AMERICAN RETIREMENT ASSOCIATION
Working for America's Retirement
4245 North Fairfax Drive | Suite 750 | Arlington, VA 22203 • P. 703.516.9300 • F. 703.516.9308

March 15, 2017

Mr. Joe Canary, Director
Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Fiduciary Rule Examination
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: Definition of the Term "Fiduciary;" Conflict of Interest Rule – Retirement Investment Advice; Proposed Extension of Applicability Date Department of Labor RIN 1210-AB79

Dear Mr. Canary:

The American Retirement Association ("ARA") is writing to provide comments with respect to the proposed extension of the applicability date[1] for the Conflict of Interest Regulation and related exemptions (collectively, the "Regulation").[2] We believe an extension of the applicability date is merited as explained in detail below. In particular, a delay will give the Department of Labor (the "Department" or "DOL") the time necessary to consider the comments it will receive in conjunction with its examination of the Regulation pursuant to the President's Memorandum to the Secretary of Labor dated February 3, 2017 ("Presidential Memorandum").[3] Since the review process could result in changes to or even withdrawal of the Regulation, a delay in applying the existing Regulation is critical to avoid the unnecessary disruption and expense that would result from shifting standards for compliance.

ARA appreciates the thought, time and effort the Department has put into the initiative to update and redefine fiduciary investment advice under section 3(21) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). ARA has long been supportive of the Department in this area. We agree that investment advice should be impartial, given in an environment that is free from conflicts of interest and in the recipient's best interest. At the same time, it is important to ensure that American workers continue to have access to workplace savings arrangements and professionals to help guide them through the very daunting process of preparing for and living out one's retirement years.

[1] Proposed Regulation - Definition of the Term Fiduciary, 82 Fed Reg 12319 (March 2, 2017).
[2] Definition of the Term Fiduciary, 81 Fed Reg 20946 (April 8, 2016).
[3] Presidential Memorandum Fiduciary Rule - February 3, 2017, 82 Fed Reg 9675 (February 7, 2017).

ARA is a national organization of more than 20,000 members who provide consulting and administrative services to American workers, savers and sponsors of retirement plans and IRAs. ARA members are a diverse group of retirement plan professionals of all disciplines including financial advisers, consultants, administrators, actuaries, accountants, and attorneys. ARA is the coordinating entity for its four underlying affiliate organizations, the American Society of Pension Professionals and Actuaries ("ASPPA"), the National Association of Plan Advisors ("NAPA"), the National Tax-deferred Savings Association ("NTSA") and the ASPPA College of Pension Actuaries ("ACOPA"). ARA members are diverse but united in a common dedication to America's private retirement system.

Recommendations

ARA recommends that the applicability date be delayed until January 1, 2018, and that transitional relief with regard to the Best Interest Contract Exemption be extended until July 1, 2018.

ARA further recommends that the Department take such actions as are necessary to ensure that the effective date of the delay precedes the existing applicability date to avoid the unnecessary expense and disruption that would be caused by uncertain and shifting compliance standards.

Discussion

The Regulation was published in final form on April 8, 2016, with an effective date of June 7, 2016, and an applicability date of April 10, 2017. The preamble indicates that it was the Department's belief that the one-year delay in the applicability date would be "… adequate time for plans and their affected financial services and other service providers to adjust to the basic change from non-fiduciary status."[4]

Understandably, the process of preparing for the applicability date has been filled with many challenges. The Regulation constitutes a major regulatory change modifying a rule and long-standing business practices that had been in place for more than 40 years. Since the Regulation was promulgated, the entire financial services industry has been trying to educate hundreds of thousands of advisors on how to become fiduciary advisors while building extensive and extremely complicated compliance systems necessary to satisfy the associated prohibited transaction exemptions. These are daunting challenges and many financial services firms, particularly smaller firms, will have difficulty being ready for the upcoming April 10, 2017, deadline.

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[4] Definition of the Term Fiduciary, 81 Fed Reg 20946, 20993 (April 8, 2016).

The preparation process, however, has been interrupted by the President's directive to the Department to review the Regulation to determine whether it may adversely affect the ability of Americans to gain access to retirement information and financial advice.[5] The Presidential Memorandum further directs the Department to publish a proposed regulation rescinding or amending the Regulation if, after its examination, the Department finds the Regulation to be inconsistent with the expressed policies of the President.[6]

This examination raises the very real possibility that at some point in the future, the Regulation may be amended or rescinded. In the absence of an extension, compliance systems will need to be compliant with the Regulation's standards by the current April 10, 2017, applicability date. If thereafter, the Department chooses to amend or rescind the Regulation, compliance systems would need to be modified to conform to the amendment. The resulting expense and burdens of shifting compliance standards is unnecessary and can be avoided very easily by extending the applicability date while the Department completes its review. This is particularly important because many of the financial services firms affected by the Regulation are small businesses who can least afford the expense and disruption that would be caused by rapidly changing compliance standards.

Field Assistance Bulletin 2017-01 announced a temporary enforcement policy to address similar concerns expressed by others to the Department.[7] Although we appreciate the guidance and position taken in FAB 2017-01, there remains concern with respect to potential IRS enforcement activities as well as private litigants. Consequently, a formal, legally effective extension of the applicability date before April 10, 2017, is critical. We recognize that FAB 2017-01 indicates it is the Department's intention to avoid the possibility of a "gap" period (*i.e.,* shifting compliance standards) by acting before April 10, 2017. We urge the Department to meet that timeframe to avoid the need for a temporary enforcement policy.

As proposed, the applicability date would be extended for a period of 60 days, or until June 9, 2017. Substantive comments on various law and policy issues associated with the Regulation were also requested no later than April 17, 2017. Those comments will be informed and illuminated by the experience and work already done in anticipation of the current applicability date. Given the Department's need to give due consideration to the comments it receives, it is obvious that a 60 day extension of the existing applicability date is inadequate. In order to give the Department and interested parties sufficient time to respond to the Presidential Memorandum, the applicability date should be delayed until no earlier than January 1, 2018, and transitional relief provided with respect to the related prohibited transaction exemptions should be extended until at least July 1, 2018. Additionally, as the review process proceeds, the Department should consider further extensions. It is critical that any new compliance regime be implemented in a considered and thoughtful way to avoid the unnecessary expense and burdens caused by insufficient lead-time between the promulgation of standards and their effective date.

[5] Presidential Memorandum Fiduciary Rule - February 3, 2017, 82 Fed Reg 9675 (February 7, 2017).
[6] *Id*.
[7] DOL Field Assistance Bulletin 2017-01, (March 10, 2017) available at https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2017-01

A delay in the applicability date would also provide DOL with an opportunity to further coordinate its approach with the SEC. A significant deficiency in the Regulation is that it is only applicable to investment advice provided to retirement accounts. It does not apply to other investment accounts and consequently those investors are not protected by a fiduciary standard. A delay would allow the DOL and SEC to consider jointly proposing a modified uniform fiduciary standard that would ensure that all investors, rather than just those with retirement accounts, are protected by a consistent fiduciary standard. Additionally, SEC involvement in the rule making process, and the accompanying enforcement activities provided through FINRA, would substantially eliminate the need for the controversial private right of action mechanism currently incorporated in the best interest contract exemption.

For the reasons outlined herein:

ARA recommends that the applicability date be extended until at least January 1, 2018, and that transitional exemptive relief be extended until at least July 1, 2018; and

ARA further recommends that the Department take such actions as are necessary to ensure that the effective date of the delay precedes the existing applicability date to avoid the unnecessary expense and disruption that would be caused by uncertain and shifting compliance standards.

ARA looks forward to working with the Department to provide input throughout this process of review. We support the idea of putting plan participants, beneficiaries, and IRA owners' interests' front and center under a "best interest" standard. Consistent with this support, we believe that some changes to the Regulation will be beneficial and protective of participants, beneficiaries, and IRA owners while supporting and enhancing the diverse range of products and services available in the ERISA marketplace. We would welcome the opportunity to discuss these comments further with you. Please contact Craig Hoffman, ARA General Counsel, at CHoffman@USARetirement.org if you have any questions. Thank you for your time and consideration.

Sincerely,

/s/
Brian H. Graff, Esq., APM
Executive Director/CEO
American Retirement Association

/s/
Craig P. Hoffman, Esq., APM
General Counsel
American Retirement Association

/s/
Robert Richter, Esq., APM
President
American Retirement Association

/s/
Scott Hayes
President-Elect
American Retirement Association