

**Congress of the United States**  
Washington, DC 20510

June 21, 2019

The Honorable Gene Dodaro  
Comptroller General  
U.S. Government Accountability Office  
441 G Street, N.W.  
Washington, D.C. 20548

Dear Mr. Dodaro:

We write to request an examination by the Government Accountability Office (GAO) of the response to the Department of Labor's (DOL's) 2016 Fiduciary Rule (2016 Rule) by the financial services industry and what has occurred since it was overturned. Today marks the one-year anniversary of the Fifth Circuit issuing its Order to vacate *in toto*<sup>1</sup> the DOL's 2016 Rule, including the Best Interest Contract (BIC) and the related prohibited transaction exemptions.<sup>2</sup> DOL chose not to appeal and issued a Field Assistance Bulletin (FAB) to help industry understand its obligations and to communicate the DOL's decision not to enforce the rule and its associated prohibited transaction exemptions.<sup>3</sup> Specifically, the FAB included a "non-enforcement policy" and specified that DOL would not pursue prohibited transaction claims against investment advice fiduciaries. In the past year, DOL appears to have done little, if anything, to warn retirement savers that they are now vulnerable to professionals who, according to DOL, have no obligation to put their clients' interest before their own.

The Employee Retirement Income Security Act of 1974 (ERISA) established the concept of a retirement plan fiduciary over 40 years ago. ERISA provides that certain actions or functions confer fiduciary status on an individual or entity. Section 404 of ERISA explains the basic requirements of an ERISA fiduciary through the "prudent man" standard of care.<sup>4</sup> These requirements essentially dictate that a fiduciary of a defined contribution plan should offer a prudent menu of investments that are competitive in terms of fees, and that are free from conflicts of interest, as should the information or advice provided to plan participants.

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<sup>1</sup> *Chamber of Commerce of the U.S. et al v. Acosta*, No. 17-10238 (5th Cir. Mar. 15, 2018) (vacating the fiduciary rule *in toto*).

<sup>2</sup> Definition of the Term "Fiduciary;" Conflict of Interest Rule- Retirement Investment Advice, 81 Fed. Reg. 20,946 (Apr. 8 2016) (to be codified at 29 C.F.R. pts. 2509, 2510, and 2550); Amendment to and Partial Revocation of Prohibited Transaction Exemption (PTE) 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters, 81, Fed. Reg. 21,147 (Apr. 8, 2016) (to be codified at 29 C.F.R. pt. 2550); Best Interest Contract Exemption, 81 Fed. Reg. 21, 002 (Apr. 8, 2016) (to be codified at 29 C.F.R. pt 2550).

<sup>3</sup> DOL Field Assistance Bulletin No. 2018-02, "Temporary Enforcement Policy on Prohibited Transaction Rules Applicable to Investment Advice Fiduciaries" (May 7, 2018).

<sup>4</sup> 29 U.S.C. § 1104 (a) (requiring that a fiduciary discharge its duties (1) solely in the interest of plan participants and beneficiaries; (2) for the exclusive purpose of providing plan benefits or for defraying reasonable expenses of plan administration; (3) with the care, skill, prudence, and diligence that a prudent person in a similar circumstance would use; (4) by diversifying the plan's investments to minimize the risk of large losses; and (5) in accordance with the plan's documents.).

ERISA became law when the retirement landscape consisted largely of defined benefit plans and before the widespread adoption of 401(k) plans and the technologically- and regulatory-driven explosion of new financial products. In particular, Individual Retirement Accounts (IRAs), originally established as a supplemental savings vehicle, have accumulated trillions of dollars more in assets than 401(k) plans, partially due to guidance and marketing favoring IRAs, as documented in your earlier report, “Labor and IRS Could Improve the Rollover Process for Participants.”<sup>5</sup> In 2016, the DOL sought to modernize the definition of a fiduciary by finalizing a “conflict of interest” rule that took into account these dramatic changes. Understanding the 2016 Rule’s significance and the likelihood that it would soon be operational, many financial services firms took considerable action to comply in advance. Some firms believed that the rule included many commonsense changes that were long overdue, particularly with regard to the provision of investment advice. These firms revised their operations significantly, in some cases spending millions of dollars. After being upheld a number of times in various courts,<sup>6</sup> the U.S. Court of Appeals for the Fifth Circuit unexpectedly vacated the DOL’s rule in 2018, creating uncertainty and confusion for the financial services industry and the retirement world generally.<sup>7</sup>

Today, plan sponsors, financial services professionals, and investment advisors must decide whether to retain the new policies and procedures they developed, often at considerable expense, in response to the 2016 Rule. One unclear alternative was to revert to the pre-2016 ways of doing business, restoring harmful conflicts of interest that had previously been eliminated to comply with the 2016 Rule. Additionally, the Securities and Exchange Commission (SEC) recently promulgated a rule covering investment advice in the retail market. While the SEC rule does not immediately implicate retirement plans, Secretary of Labor Alexander Acosta has indicated that DOL will collaborate with the SEC to issue a new fiduciary rule later this year, which may exacerbate the confusion. Meanwhile, plan participants may experience difficulty in understanding the various duties owed to them by those giving retirement advice and may be receiving conflicted advice. In light of these challenges, we would like GAO to address the following questions:

1. To what degree did financial services firms, plan administrators and financial advisors serving defined contribution plans, 401(k) plan participants, and IRA investors assume a fiduciary role in response to the 2016 Rule?
2. For those firms that initiated efforts to comply with the 2016 Rule prior to the Fifth Circuit’s decision:
  - a. How did their product line change during this period (*i.e.*, what new products, if any, were introduced and which products were de-emphasized to facilitate compliance, particularly with the 2016 Rule’s BIC exemption)?

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<sup>5</sup> U.S. Gov’t Accountability Off., GAO-13-30, *Labor and IRS Could Improve the Rollover Process for Participants* (Mar. 2013).

<sup>6</sup> *Chamber of Commerce of the U.S. et al. v. Hugler*, No. 3:16-cv-1476-M (N.D. Tex. Feb. 8, 2017); *Nat’l Ass’n for Fixed Annuities v. Perez*, 16-cv-1035, 2016 WL 6573480 (D.D.C. Nov. 4, 2016); *Mkt. Synergy Grp., Inc. v. U.S. Dep’t of Labor*, 16-CV-4083-DDC-KGS, (D. Kan. Feb. 17, 2017); *Thrivent Financial for Lutherans v. Perez*, No. 0:16-cv-03289 (D. Minn. Sept. 29, 2016); *Mkt. Synergy Grp., Inc. v. Acosta*, No. 17-3038 (10<sup>th</sup> Cir. Mar. 13, 2018).

<sup>7</sup> *Chamber of Commerce of the U.S. et al v. Acosta*, No. 17-10238 (5th Cir. Mar. 15, 2018) (vacating the fiduciary rule *in toto*).



- b. How did their compensation structure (*e.g.*, commission *vs.* fee for service) of advisors and other staff change during this period?
  - c. How did the amount of sales and revenue by product type change during this period?
  - d. What were their aggregate compliance costs, and how did these costs vary by type (*e.g.*, technology or training product development among other things)?
  - e. What was the overall effect on plans, participants, and IRA investors?
3. To what extent have those entities who assumed a fiduciary role continued to act as fiduciaries after the rule was vacated in 2018? To what extent have those entities who assumed a fiduciary role decided not to act as fiduciaries after the rule was vacated? Why did these entities choose their specific path?
4. For the entities who continued to assume a fiduciary role after the rule was vacated and those that did not, to what extent, if any, has the rule being vacated affected:
  - a. their product line;
  - b. the amount of sales and revenue for by product type;
  - c. compensation structure; and
  - d. their aggregate compliance costs, and costs by type.
5. To what extent will the SEC's Regulation BI (Best Interest), which was finalized on June 5, 2019, cover advice to retirement savers and what protections will it extend to retirement savers and plan participants generally? Which retirement products will be subject to the SEC's rulemaking?

We appreciate GAO's assistance with this study. If you have any questions concerning this request, please contact Kevin McDermott, Senior Labor Policy Advisor for the House Education & Labor Committee, at (202) 225-3725, and Kendra Isaacson, Senior Pensions Counsel for the Senate HELP Committee, at (202) 224-6572.

Thank you for your attention to this matter.

Sincerely,



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ROBERT C. "BOBBY" SCOTT  
Chairman, House Committee on Education &  
Labor



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PATTY MURRAY  
Ranking Member, Senate Committee on  
Health, Education, Labor & Pensions