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April 17, 2017

**SUBMITTED VIA REGULATIONS.GOV**

Mr. Edward C. Hugler  
Acting Secretary  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

**Re: Comments Regarding RIN 1210-AB79**

Dear Acting Secretary Hugler:

On February 3, 2017, President Trump declared that a priority of his administration is “to empower Americans to make their own financial decisions, to facilitate their ability to save for retirement and build the individual wealth necessary to afford typical lifetime expenses ....”<sup>1</sup> Recognizing the regulation amending the definition of “fiduciary” under the *Employee Retirement Income Security Act* that was promulgated during the Obama administration<sup>2</sup> “may not be consistent” with this policy, the President directed the Department of Labor (DOL or Department) to analyze a number of questions regarding the regulation’s likely consequences.<sup>3</sup> Subsequently, the Department requested comment on the questions posed by the President.<sup>4</sup> Therefore, we again write to express our strong concerns with the Obama administration’s

<sup>1</sup> Presidential Memorandum on Fiduciary Duty Rule (Feb. 3, 2017), <https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-memorandum-fiduciary-duty-rule> [hereinafter Presidential Memo].

<sup>2</sup> Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20946 (Apr. 8, 2016).

<sup>3</sup> Presidential Memo, *supra* note 1.

<sup>4</sup> Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice; Best Interest Contract Exemption (Prohibited Transaction Exemption 2016–01); Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Prohibited Transaction Exemption 2016–02); Prohibited Transaction Exemptions 75–1, 77–4, 80–83, 83–1, 84–24 and 86–128, 82 Fed. Reg. 12319 (Mar. 2, 2017) (proposing to extend the applicability date of the fiduciary regulation by 60 days and asking detailed questions regarding the consequences of the fiduciary regulation) [hereinafter Delay Proposal].

regulation. Further, we urge DOL to delay the applicability of the rule until the conclusion of the analysis directed by the President.<sup>5</sup>

Because of its primary jurisdiction over this regulation, the Committee on Education and the Workforce (Committee) of the U.S. House of Representatives has exhaustively reviewed the consequences of this Obama-era regulation.<sup>6</sup> In addition to conducting significant oversight, the Committee in the 114th Congress favorably reported bipartisan legislation providing a substantive alternative to the proposed rule.<sup>7</sup> Further, when the misguided fiduciary proposal was finalized, both houses of Congresses approved a joint resolution of disapproval under the *Congressional Review Act*.<sup>8</sup> However, due to President Obama's veto of that legislation, the rule was scheduled to become applicable on April 10, 2017.

Thankfully, President Trump has provided an opportunity to reevaluate the rule. We share the concerns that led to the Presidential Memo, including the potential disastrous effects the regulation is likely to have on retirement savings. While we have previously detailed the flaws of the final regulation, we briefly highlight the following in response to the questions posed by the Presidential Memo.

- **The applicability of the fiduciary regulation is likely to harm investors by reducing access to retirement savings offerings and financial advice.**

The Committee has previously explained its view, based on the hearing testimony it has received, that the fiduciary regulation “will have the net effect of locking lower- and middle-income investors out of the advice market.”<sup>9</sup> For instance, one hearing witness described the regulation when in proposed form as “poorly designed for investors and unduly burdensome for financial advisors and financial institutions. The result is that the proposal will drive up costs putting retirement advice out of the reach of many investors.”<sup>10</sup>

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<sup>5</sup> Last month, Republican members of the Committee sent a letter to the Department expressing the Committee's support for an initial 60 day delay, and for further delays as needed to complete the analysis required by the Presidential Memo. Letter from the Hon. Virginia Foxx, Chairwoman, H. Comm. on Educ. and the Workforce, *et al.* to Mr. Edward Hugler, Acting Sec'y, Dep't of Labor (Mar. 17, 2017), <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/00817.pdf>.

<sup>6</sup> The Committee's oversight and views on this issue are described, in part, in the Committee's 2016 report recommending House passage of a resolution of disapproval of the regulation under the *Congressional Review Act*. H. Rept. 114-527 (2016), <https://www.gpo.gov/fdsys/pkg/CRPT-114hrpt527/pdf/CRPT-114hrpt527-pt1.pdf>.

<sup>7</sup> Affordable Retirement Advice Protection Act, H.R. 4293, 114th Cong. (2016); Strengthening Access to Valuable Education and Retirement Support Act, H.R. 4294, 114th Cong. (2016).

<sup>8</sup> H.J. Res. 88, 114th Cong. (2016). H.J. Res. 88 passed the House on April 28, 2016 and passed the Senate on May 24, 2016, but was vetoed on June 8, 2016.

<sup>9</sup> H. Rept. 114-527, *supra* note 6, at 15.

<sup>10</sup> *Restricting Access to Financial Advice: Evaluating the Costs and Consequences for Working Families and Retirees: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce*, 114th Cong. 10 (Jun. 17, 2015) (written testimony of Dean Harman, CFP, Managing Dir., Harman Wealth Management).

Regulatory comments on the proposed rule also explained how fewer working families would have access to affordable advice. For example, the Small Business Administration's Office of Advocacy warned the regulation "would likely increase the [advisors'] costs and burdens associated with servicing smaller plans ... [and] could limit financial advisors' ability to offer savings and investment advice to clients ... ultimately lead[ing] advisors to stop providing retirement services to small businesses."<sup>11</sup> We remain concerned that it is "inevitable that many [Individual Retirement Account] investors would no longer be able to obtain advice at all."<sup>12</sup>

- **The fiduciary regulation will disrupt the retirement services industry in a way that adversely affects investors.**

While it is apparent that the regulation will reduce access to affordable investment advice, proponents falsely claim significant financial benefits for retirement savers. For example, the Obama administration trumpeted an estimate that investors could save \$17 billion annually as a result of the regulation.<sup>13</sup> Indeed, both the delay proposal from March 2, 2017, and the finalized delay point to the Regulatory Impact Analysis (RIA) from the Department as evidence of significant cost savings for retirement savers.

Nearly from the start, the Obama administration's analysis came under intense scrutiny. Again, the record from our Committee's hearings demonstrated how the previous administration's approach to measuring such benefits was based on hypotheticals and vastly overestimated potential benefits. For instance, Dr. Brian Reid testified that the Department arrived at its RIA "by misinterpreting and incorrectly applying the findings of the academic research that it cites as the foundation of its conclusions. In fact, these assertions do not stand up when tested against actual experience and data."<sup>14</sup> As an example, according to Dr. Reid, the administration's Council of Economic Advisors overestimated the purported fee differential paid by certain investors by as much as 85 percent.<sup>15</sup> Therefore, the President's directive to conduct a new economic analysis is absolutely vital to ensure retirement savers are not adversely affected.

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<sup>11</sup> Small Bus. Admin's Office of Advocacy, Comment Letter on Definition of the Term "Fiduciary"; Conflict of Interest Rule--Retirement Investment Advice (RIN 1210-AB32) (Jul. 17, 2015), <https://www.sba.gov/advocacy/comments-department-labor-re-definition-term-fiduciary-conflict-interest-rule-retirement>.

<sup>12</sup> *Restricting Access to Financial Advice: Evaluating the Costs and Consequences for Working Families and Retirees: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce*, 114th Cong. 160 (June 17, 2015) (statement of Dr. Brian Reid, Ph.D., Chief Economist, Inv. Co. Inst.).

<sup>13</sup> See, e.g., *Principles for Ensuring Retirement Advice Serves the Best Interests of Working Families and Retirees: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce*, 114th Cong. 80 (Dec. 2, 2015) (Statement of Rep. David P. Roe, Chairman, Subcomm. on Health, Employment, Labor, and Pensions) ("I looked at that formula that was used to calculate this \$17 billion. . . . The number \$17 billion is now going to become the Ten Commandments. It is not. It is not a real number.").

<sup>14</sup> Reid, *supra* note 12, at 162.

<sup>15</sup> *Id.* at 167.

- **The fiduciary regulation is likely to cause an increase in litigation and the prices investors and retirees must pay to gain access to retirement services.**

It appears the Obama administration considered an increase in litigation to be a *feature* of its fiduciary project. In fact, in order to receive an exemption from the prohibited transaction rules, many retirement service providers will be required to enter into a contract envisioning class action litigation. The prospect of this litigation will drive costs up for low- and middle-income retirement savers. These higher costs and higher liability risks will undermine the provision of affordable advice.<sup>16</sup>

- **The applicability date of the fiduciary regulation should be delayed pending completion of the analysis required by the President's Memo.**

We were pleased when the Department sought comments on the questions posed by the President's Memo and proposed an initial delay in the applicability date for 60 days. More specifically, we were heartened the Department's proposal for delay stated the following:

There are approximately 45 days until the applicability date of the final rule and the PTEs. The Department believes it may take more time than that to complete the examination mandated by the President's Memorandum. Additionally, absent an extension of the applicability date, if the examination prompts the Department to propose rescinding or revising the rule, affected advisers, retirement investors and other stakeholders might face two major changes in the regulatory environment rather than one. This could unnecessarily disrupt the marketplace, producing frictional costs that are not offset by commensurate benefits. This proposed 60-day extension of the applicability date aims to guard against this risk. The extension would make it possible for the Department to take additional steps (such as completing its examination, implementing any necessary additional extension(s), and proposing and implementing a revocation or revision of the rule) without the rule becoming applicable beforehand.<sup>17</sup>

From this, it appeared the Department recognized how counterproductive it would be for the rule to become applicable before its completion of the analysis required by the President's Memo. Only delaying the regulation would avoid harmful consequences for retirement savers and unwarranted costs.<sup>18</sup> Unfortunately, in announcing the final 60-day delay, the Department was less clear, advising stakeholders to "plan on and prepare for compliance" beginning June 9,

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<sup>16</sup> Bradford Campbell, former Assistant Secretary of Labor for Employee Benefits, compellingly explained how rules that increase burdens and liability on those providing retirement services to small employers, such as the rule adopted in the Department's final fiduciary regulation, serve to increase costs for small businesses. *Principles for Ensuring Retirement Advice Serves the Best Interests of Working Families and Retirees: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce*, 114th Cong. 5 (Dec. 2, 2015) (written testimony of the Hon. Bradford Campbell, Counsel, Drinker Biddle & Reath LLP).

<sup>17</sup> Delay Proposal, 82 Fed.Reg. at 12320.

<sup>18</sup> In fact, legislation has been introduced in the House that would delay the regulation by two years, giving an appropriate amount of time for reconsideration. Protecting American Families Retirement Advice Act, H.R. 355, 115th Cong. (2017) (introduced by Rep. Joe Wilson (R-SC)).

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2017.<sup>19</sup> Of additional concern, the Department appeared to feel compelled to justify this very modest delay in terms of the purported “costs” of the status quo enumerated in the highly questionable RIA. This is curious because the very existence of the Presidential Memo calls into serious question the credibility of that RIA, as do both the congressional and regulatory records.<sup>20</sup>

As we assured you previously, the Committee is eager to work with the administration to mitigate the harm caused by this onerous regulation.<sup>21</sup> Indeed, retirement policies should ensure access to affordable, sound retirement advice for working families and retirement savers. The Department should not establish an arbitrary applicability date for a regulation that should be rescinded or significantly revised. Instead, we urge you to clarify that the applicability date of the regulation will be delayed until the analysis required by the President’s Memo is completed and rescission or appropriate revisions are finalized.

Respectfully,



Virginia Foxx  
Chairwoman  
Committee on Education  
and the Workforce



Tim Walberg  
Chairman  
Subcommittee on Health, Employment,  
Labor, and Pensions



Joe Wilson  
Member of Congress



Duncan Hunter  
Member of Congress



David P. Roe, M.D.  
Member of Congress



Glenn “GT” Thompson  
Member of Congress

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<sup>19</sup> Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice; Best Interest Contract Exemption (Prohibited Transaction Exemption 2016–01); Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Prohibited Transaction Exemption 2016–02); Prohibited Transaction Exemptions 75–1, 77–4, 80–83, 83–1, 84–24 and 86–128, 82 Fed. Reg. 16902, 16907 (Apr. 7, 2017).

<sup>20</sup> See e.g., Inv. Co. Inst., Comment Letter on RIN 1210-AB79; Proposed Rule; Extension of Applicability Date (Mar. 17, 2017), <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/01073.pdf>.

<sup>21</sup> Foxx, *supra* note 5.



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Member of Congress



Todd Rokita  
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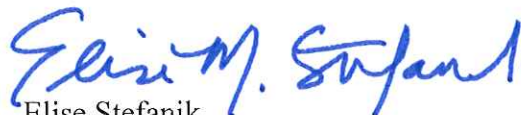
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CC: The Honorable Mick Mulvaney, Director, Office of Management and Budget