retirement>.

⁴ *Chamber of Commerce of the U.S., et al., v. Perez, et al.*, Case No. 16-cv-1476-M, (N. D. Tex.), No. 17-10238 (5th Cir.).

Our comments here relate only to the Proposal's delay of the applicability date. We will provide additional comments related to the other issues on which the Department separately sought comment in a later letter.

Efforts to Comply are Already Resulting in Increased Costs and Reduced Access to Advice That Is Not in the Best Interest of Workers and Retirees:

The President's Memorandum properly directs the Department to review the harm the rule is doing to workers and retirees through reduced access to investment products and assistance, as well as increased costs stemming from litigation and compliance. In the roughly 10 months since the final regulation was published, a great deal of new information and real-world compliance experience is now available to the Department. This new information needs to be taken into account by the Department in the course of its review.

- Complexity

The Fiduciary Rule is an extremely complex regulatory package that does not lend itself to a "one-size-fits-all" compliance answer. Announcements of intended changes by financial advisors so far have already shown very different approaches to compliance, including the elimination of certain types of advice and investment products and services.⁵ Thus far, the real-world execution of the Fiduciary Rule has been even more complex than anticipated.

⁵ See, e.g., InvestmentNews, *Figuring out Fiduciary: Now Comes the Hard Part*, By Liz Skinner, May 9, 2016. "The overall compliance headache and expense the DOL rule will cause could even persuade older advisers to exit the business, years before they planned to, just to avoid dealing with the changes. That would worsen the nation's overall shortage of financial advisers." <http://www.investmentnews.com/article/20160509/FEATURE/160509939/the-dol-fiduciary-rule-will-forever-change-financial-advice-and-the>;

MarketWatch, *How the fiduciary rule could change your relationship with your adviser*, by Alessandra Malito, Dec 10, 2016, "J.P. Morgan Chase & Co. (JPM) and Commonwealth Financial Network said they will stop charging commissions on IRAs and Merrill Lynch Wealth Management said it wouldn't allow clients to open commissions-based accounts beginning in April, instead opting for fee-based IRAs" <http://www.marketwatch.com/story/how-the-fiduciary-rule-could-change-your-relationship-with-your-adviser-2016-12-09>;

Forbes, *Trump, The Fiduciary Rule And Your IRA*, by Adam Bergman, February 7, 2017, "Edward Jones and some other financial advisors announced that it would stop offering mutual funds and exchange traded funds in IRA accounts that charge investors a commission and move to an account value fee based arrangement" <https://www.forbes.com/sites/greatspeculations/2017/02/03/trump-the-fiduciary-rule-and-your-ira/#12bd245e4a3c>.

For example, the general rule prohibits the otherwise legal and long-standing commission-based form of compensation. In other words, even though a commission is fully compliant with securities or insurance law, the Fiduciary Regulation will prohibit it in connection with ERISA plans and IRAs on April 10th (unless the applicability date is delayed). While the Department did provide for certain exemptions to permit some commissions despite the general prohibition, these special rules present a bewildering array of new conditions, limitations, litigation risks, and restrictions. In fact, as we discuss in more detail below, some common advice providers and investment products will be prohibited and do not yet have an exemption permitting them to take place.

Many of the new conditions were not well drafted, and it is not clear what compliance actually entails. Even after months of argument and discussion, lawyers and compliance officials do not agree on what the Fiduciary Rule actually requires with regard to a number of essential issues. Despite this uncertainty, the Rule's unrealistically short deadline is forcing industry participants to move forward based on nothing more than "best-guesses," with the risk that the Department may issue contrary guidance, or disagree with these interpretations in enforcement actions. All of these judgment calls relating to new and poorly-defined requirements create needless litigation risks and costs that are ultimately borne by the retirement investor in the form of higher costs and reduced access to advice and investment products.

The lack of timely guidance from the Department has only compounded these difficulties. Even before the Fiduciary Rule was published, the Department promised it would issue interpretive guidance. Despite this promise, the Department did not issue any substantive guidance until nearly seven months after the Fiduciary Rule was released – and only five months before the applicability date. Additional guidance documents were not released until nine months after the Rule came out – a mere three months before the applicability date. Both sets of guidance were too late to be truly helpful in the compliance process—interpretive guidance was needed at the beginning when compliance plans were being developed. In fact, portions of the guidance created new issues and compliance problems by offering new and more restrictive interpretations about advisor compensation, further complicating implementation by disrupting decisions already made, and raising new issues in the final weeks before the deadline.⁶

⁶ For example, while the Exemption FAQs issued on October 27, 2016 were portrayed as merely interpretive guidance, portions of the "guidance" in fact called for prohibitions and restrictions on common compensation arrangements legally permitted under securities and insurance law, and not addressed anywhere in the text or preambles to the final rule or final class exemptions. These portions of the "guidance" appeared to many observers as an attempt to regulate outside of the regulatory process, and many questioned the Department's authority in this regard. Specifically, the FAQs

Failure to Delay the Applicability Date Will Deny Retirement Investors the Right to Purchase Fixed Annuities from Independent Insurance Agents:

The Fiduciary Rule does not permit commissions as a form of compensation unless there is a special exemption available. For transactions involving Fixed Index Annuities and similar investments, the Fiduciary Rule provides only one such exemption, the Best Interest Contract Exemption (“BIC Exemption”). However, banks, registered investment advisors, insurance carriers and broker-dealers are the only financial institutions eligible to use the BIC Exemption. Insurance brokers, insurance marketing organizations and other insurance intermediaries are not able to enter into a BIC Exemption arrangement. As a result, the Fiduciary Rule generally prohibits independent insurance agents that do not also have a securities license from selling fixed index annuities.⁷ Unless the applicability date is changed, this will directly harm retirement savers who will be unable to receive advice services and some investment products from their insurance agents.

While the Department did propose a new insurance intermediary class exemption on January 19, 2017 that would allow a small number of entities to be financial institutions for an exemption similar to the BIC Exemption (though with many additional conditions), the proposal was quite controversial and the comment period only just ended on February 21, 2017.⁸

This proposal is another example of the need for a delay to study the full impact his regulation will have on retirement savers and retirees. Despite months of effort by insurance intermediaries applying for individual exemptions, the proposed

sought effectively to prohibit retroactive compensation and so-called “back-end” compensation, as well as to define how compensation grids should be structured. Further supporting the view that this guidance was, in fact, an attempt to regulate outside of proper channels, the “guidance” indicated that the Department would permit the suddenly non-compliant arrangements already entered into as of the day the guidance was issued to continue, but not any arrangements entered into after that date. Banning common forms of compensation as of a date certain with no advance notice is not an action typical of mere guidance and merely posting such a decision on a website likely does not constitute proper notice. CONFLICT OF INTEREST FAQs (PART I- EXEMPTIONS), U.S. Department of Labor Employee Benefits Security Administration, October 27, 2016, FAQs 9 and 12. <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/coi-rules-and-exemptions-part-1.pdf>

⁷ While the Department has noted that insurance carriers could act as financial institutions for independent agents under the “letter” of the 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. Carriers may do so for captive agents, but are unlikely to do so for independent agents.

⁸ 82 Fed. Reg. 7,336 (Jan. 19, 2017).

class exemption was not published until the applicability date was nearly upon us. We are very concerned about the Department's ability to review the comments on the class exemption, develop a final exemption that works to better protect retirement investors, receive approval from the Office of Management and Budget, and publish the final exemption by April 10, 2017.

In fact, even if the Department succeeds under this very aggressive regulatory schedule, there will be no time for insurance intermediaries to make the necessary changes to their business models and compliance processes before April 10th. The result likely will be a period of time when retirement savers are denied access to investment advice and products from their insurance agents. Even more troubling, the Department has made no public statements regarding its intentions or next steps with regard to the proposed class exemption. If the Department does not intend to complete the class exemption in the near term, then it is even more important that the Department substantially delay the applicability date beyond the 60 days proposed here in order to allow it to protect retirement savers who will otherwise be denied these products and services.

We Urge the Department to Pursue a Complete and Accurate Economic Analysis of the Final Rule:

The Chamber provided extensive comments and testimony regarding the inadequate economic analysis prepared by the Department and used to justify the Fiduciary Rule. In our post-hearings comment letter submitted regarding the proposed rule (September 24, 2015) we raised the concern that:

“EBSA has not adequately considered the risks of unanticipated adverse impacts of its proposal. In particular, EBSA should consider the risks that anticipated benefits of the proposed rule will be diminished by the effect of higher costs of obtaining advice, or the scarcity of the supply of advisers able to comply with the proposed rule results in retirement savings investors making decisions without adequate information and advice.”⁹

In particular, the Chamber and other commenters raised concerns that millions of smaller savers would lose the benefits of advice as a result of the Fiduciary Rule. In publishing the final rule, the Department dismissed these concerns as unfounded, but the experience of the past ten months has confirmed the reality of this adverse

⁹ U. S. Chamber of Commerce, letter submitted to rulemaking docket RIN 1210-AB32, September 24, 2015

impact of the rule. Some investment advisors have already announced effective or planned changes in their advisory operations to limit the scope of advisory services offered and/or significantly raise the minimum account size required to gain access to advice.¹⁰

These changes in the investment advice market are the direct result of the constraints, costs and financial liability exposure to which companies will be subject if the Fiduciary Rule becomes applicable. The loss of access to investment advice and assistance for retirement savers results from both the increased cost of advice because of the final rule and from the higher thresholds for advice-eligible account values the final rule imposes. The Department gave no credence to the concern that higher costs for obtaining advice would cause some savers to choose to “do it themselves.” The Department also gave no attention in its analysis to the possibility that retirement savers would be excluded from advice by increased account thresholds, but that unanticipated consequence is already happening. Both of these sources of loss of access to advice and assistance are now becoming evident as real consequences of the rule.

The Department seriously erred in its analysis of costs and benefits for the final rule published April, 8, 2016, when it assumed that no saver would lose access to expert investment advice. The loss of access to advice brings with it a cost to savers that may offset any benefits from improved quality of advice that the new rule may offer. This cost arises because savers without access to expert advice make mistakes that reduce their investment earnings and that may even destroy their savings principal.

The Department itself recognized this danger in its economic analysis of a 2011 investment advice regulation intended to afford retirement savers greater access to expert investment advice.¹¹ The Department in 2011 stated that “many participants make costly investment mistakes” when they do not have access to expert advice, and estimated \$124 billion in investment losses in 2010 attributable to mistakes resulting from lack of advice for retirement savers.¹² The magnitude of the potential for costly

¹⁰ For examples, refer to Footnote 5 of these comments.

¹¹ 76 Fed. Reg. 66,136 (Oct. 25, 2011).

¹² Id at 66,151-66,152. “With the growth of participant-directed retirement savings accounts, the retirement security of America’s workers increasingly depends on their investment decisions. Unfortunately, there is evidence that many participants of these retirement accounts often make costly investment errors due to flawed information or reasoning. As more fully discussed in the Benefits section below, these participants may make financial mistakes which result in lower asset accumulation, and thus final retirement account balances, for these individuals and/or result in less than

mistakes because of lack of expert financial advice and assistance is too great to ignore. The Department's failure to consider in April 2016 that at least some retirement savers might be pushed into the "no advice" category is inexplicable. The Department should have recognized this risk – as it did before – and reasonably estimated both the number of savers who would be denied access to advice and also the amount of loss that the typical advice-less saver would experience annually.

The Department also should have considered this result as a potential offset to the overly optimistic benefits it ascribed to the Fiduciary Rule. Given that the Department in 2011 was able to estimate that the rule it promulgated then to improve access to investment advice would yield benefits of between \$7 billion and \$18 billion annually, it was certainly within the ability of the Department to have estimated the monetary loss to retirement savers who may be expected to lose access to advice as a result of the restrictive April 2016 rule. The failure of the Department to do so makes the April 2016 claim of positive net benefits highly questionable. The opportunity now to correct this analytical error that may have led to a wrong rulemaking decision is ample reason to justify postponement of the applicability date of the Fiduciary Rule.

The Department's discussion of economic impacts in its final rule notice gave only cursory attention to the impact of the new requirements on the cost of providing advice and assistance. Compared to servicing cost estimates provided by commenters to the proposed rule notice, the Department did not provide a reasonable basis for the low (less than \$2 billion per year) cost impacts that it presented in its final rule notice. Affected companies now have had ten months of experience grappling with the complexities of the April 2016 final rule. The Department needs to delay applicability of the rule to allow research to use this experience to inform better its estimates of the actual compliance costs and services availability impacts of the rule.

The Department Erred in Its Estimate of the Loss of Benefit that Would Accrue as a Cost of Delaying the Applicability Date of the Final Rule:

The Department has also seriously erred in its estimate of the loss of benefit that would accrue as a cost of delaying the applicability date of the final rule. The

optimal levels of compensation risk. Financial losses (including foregone earnings) from such mistakes likely amounted to more than \$114 billion in 2010. These compound and grow larger as workers progress toward and into retirement.

Such mistakes and consequent losses historically can be attributed at least in part to provisions of the Employee Retirement Income Security Act of 1974 that effectively preclude a variety of arrangements whereby financial professionals might otherwise provide retirement plan participants with expert financial advice.”

Department estimated that the proposed 60-day delay would result in an immediate (2017) loss of \$147 million in benefits and further losses in the future. We do not believe the figure is accurate.

The Department's analysis of the cost of delay is based on the unsubstantiated presumption that the full benefits of the April 2016 rule will begin to accrue immediately upon the date of applicability and continue to accrue uniformly thereafter. It actually begs the question as to what "benefit" the Department believed it was providing with an April 10 applicability date for certain requirements and a January 1, 2018 applicability date for other requirements if it believes that the full benefit is realized on April 11, 2017. The Department explicitly states:

"...that the final rule and exemptions would entirely eliminate the negative effect of load-sharing on mutual fund selection, and that the proposed delay would leave that negative effect undiminished for an additional 60 days."¹³

In reality, the putative benefits of the rule more likely will accumulate gradually over time as advisors and investors learn how to comply with the new rule. Additionally, the supposed negative effect of load-sharing on which the Departments calculations of benefits were based reflect a snapshot in time, investment returns differences observed by Christoffersen, Evans and Musto (CEM) for 1994-2004.¹⁴ Since that time the market has changed and the differences in returns associated with competing advice incentive models have likely decreased. The Department recognizes this likelihood and the fact that it would result in a smaller cost of delay in the Preamble to the Proposal.¹⁵ Furthermore, evidence of changes in the market over the last ten months since publication of the Fiduciary Rule but prior to its applicability date appear to have accelerated the pre-existing trend that have had the effect of diminishing the differences in returns estimated by CEM. There is no reason to expect that a delay in the applicability date of the 2016 rule will cause pause or reversal in this trend. These considerations all point toward the conclusion that the "cost of delay" estimates presented in the Proposal are exaggerated. We urge the Department to explore these questions in more depth in order to develop more accurate and up-to-date calculations of the effects of possible future delays in the applicability of the 2016 final rule.

¹³ 82 Fed. Reg. 12,320.

¹⁴ Susan Christoffersen, Richard Evans and David Musto, "What Do Consumers' Fund Flows Maximize? Evidence from Their Brokers' Incentives," The Journal of Finance, volume 68, issue 1, February 2013, pp.. 201-235.

¹⁵82 Fed. Reg. at 12,326.

Another problem with the Department's analysis of the "cost of delay" is that it ignores the impact of the loss of access to assistance and advice. The mistakes and losses arising from loss of advice access are likely to accrue sooner than the full benefits from supposedly improved quality of advice for those retirement savers who may be fortunate enough to still be able to afford advice or to present an account balance high enough to meet new thresholds. The presence of large, immediate and persistent losses to retirement savers who are cut off from any kind of advice may more than offset any gains to other investors by improved advice from an early applicability date. A delay in the applicability date may help protect some retirement savers from denial of advice services.

Conclusion:

The Department was imprudent in providing only a 12 month implementation period for the Fiduciary Rule. The result of this unrealistic deadline has already been to harm retirement savers by forcing advisors and other professionals to focus on meeting an artificial compliance deadline rather than serving the true needs of their clients. Complying with the Fiduciary Rule requires reviewing and understanding the complex rule and exemptions; deciding how to restructure the advisors' businesses to comply; implementing the restructuring plans (including building IT systems required by the rule's disclosure requirements, etc.); and training advisors to properly comply with the new rules, policies and procedures. Despite good faith efforts and literally hundreds of millions spent on these activities, financial advisors and other professionals are struggling to meet the April 10 deadline to avoid potentially enormous litigation and prohibited transaction excise tax consequences. A measured and considered compliance approach for any regulation maximizes the services and value offered to clients, but a race to meet the deadline forces short-term decisions that increase costs and decrease access just to avoid potential penalties. While these issues may be addressed over time, an orderly transition would protect the interests of workers and prevent unnecessary harm.

A failure to delay the applicability date ultimately hurts workers and individuals trying to save for retirement. Small business retirement plans and small dollar savers are already seeing fewer options available to them, an outcome that will increase as more financial advisors announce their compliance plans. Minimum asset thresholds are already increasing, cutting off small dollar savers from the advice they need to grow their nest eggs. The review ordered by President Trump will delay and partially avoid these negative impacts. However, this review cannot be completed thoroughly

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and objectively – and these negative impacts cannot be avoided entirely – without a delay in the applicability date at the very least of 60 days and we urge the Department to consider up to an additional year delay.

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

Sincerely,



David Hirschmann
President & CEO
Center for Capital Markets Competitiveness



Randel Johnson
Senior Vice President
Labor, Immigration, and Employee Benefits