

United States Senate

WASHINGTON, DC 20510

March 17, 2017

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Fiduciary Rule Examination (RIN 1210-AB79)

Dear Acting Secretary Hugler:

We write regarding the regulation proposed by the Department of Labor (the “Department” or “DOL”) delaying the applicability date defining who is a “fiduciary” (82 Fed. Reg. 12,319 (Mar. 2, 2017), the “Proposed Regulation”) under the Employee Retirement Income Security Act of 1974, as amended (“ERISA”). We strongly urge the Department not to delay the applicability date of the Proposed Regulation, as a delay serves neither the interests of retirement investors nor industry. In fact, the Proposed Regulation does not justify its costs, but rather acknowledges the harm inflicted on retirement savers.

Further, the study that is called for in the Presidential Memorandum, issued by the Administration on February 03, 2017, was already completed in the regulatory impact analysis accompanying the Department’s final rule (“2016 RIA”)¹ that was promulgated on April 8, 2016 (the “Final Rule”). This redundant study would only serve to find a rationale for rescinding or significantly revising the Final Rule. We would adamantly oppose either of those actions.

Rulemaking Process

After more than six years of studying the industry and international trends, and engaging extensively with all stakeholders, the Department issued a Final Rule updating the definition of “fiduciary” in April 2016. This project was long overdue as the definition had not been updated to reflect the changes in the retirement landscape since ERISA was enacted over forty years ago. The Department’s Final Rule, reflecting the feedback and comments from industry and consumers, produced a rule that protects retirement savers yet is also reasonable and workable for financial institutions.

¹ 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).

We are concerned that the approach of this Administration appears thus far to take into account only the concerns of industry and not of consumers. Before abruptly intervening to delay the applicability date of the Final Rule, President Trump did not meet to hear the concerns of regulators or consumers. Instead he met with some of Wall Street's biggest names to discuss this rule before directing the Department to conduct a study to justify the Administration's basis to rescind or significantly revise the rule.²

Additionally, it appears President Trump's Administration may be violating its own Executive Order on ethics. President Trump issued an Executive Order requiring Executive Branch Appointees to make certain ethics commitments.³ Paragraphs 6 and 7 of the Executive Order prohibit individuals from participating in matters "directly and substantially related to [their] former employer or former clients, including regulations and contracts" and ban former registered lobbyists from participating in any matter on which he or she lobbied within the two years before the date of his or her appointment. We understand that a former lobbyist who fought the Final Rule may now be working on it, which presents a conflict of interest on this particular matter and contradicts the Administration's so-called commitment to ethics.⁴ We are extremely concerned that under the Administration's current approach, the voices of the retirement savers the Final Rule seeks to protect will not just be ignored, but never heard.

Harm to Consumers and Industry

Prior to issuing the Final Rule, the White House Council of Economic Advisers under the previous Administration found that conflicted advice costs retirement savers \$17 billion annually.⁵ Even the cursory regulatory impact analysis accompanying this Administration's Proposed Regulation indicates the quantified losses to retirement investors from delaying the rule at approximately \$147 million in this year alone and \$890 million over ten years. Moreover, the actual losses to consumers as a result of the delay may be substantially higher given the quantified losses relate to the delayed elimination of only one negative effect of one form of conflict in one market segment. This is a significant gamble to take with the savings of hardworking Americans without a clearly stated benefit that outweighs this potential harm. We are aware of the economic harm that consumers are already feeling, and you should not delay requiring advisers to act in their customers' best interests.

Further, the market appears to be adjusting in a manner that is beneficial to consumers. Companies have launched campaigns advertising they are already operating under a best interest

² Mike Konczal, "Trump Picks Wall Street Over Main Street," New York Times (Feb. 4, 2017), <https://mobile.nytimes.com/2017/02/04/opinion/trump-picks-wall-street-over-main-street.html>.

³ Exec. Order No. 13,770, 82 Fed. Reg. 9,333 (2017), <https://www.gpo.gov/fdsys/pkg/FR-2017-02-03/pdf/2017-02450.pdf>.

⁴ Justin Elliott, "How the Trump Administration May Be Skirting Its Own Ethics Rules," ProPublica (Mar. 3, 2017), <https://www.propublica.org/article/how-the-trump-administration-may-be-skirting-its-own-ethics-rules>.

⁵ Executive Office of the President, Council of Economic Advisers, "The Effects of Conflicted Investment Advice on Retirement Savings" 2 (Feb. 2015).

standard.⁶ And quite significantly, companies have started lowering fees⁷ and standardizing commissions, in addition to implementing other consumer-friendly innovations.⁸

In addition to harming consumers, we believe the Proposed Regulation will inject uncertainty into the market, which was a primary complaint voiced by industry during the prior rulemaking process. The financial industry has spent a considerable amount of time and money and made significant changes to business practices to comply with the rule; accordingly, inserting the possibility of a new rule would unnecessarily disrupt the marketplace without any benefits to consumers.

Insufficient Regulatory Impact Analysis for Proposed Regulation

We have a number of comments related to the Regulatory Impact Analysis accompanying the Department's Proposed Regulation (henceforth "2017 RIA"). As an initial matter, the 2017 RIA is severely lacking in its analysis and does not come close to justifying the delay's harm to retirement savers. The 2017 RIA is insufficient for a regulatory action deemed economically significant by the Office of Management and Budget. At a mere four pages long, the 2017 RIA made almost no attempt to evaluate what data may be available on the progress of industry coming into compliance with the rule, and it contains no details of the calculations made by the Department to produce the very few quantified benefit and cost estimates that are provided. Without such detail, the public cannot evaluate the validity of these estimates and provide informed comment on the potential impacts of the proposed delay. By itself, this severely calls into question the intent of the new rulemaking process and the value to consumers of any delay, and should be reason enough to terminate this Administration's efforts initiated on February 3, 2017.

Second, the 2017 RIA presents no new data or empirical analysis that was not provided in the 2016 RIA, which found that the costs of rule implementation on April 10, 2017 were more than justified by its benefits. The Final Rule gave the industry a full year to comply with its provisions, and the 2017 RIA offers no new evidence that companies were not aware of this timetable, that the industry has experienced any sudden structural changes that would make compliance significantly more difficult, or that industry is unable to comply with the Final Rule's original applicability date.

Third, the 2017 RIA fails to establish that the benefits of the proposed delay would outweigh the costs of such a delay. The 2017 RIA acknowledges that quantified losses to retirement savers from the delay could be expected to total approximately \$147 million this year and \$890 million over ten years, and that actual losses to consumers as a result of the delay could

⁶ "Merrill Lynch Showcases DOL Stance in New Ads," [WealthManagement.com](http://www.wealthmanagement.com/industry/merrill-lynch-showcases-dol-stance-new-ads) (Nov. 3, 2016), <http://www.wealthmanagement.com/industry/merrill-lynch-showcases-dol-stance-new-ads>; Liz Skinner, "Barrage of Schwab ads to proclaim fiduciary advisers," [InvestmentNews](http://www.investmentnews.com/article/20160616/FREE/160619940/barrage-of-schwab-ads-to-proclaim-virtues-of-fiduciary-advisers) (Jun. 16, 2016), <http://www.investmentnews.com/article/20160616/FREE/160619940/barrage-of-schwab-ads-to-proclaim-virtues-of-fiduciary-advisers>.

⁷ "DOL fiduciary rule may finally spark lower fund fees for mutual funds," [InvestmentNews](http://www.investmentnews.com/article/20161009/FREE/161009927/dol-fiduciary-rule-may-finally-spark-lower-fund-fees-for-mutual-funds) (Oct. 9, 2016), <http://www.investmentnews.com/article/20161009/FREE/161009927/dol-fiduciary-rule-may-finally-spark-lower-fund-fees-for-mutual-funds>.

⁸ Diana Britton, "LPL Makes More Changes to Prepare for DOL Rule," [WealthManagement.com](http://www.wealthmanagement.com/industry/lpl-makes-more-changes-prepare-dol-rule) (Nov. 3, 2016), <http://www.wealthmanagement.com/industry/lpl-makes-more-changes-prepare-dol-rule>. See also Jason Zweig, "SEC Blesses Negotiable Mutual-Fund Fees," [The Wall Street Journal](http://blogs.wsj.com/moneybeat/2017/01/11/sec-blesses-negotiable-mutual-fund-fees/) (Jan. 11, 2017), <http://blogs.wsj.com/moneybeat/2017/01/11/sec-blesses-negotiable-mutual-fund-fees/>.

be substantially higher given that these quantified losses relate to the delayed elimination of only one negative effect of one form of conflict in one market segment. However, the 2017 RIA makes no case that the reduction in compliance costs or other benefits to the industry associated with the delay would exceed or even equal the money taken from the pockets of retirement investors. The only estimate of cost reduction provided in the 2017 RIA – a \$42 million reduction in day-to-day compliance burdens – does not approach the quantified estimate of consumer losses resulting from the delay, let alone the likely actual value of losses to consumers once other forms of conflict in other market segments are accounted for. The 2017 RIA also makes no qualitative case that additional compliance cost reductions or benefits to the industry could outweigh expected consumer losses.

Fourth, there are too many acknowledged uncertainties, and the 2017 RIA is simply insufficient for the Department to move forward with a new final rule that would delay the applicability date of the conflict of interest rule. The Department could have issued a Request for Information before proposing to delay the Final Rule with zero economic justification.

Concluding that the Proposed Rule's benefits justify its costs using only the information currently available in the 2017 RIA would be arbitrary and would provide no factual justification for the harm the Department acknowledges a delay in the Final Rule would inflict on millions of retirement savers. Incorporating an enormous amount of new information gained from new comments and reaching a new conclusion about whether the delay's benefits justify its costs in a new RIA accompanying the issuance of a final rule would also be unacceptable, as it would not offer the public any opportunity to comment on the Department's reasoning given that no such arguments or conclusions are presented in the current 2017 RIA. If the Department wishes to go forward with a delay, it must re-propose this economically significant rule with a fully-formed regulatory impact analysis that the public can provide informed comment on.

Protecting Retirement Savers and Modernizing Rule is well within the Department's Authority

The day President Trump signed the Presidential Memorandum directing the Department to review the conflict of interest rule, White House Press Secretary Sean Spicer stated the Department had “exceeded its authority with this rule, and this is exactly the kind of government regulatory overreach the President was put into office to stop.”⁹ This statement demonstrates a profound lack of knowledge of the Department, its mission, and the judgment of the courts.

In three separate court cases, the Department has been found to have acted within its authority to promulgate this regulation and within its exemptive authority to adopt the prohibited transaction exemptions.¹⁰ In addition to holding that the Department properly exercised its authority, the judge in the case heard in the Northern District of Texas held that “the DOL adequately weighed the monetary and non-monetary costs on the industry of complying with the rules, against the benefits to consumers [and i]n doing so, the DOL conducted a reasonable cost-benefit analysis.” We will discuss this in greater detail below.¹¹

⁹ Transcript of Press Briefing by Press Secretary Sean Spicer (Feb. 3, 2017), <https://www.whitehouse.gov/the-press-office/2017/02/03/press-briefing-press-secretary-sean-spicer-232017-8>.

¹⁰ *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).

¹¹ *Chamber of Commerce of the United States et al.* at 60.

In addition, in the *Market Synergy Group* case, the Plaintiff sought a preliminary injunction to prevent the Department from taking any actions to adopt or enforce one of the prohibited transaction exemptions related to the Final Rule. Interestingly, the court held that an injunction would lead to confusion and would likely result in “unwarranted delay,” which “is not in the public’s interest.”¹² We agree a delay is not in the public’s interest and ask the Department to act accordingly.

Presidential Memorandum Calls for Redundant and Wasteful Study

The reevaluation of the Final Rule that the delay is meant to facilitate is unnecessary, redundant, and a waste of taxpayer dollars. In the Presidential Memorandum, the Department was directed to:

“[P]repare an updated economic and legal analysis concerning the likely impact of the Fiduciary Duty Rule, which shall consider, among other things, the following:

- (i) Whether the anticipated applicability of the Fiduciary Duty Rule has harmed or is likely to harm investors due to a reduction of Americans’ access to certain retirement savings offerings, retirement product structures, retirement savings information, or related financial advice;
- (ii) Whether the anticipated applicability of the Fiduciary Duty Rule has resulted in dislocations or disruptions within the retirement services industry that may adversely affect investors or retirees; and
- (iii) Whether the Fiduciary Duty Rule is likely to cause an increase in litigation, and an increase in the prices that investors and retirees must pay to gain access to retirement services.”

As part of the rulemaking process the Department undertook in completing the Final Rule, the Department prepared a 382-page regulatory impact analysis (the “2016 RIA”) examining in great detail the expected economic impacts of the rule. As noted above, this was the culmination of a roughly six-year process that incorporated the feedback of thousands of public comments submitted to the Department in multiple comment periods. Included in that analysis were discussion of the exact issues the Administration seeks to study according to the new Presidential Memorandum. Below is where the Final Rule’s 2016 RIA addressed each of these questions.

I. Harm or Likely Harm to Investors Due to a Reduction of Access to Retirement Advice, Etc.

Multiple portions of the 2016 RIA deal explicitly with these questions. For example, Section 2.10 looks extensively at the experiences of other nations in implementing similar standards, including the experience of the United Kingdom with its Retail Distribution Review (RDR). In this section, the Department’s 2016 RIA concluded that “based on the available data from post-RDR reports since 2013, the Department believes that the RDR has not significantly reduced availability of advice, and any RDR-related advice gap is likely minor and temporary. Simple, affordable advice, which is mostly likely to benefit many small investors, was scarce before the

¹² *Mkt. Synergy Grp. Inc. v. U.S. Dep’t of Labor*, 16-CV-4083-DDC-KGS, 2016 WL 6948061, 62 (D. Kan. Nov. 28, 2016).

RDR, but indications are the market is evolving to meet these needs under the RDR.” Section 2.9.2.1 details how the final Best Interest Contract Exemption did not prohibit any forms of compensation and allows advisors to use many of the same fee structures for their products that they currently use, as long as they give customers advice that is in the customer’s best interest and implement basic protections against the dangers posed by conflicts of interest. Sections 2.9.1 and 4.3.1.2 explain how retirement savers’ access to essential investment education will be protected and details how the Department establishes a critical distinction between fiduciary investment advice and non-fiduciary investment information and educational materials. Section 8.4.4 and Appendix C discuss how the Final Rule may impact small savers and illustrate just how badly savers of modest means need impartial financial advice that is in their best interests.

II. Dislocations or Disruptions within the Retirement Services Industry that May Adversely Affect Investors

The 2016 RIA has also already dealt explicitly with this question, most clearly in Section 8.4. Section 8.4.1, for example, states that “Advisory firms’ responses to the Final Rule and exemptions (and to related changes in consumer demand and competition) will impact the labor market for advisers. These dynamics may involve frictional costs and have distributional effects. For example, advisers may migrate from advisory firms where conflicts had been most deeply embedded to firms that are well situated to efficiently provide impartial advice compliant with the Final Rule and exemptions. The overall movement is likely to be toward greater long-term efficiency, with a more efficient allocation of labor and other resources to investment advice and other productive enterprises.”

III. Increase in Litigation or Increase in Prices that Investors and Retirees Must Pay for Retirement Services

Again, the 2016 RIA has already addressed this question. Section 5.4.1 in the analysis of the costs of the rule explicitly addresses the issue of litigation and states that “The Department understands that (1) premiums for these affected advisers could be expected to increase by approximately 10 percent due to their new fiduciary status, (2) insurance is priced on a per-representative basis; and (3) the average insurance premium is approximately \$3,000 per representative. Based on the foregoing, the estimated 10 percent premium increase would be approximately \$300 per insured representative.” The 2016 RIA calculates what the total cost of these premium increases would be across all impacted advisers per year and incorporates these costs into its overall cost-benefit analysis.

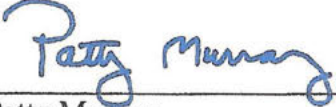
Conclusion

Delaying the conflict of interest rule to revisit questions that were already addressed in detail in the thorough economic analysis accompanying the Final Rule is irresponsible and harmful to retirement savers. The Administration should look to the Final Rule’s 2016 RIA to address the questions to which it seeks answers and not punish Americans struggling to save for retirement by postponing a necessary consumer protection for the purposes of producing a redundant unnecessary analysis.

For the reasons outlined above, we strongly urge the Department not to conduct the wasteful and redundant study called for in the Presidential Memorandum as a means to justify changing the Final Rule and weakening protections for retirement savers. We call on the Department and

the President to demonstrate their commitment to America's retirement savers and proceed with the Final Rule's applicability date of April 10, 2017.

Sincerely,


Patty Murray
United States Senator


Sherrod Brown
United States Senator


Tammy Baldwin
United States Senator

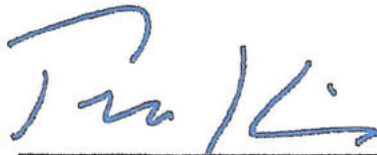

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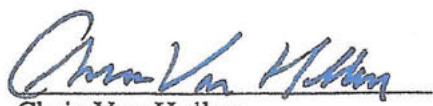
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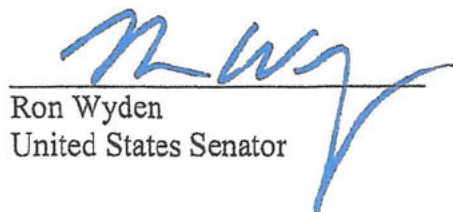
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