NASAA

NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.
750 First Street N.E., Suite 1140
Washington, D.C. 20002
202/737-0900
Fax: 202/783-3571
www.nasaa.org

March 16, 2017

By email to EBSA.FiduciaryRuleExamination@dol.gov

Timothy D. Hauser
Deputy Assistant Secretary for Program Operations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue NW
Washington, D.C. 20210

RE: RIN 1210-AB79, Proposed Extension of Applicability of the Department of Labor's Conflict of Interest Rule and Related Rulemakings

Dear Mr. Hauser,

The North American Securities Administrators Association, Inc. ("NASAA")[1] welcomes the opportunity to provide these comments on the proposed extension by the U.S. Department of Labor (the "Department") of the applicability of the Department's fiduciary duty rulemaking, including redefinition of the scope of the term fiduciary and related initiatives such as the Best Interest Contract Exemption ("BIC exemption") and amendments to Prohibited Transaction Exemption ("PTE") 84-24.[2] NASAA first commented in support of the Department's rule proposal on July 21, 2015,[3] and remains supportive of the Department's final fiduciary duty rule released on April 1, 2016.[4]

---

[1] The oldest international organization devoted to investor protection, NASAA was organized in 1919. NASAA's membership consists of the securities administrators in the 50 states, the District of Columbia, Canada, Mexico, Puerto Rico, and the U.S. Virgin Islands. NASAA is the voice of securities agencies responsible for grass-roots investor protection and efficient capital formation.

[2] Definition of the Term "Fiduciary", Conflict of Interest Rule—Retirement Investment Advice, U.S. Dept. of Labor, 82 Fed. Reg. 12319 (March 2, 2017).

[3] *See* Letter from William Beatty, NASAA President and Wash. Sec. Adm'r, to Phyllis C. Borzi, Assistant Sec'y, Emp. Benefits Sec. Admin. (July 21, 2015). NASAA subsequently submitted two additional comment letters of the Department's rule proposal. *See* Letter from William Beatty, NASAA President and Wash. Sec. Adm'r, to Phyllis C. Borzi, Assistant Sec'y, Emp. Benefits Sec. Admin. (September 24, 2015); Letter from Judith Shaw, NASAA President and Maine Sec. Adm'r, to Phyllis C. Borzi, Assistant Sec'y, Emp. Benefits Sec. Admin. (October 5, 2015).

[4] Definition of the Term "Fiduciary", Conflict of Interest Rule—Retirement Investment Advice, U.S. Dept. of Labor, 81 Fed. Reg. 20946 (April 8, 2016).

NASAA opposes further delaying the implementation of the rule. Any such delay in the rule's current effective date would be a disservice to investors and to the firms that have worked diligently to comply with the rule in advance of the effective date. Furthermore, delaying the rule's effective date will undermine effective implementation.

NASAA's membership includes all U.S. state securities regulators, who serve on the frontlines of investor protection. Our members have seen first-hand the negative consequences of investors not having their financial advisers owe them fiduciary duties.[5] Therefore, NASAA has been a longstanding advocate of extending the fiduciary duty of care applicable to investment advisers to broker-dealers.[6] While the Department's rulemaking remains distinct from any potential Securities and Exchange Commission ("SEC") rulemaking pursuant to Section 913 of the Dodd-Frank Act of 2010, NASAA continues to advocate on multiple initiatives to raise the standard of care for the benefit of investors. The Department's 2016 rule increases the duty of care for an important group of the investing public – particularly investors with defined contribution retirement accounts – and is therefore a key step in the right direction. As we noted in past comment letters, SEC rulemaking can and should occur in close coordination with the Department's rulemaking, but regulatory harmony should not delay the Department's rulemaking, particularly as this rulemaking is well into the implementation phase.

The Department's rulemaking has undergone years of development (including an initial proposal in 2010 and a significantly revised re-proposal in 2015) and multiple comment periods, culminating in numerous hearings and public comments representing a diverse array of viewpoints. The final rule, adopted in April 2016 and with a first effective date of April 10, 2017, represents an in-depth, multi-year, deliberate and thoughtful rulemaking exercise. It also represents the benefits of the administrative rulemaking process – one that is careful and considered, not rushed. The rulemaking is already changing industry practices for the better.[7] Press reports show that in direct response to the rule, major broker-dealers have announced and undertaken significant changes to sales practices that benefit investors, including by lowering commissions, reducing certain conflicts of interest, and improving disclosure.[8]

---

[5] NASAA compiles an annual summary of state securities enforcement actions. *See* NASAA 2016 Enforcement Report, *available at* nasaa.cdn.s3.amazonaws.com/wp-content/uploads/2016/09/2016-Enforcement-Report-Based-on-2015-Data_online.pdf.

[6] Section 913 of the Dodd-Frank Act of 2010 instructed the SEC to study and report to Congress on the differing duties applicable to broker-dealers and investment advisers and authorized the SEC to promulgate rules in this regard, including potentially a rule imposing fiduciary duties on broker-dealers. *See* Sec. 913, Dodd-Frank Act of 2010, Pub. Law 111-203, 124 Stat. 1376 (2010). NASAA has advocated for the SEC to adopt such a rule. *See* Letter from William Beatty, NASAA President and Wash. Sec. Adm'r, to Brent J. Fields, Secretary, U.S. Sec. and Exch. Comm. (July 21, 2015); Letter from A. Heath Abshure, NASAA President and Ark. Sec. Adm'r, to Elizabeth M. Murphy, Secretary, U.S. Sec. and Exch. Comm. (July 5, 2013).

[7] *See* John Bowman, *Don't Junk the DOL Fiduciary Rule*, Pensions & Investments (Dec. 14, 2016); Jamie Hopkins, *New Department of Labor Retirement Standard Creates Opportunity for Millennials*, Forbes (July 13, 2016); Reshma Kapadia, *New Rule Could Improve Annuities*, Barron's (June 25, 2016).

[8] *E.g.*, *Morgan Stanley to Move Ahead with Changes Despite Uncertainty Around DOL Fiduciary Rule*, InvestmentNews.com (Jan. 27, 2017), *available at*

In short, the Department's fiduciary duty rule and the process by which it was promulgated is sound. Any rule as significant as this one will likely need technical amendments to address industry compliance practices; however, any such amendments should be minor and not result in major changes. Furthermore, the Department's rulemaking has been upheld by every court that has reviewed challenges to it, another strong indicator of the thoroughness of the Department's rulemaking process.[9] The Department's rulemaking involved input from numerous sources including significant analytical data on both the potential benefits and harm to investors that might result from the promulgation of the rule.[10] The Department carefully evaluated this information and explained in the adopting release that compliance with the final rule would result in "large net gains" for retirement investors.[11]

The Department's recent release notes that, were the DOL to rescind or revise the rule after it became effective, "retirement investors and other stakeholders might face two major changes in the regulatory environment rather than one."[12] Yet, at this late point in the rulemaking process, mere weeks before the implementation deadline, it is unlikely that there would need to be major revisions. The rule has already undergone major revisions since the initial proposal in 2010, and again between the 2015 revised proposal and the 2016 adoption. Market participants have readied themselves for the rule, revised compensation structures, expended considerable resources to revise internal compliance frameworks and technologies, and generally prepared their firms for the changes required. Firms' ability to adapt in anticipation of compliance with the rule demonstrates that the rule is sound and workable. Industry stakeholders provided extensive comments, which the Department considered. The economic cost of any delay at this stage would likely be borne disproportionately and unjustly by those firms that have invested most to prepare for the rule and ensure their compliance.

NASAA reiterates its support for the Department's important goal of enhancing the standard of care available to retirement investors. The Department's 2016 rulemaking, which is now mere days from implementation, should not be delayed. Furthermore, this rulemaking paves the way for additional regulatory initiatives to raise the standard of care for all investors. Should that occur, firms would be able to leverage existing investments in technology and compliance for the Department's rule to meet additional fiduciary obligations for non-retirement investors. Therefore, the Department's rulemaking will have long-ranging benefits in how the

---

www.investmentnews.com/article/20170127/FREE/170129946/morgan-stanley-to-move-ahead-with-changes-despite-uncertainty-around.

[9] *Mkt. Synergy Grp. v. Dept. of Labor*, No. 16-cv-4083, 2017 WL 661592 (D. Kan. Feb. 17, 20170; *Chamber of Commerce v. Hugler*, No. 16-cv-1476, 2017 WL 514424 (N.D. Tex. Feb. 8, 2017); *Natl. Assn. for Fixed Annuities v. Perez*, No. 16-cv-1035, 2016 WL 6573480 (D.D.C. Nov. 4, 2016).

[10] *See* Steven Garber *et al.*, Potential Economic Effects on Individual Retirement Account Markets and Investors of DOL's Proposed Rule Concerning the Definition of a 'Fiduciary,' Rand Corp. (Feb. 2015); The Effects of Conflicted Advice on Retirement Savings, White House Council of Economic Advisers (Feb. 2015); Letter from David Certner, AARP, July 21, 2015; Letter from Niels Holch, Coalition of Mutual Fund Investors, July 21, 2015.

[11] 81 Fed. Reg. at 20952.

[12] 82 Fed. Reg. at 12320.

securities industry provides investment advice to all retail investors. Delay at this juncture would be unfortunate and a setback for firms, investors, and the public.

Sincerely,

Mike Rothman
NASAA President
Minnesota Commissioner of Commerce