

Congress of the United States
Washington, DC 20510

July 21, 2017

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

Re: Fiduciary Rule Request for Information (RIN 1210-AB82)

Dear Secretary Acosta:

We write today regarding the Request for Information (“RFI”) published by the Department of Labor (the “Department” or “DOL”) in connection with its examination of the final rule defining who is a “fiduciary” under the Employee Retirement Income Security Act of 1974, as amended (“ERISA”).

We strongly urge the Department not to delay the January 2018 applicability date of certain provisions of the final rule, because delaying this applicability date serves neither the interests of investors nor of industry. Delay of the rule would result in considerable financial harm to retirees and investors as is outlined in our previous respective letters. Delay also increases regulatory uncertainty for the industry, which has been diligently working to comply with the rule.

We are concerned that the RFI will be used as a pretext for revising the final rule to weaken retiree and investor protections. Accordingly, we do not support re-litigation of the final rule, which has already undergone extensive examination and revision during a seven-year rulemaking process. For example, the final rule has been partially applicable for only a month, is not yet fully implemented, and the Department has issued a temporary enforcement policy,¹ yet the RFI is prematurely seeking to gather evidence regarding the final rule’s impact on industry in order to make changes to the rule.

We and thousands of others have already provided substantive comments many times throughout this process.² At this time, there is no new information to provide except with respect to innovations directly resulting from this rulemaking. We therefore encourage you to move forward as scheduled with the rule in its current form.

It is important that you fully understand the thorough analysis of the rule undertaken by the previous administration. What follows is a detailed account of this rule’s robust examination.

¹ Department of Labor Field Assistance Bulletin No. 2017-2 (May 22, 2017), <https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2017-02>.

² The undersigned have collectively sent 7 comment letters regarding this rulemaking.

In this era of budgetary restraints, we hope this will save you from wasting any valuable resources conducting a redundant study.

In October 2010, the Department proposed the first iteration of the fiduciary rule,³ and it received 202 public comments.⁴ In March 2011, the Department held a public hearing, which generated 114 public comments, including 45 comments from Members of Congress.⁵ Given the comments and reactions to the rule, the Department felt it would be prudent to withdraw the rule in September 2011.⁶ At that time, the Department noted its plan to reintroduce an updated rule in 2012. Rather than rush the process to meet the stated timeline, over the next two and a half years, the Department engaged in a thorough study of the industry and global trends, held meetings with stakeholders, and consulted with the Securities and Exchange Commission (“SEC”).

In February 2015, President Obama directed DOL Secretary Perez to proceed with the re-proposal of the fiduciary rule, because his Council of Economic Advisers found that conflicted advice costs retirement savers up to \$17 billion annually.⁷ The Department issued a proposed fiduciary rule in April 2015⁸ and provided ample opportunity for comment during its initial 75-day comment period, which was extended by an additional 15 days in response to public input.⁹ Following the 90-day comment period, the Department held four days of public hearings, featuring 80 witnesses.¹⁰ The Department then opened another public comment period, which lasted for 14 days.¹¹ In total, the Department received 3,134 comments, as well as 30 separate petitions with 385,889 submissions regarding the proposed rule over the course of two comment periods.¹² Moreover, it was reported that the Department met in person with over 100 stakeholders.¹³

³ Department of Labor, “Definition of the Term ‘Fiduciary,’” 75 Fed. Reg. 204 (Oct. 22, 2010).

⁴ See <https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32#comments>.

⁵ *Id.*

⁶ Department of Labor, “US Labor Department’s EBSA to re-propose Rule on definition of a fiduciary,” press release, Sept. 19, 2011, <http://www.dol.gov/opa/media/press/ebsa/EBSA20111382.htm>.

⁷ The White House, “Remarks by the President at AARP,” Feb. 23, 2015, *available at* <https://obamawhitehouse.archives.gov/the-press-office/2015/02/23/remarks-president-aarp>. See also Executive Office of the President, Council of Economic Advisers, “The Effects of Conflicted Investment Advice on Retirement Savings” 2 (Feb. 2015).

⁸ Definition of the Term “Fiduciary,” 80 Fed. Reg. 21,928 (Apr. 20, 2015).

⁹ Mark Schoeff, “DOL extends comment period on fiduciary duty proposal,” Investment News (May 15, 2015), <http://www.investmentnews.com/article/20150515/FREE/150519925/dol-extends-comment-period-on-fiduciary-duty-proposal>.

¹⁰ Department of Labor, “Public Hearing Agenda: Conflict of Interest – Definition of Fiduciary Investment Advice,” (Aug. 10-13, 2015), <https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/proposed-regulations/1210-AB32-2/hearing-agenda>.

¹¹ Cyril Tuohy, “DOL Releases Transcript from Fiduciary Rule Hearing,” (Sept. 9, 2015), <https://insurancenewsnet.com/innarticle/dol-releases-transcript-from-fiduciary-rule-public-hearing>.

¹² Department of Labor, “Conflict of Interest Proposed Rule,” public comments, <https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2>.

¹³ “Department of Labor announcement of a delay of the fiduciary rule,” (May 18, 2017), <http://www.epi.org/perkins/departement-of-labor-announcement-of-a-proposed-delay-of-the-fiduciary-rule/>.

On April 8, 2016, the Department promulgated the final fiduciary rule,¹⁴ which included key changes to many provisions that had been criticized by industry as unworkable. The rule became effective on June 7, 2016, applicable on April 10, 2017, with full compliance required beginning January 1, 2018.¹⁵

This year, President Trump called for another study of the rule in a Presidential Memorandum, issued on February 3, 2017.¹⁶ Despite the fact that this study is wholly redundant, as it was already completed in the regulatory impact analysis accompanying the Department's final rule, the Department proposed a 60-day delay on March 17, 2017,¹⁷ and received 4,962 total comments for both comment periods associated with the proposal.¹⁸ The Department finalized the 60-day delay on April 7, 2017.¹⁹

On July 6, 2017, the Department issued the RFI to which we are responding.²⁰ This RFI seeks answers to 18 questions, including whether the January 1, 2018 full applicability date should be delayed.

As a reminder, the Department was not alone in thoroughly examining the rule during this seven-year period. Congress was quite active as well, holding at least 15 hearings since 2010 where the rule was the primary focus.²¹ That is 15 times the Republican-controlled chambers of Congress elected to examine a common-sense investor protection requiring advisers to act in the best interests of their clients, while choosing not to hold a single hearing this year on the Administration's healthcare replacement bill, Trumpcare, despite the fact that Trumpcare would affect one-sixth of the economy, take healthcare away from over 20 million people, and drive up the cost of healthcare, especially for retirees and those on the verge of retirement.

Additionally, there have been at least 17 bills introduced in the House and Senate seeking to prevent or delay the implementation of the conflict of interest rule or transfer this jurisdiction to the SEC.

The judiciary branch has also weighed in on the rule. Six lawsuits have been filed since the rule was finalized.²² Although the lawsuits raise different issues with the rule, the courts to

¹⁴ 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).

¹⁵ *Id.*

¹⁶ Presidential Memorandum on Fiduciary Duty Rule, 82 Fed. Reg. 9,675 (Feb. 3, 2017).

¹⁷ Department of Labor, "Definition of the Term 'Fiduciary,'" 82 Fed. Reg. 12,319 (Mar. 2, 2017).

¹⁸ *Id.*

¹⁹ Department of Labor, "Definition of the Term Fiduciary; Conflict of Interest Rule – Retirement Investment Advice; Best Interest Contract Exemption, etc.," 82 Fed. Reg. 16,902 (April 7, 2017).

²⁰ Department of Labor, "Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions," 82 Fed. Reg. 31,278 (July 6, 2017).

²¹ This does not include hearings where the rule was discussed at length though it was not the stated topic of the hearing (*i.e.*, DOL budget hearings).

²² *Chamber of Commerce of the United States 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).

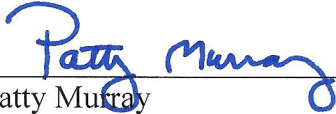
date have consistently held that the Department not only properly exercised its authority, but it also “adequately weighed the monetary and non-monetary costs on the industry of complying with the rules, against the benefits to consumers.”²³

As you can see, considerable resources have been spent already to ensure this rule was thoughtfully and carefully crafted and represents the viewpoints of all stakeholders. Other than seeking specific comments to justify a predetermined outcome, there is little chance that new evidence will be uncovered during this latest comment period, except with respect to innovations that are a direct result of the promulgation of this rule.

Throughout this regulatory process, one of the primary complaints has been the uncertainty surrounding the rule. The rule is now finalized, and there is clarity as to the parameters of the rule. Yet, by dragging out this process, you are now electing to move away from the clarity of a final rule and reintroducing uncertainty. This RFI and the ongoing study increases uncertainty regarding the future of the rule, thereby imposing unnecessary stress on this industry.

Accordingly, in the best interests of the adviser industry and investors, we strongly urge the Department not to use this RFI to revise the final rule or its related exemptions to weaken protections for retirement savers. We once again call on the Department and the President to demonstrate their commitment to America’s retirement savers and proceed with the final rule’s full applicability date of January 1, 2018.

Sincerely,



Patty Murray
Ranking Member,
Senate HELP Committee



Ron Wyden
Ranking Member,
Senate Finance Committee



Sherrod Brown
Ranking Member,
Senate Banking, Housing, &
Urban Affairs Committee



Robert C. “Bobby” Scott
Ranking Member,
House Committee on Education
and the Workforce



Maxine Waters
Ranking Member,
House Financial Services Committee

²³ *Chamber of Commerce of the United States et al.* at 60.