SUBMITTED ELECTRONICALLY: EBSA.FiduciaryRuleExamination@dol.gov

July 21, 2017

Office of Exemption Determinations, EBSA
Attention: D-11933
U.S. Department of Labor
200 Constitution Avenue NW, Suite 400
Washington, DC 20210

RE: **RIN 1210-AB82**
Request for Information Regarding the Fiduciary Rule and Prohibited Transactions Exemptions, Relating to Advisability of Extending the January 1, 2018 Applicability Date of Certain Provisions of the Rule

To Whom it May Concern:

NAFA, the National Association for Fixed Annuities,[1] appreciates the opportunity to comment on the Department of Labor's Request for Information ("RFI") [2] regarding the Fiduciary Rule and Prohibited Transaction Exemptions ("the Rule"). NAFA will be submitting a comment in response to the additional questions included in the Department's RFI; here we address only Question 1, relating to extending the January 1, 2018 applicability date of certain provisions of the Rule, specifically the Best Interest Contract Exemption and Prohibited Transaction Exemption 84-24.

For reasons discussed in greater detail below, NAFA believes that a delay of the January 1, 2018 applicability date is essential in order to alleviate burdens on financial services providers *and* benefit Americans who wish to plan and save for their retirement and need access to the advisers and products that will allow them to do so. A January 1, 2018 implementation of the Rule in its current form will cause unrecoverable dislocations to the retirement services industry, will shrink access to retirement savings offerings and advice, and will increase litigation risk and product prices – all of which will ultimately harm retirement savers and exacerbate the U.S. retirement crisis.

[1] NAFA, the National Association for Fixed Annuities, is the premier trade association exclusively dedicated to fixed annuities. Our mission is to promote the awareness and understanding of fixed annuities. We educate annuity salespeople, regulators, legislators, journalists, and industry personnel about the value of fixed annuities and their benefits to consumers. NAFA's membership represents every aspect of the fixed annuity marketplace covering 85% of fixed annuities sold by independent agents, advisors and brokers. NAFA was founded in 1998. For more information, visit www.nafa.com.
[2] 82 FR 31278, July 6, 2017.

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Moreover, the unresolved nature of the legal challenges to the Rule that are currently before three different U.S. appellate courts creates ongoing compliance uncertainty. NAFA's lawsuit is before the U.S. Court of Appeals District of Columbia Circuit, with briefing to commence in mid-August and oral arguments expected in mid or late fall. The lawsuit in the Tenth Circuit is on a similar schedule. The lawsuit currently being heard in the Fifth Circuit is scheduled for oral arguments on July 31, 2017, ten days after this comment period closes and eight days before the close of the second comment period requested in this RFI. Clearly, the outcome of any one of these lawsuits may significantly alter the final contours of the Rule, making meaningful compliance preparations virtually impossible for annuity manufacturers, distributors, and sellers.

Accordingly, NAFA respectfully requests the Department to delay the Rule's applicability date until twelve (12) months after the later of the final resolution of all lawsuits currently filed against the Rule or the modified Rule and all exemptions are finalized.

NAFA provided comments on March 14, 2017 in response to the Department's March 2, 2017 Notice of Proposed Rulemaking to extend the original April 10, 2017 applicability date by sixty (60) days. We incorporate by reference the arguments set forth in that comment letter and supplement our previous submission with the following reasons why the Rule must be delayed beyond its current January 1, 2018 implementation date.

1. **It is impossible to create compliance protocols when the Rule itself is still up in the air.**

   January 1, 2018 is less than six months away. The Department has not completed its review of the Rule as ordered by President Trump in his February 3, 2017 Memorandum.[3] The Department is still in the process of reviewing the comments submitted in response to the Notice of Proposed Rulemaking published on March 2, 2017 regarding the examination described in the President's Memorandum. In the meanwhile, the Department has allowed two primary aspects of the Rule to go into effect on June 9, 2017 – the newly-expanded definition of fiduciary and the Impartial Conduct Standards – and there is no way at present to assess in any meaningful way the full impact of those changes. The proposed Insurance Intermediary Exemption, which the Department proposed for comment back in January of this year, has yet to be finalized – if, indeed, it ever will be. And, on July 6, 2017, the Department opened up two new, separate comment periods seeking additional information in connection with its ongoing examination of the Rule.

   It also bears noting that with the implementation of an expanded definition of fiduciary and the Impartial Conduct Standards on June 9, the underlying principles of the Rule are already in effect.

[3] 82 FR 9675, February 7, 2017.

In other words, sales and advice to IRA clients are already being delivered under a "best interest" standard. What the Department must now contemplate are the logistics and details of the final implementation of the Rule and its permanent enforcement – including reconsideration of the last-minute placement of fixed indexed annuities under the Best Interest Contract ("BIC") Exemption versus the 84-24 prohibited transaction exemption. NAFA urges the Department to take the time necessary to get these all-important details right.

Compliance is complicated and requires certainty. It is also very expensive. Given this level of uncertainty, it is impossible for industry to take the steps necessary to comply with the Rule by January 1, 2018. The applicability date must be delayed to spare all sectors of the retirement services industry unrecoverable compliance costs.

2. **More time is needed for coordination between DOL, SEC, and NAIC to develop clear and workable standards.**

NAFA agrees with Securities and Exchange Commission ("SEC") Chairman Jay Clayton that "clarity and consistency – and, in areas overseen by more than one regulatory body, coordination – are key elements of effective oversight and regulation."[4] Secretary Acosta has invited[5] the SEC to engage with the Department as both agencies continue to examine the standards of conduct that best serve the interests of American retail investors. And concurrently, the National Association of Insurance Commissioners ("NAIC") has created an Annuity Suitability Working Group to review and revise the current Suitability in Annuity Transactions Model Regulation.[6]

These three C's – clarity, consistency, and coordination – are especially important to the fixed annuity industry, which, if the rule were to go into effect as it is currently written, would bifurcate the regulation of annuity transactions between qualified and non-qualified annuity sales and between fixed declared rate annuities and fixed indexed annuities: qualified sales would be subject to the new fiduciary rule and regulated at the federal level and non-qualified sales (of both types of fixed annuities) would remain under the suitability regulations and regulated at the state level. Further complicating the matter, qualified fixed rate annuity transactions would be subject to PTE 84-24, but qualified fixed indexed annuity transactions would fall under the BIC Exemption.

The confusion caused by inconsistent and, often, incompatible regulations is particularly acute for the insurance-only licensed agents and especially those agents whose business is primarily focused on the sale of fixed indexed annuities. What is their pathway as of January 1, 2018? What

[4] https://www.sec.gov/news/public-statement/statement-chairman-clayton-2017-05-31
[5] *Ibid.* See also, Alexander Acosta, *Deregulators Must Follow the Law, So Regulators Will Too*, Wall St. J. (May 23, 2017).
[6] The NAIC Suitability in Annuity Transactions Model Regulation (MDL #275) was last revised in 2010 and can be found at http://www.naic.org/store/free/MDL-275.pdf.

does it mean to be an ERISA fiduciary for insurance-regulated agents? Who – what entity – will act as the Financial Institution to provide the oversight and the guarantees required by the BIC?

It is clear that there is renewed interest by both the SEC and NAIC to work in earnest on new, practicable conduct standards for the various stakeholders who work in the retirement services sector. And, there is a renewed interest for the DOL and SEC to engage together on this regulatory initiative. Time is needed to allow this work to proceed. A lack of coordination between the DOL, SEC, and NAIC will result in an unworkable – and unfair – regulatory landscape for the insurance industry.

3. **The uncertain outcome of the several legal challenges to the Rule necessitates delay.**

There are four ongoing lawsuits challenging various aspects of the Rule, three of which are currently in appeal before different circuits of the U.S. Court of Appeals, including NAFA's in the D.C. circuit. The earliest that any of these three lawsuits would be decided at the appellate level is sometime later this fall, and the other two will not likely have a decision until April or May 2018. All of these appeals are moving forward.

In the fourth lawsuit, which is still in federal district court in Minnesota, both the plaintiff (Thrivent Financial) and the Department have filed supplemental notices regarding the government's decision to no longer defend the Rule's requirement in the BIC exemption that would prohibit class-action waivers in arbitration agreements. (This new position of the Department was part of the government's July 3, 2017 brief in the case before the Fifth Circuit.) The supplemental notice filed by the Department in the Thrivent case indicates that the Department is conceding that the prohibition on class action waivers in the BIC Exemption violates federal law and should be vacated.[7] This change alone has caused many of NAFA members and individual producers to re-evaluate their current approach to complying with the Rule, requiring new information technology systems and new agreements with consumers.

This development is important as it would make a significant change to the Rule vis-à-vis the judicial process rather than the administrative process. The cases that are currently being appealed in the three different circuits raise a number of legal challenges to the Rule, and the courts may well issue decisions that would vacate one or more provisions of the Rule. Or, the Rule may be vacated in its entirety. Or, the courts may determine that the Rule – or certain aspects of the Rule – must be revised by the Department. The point here is that no one knows what might ultimately happen in any of these cases, but we do know that the lawsuits will not be resolved until

[7] In fact, on July 14th the U.S. Department of Justice filed a letter with the Court, withdrawing its cross-motion for summary judgment and asking the Court to either stay the case or to grant summary judgment to the Plaintiff, Thrivent Financial, because the Department of Labor is no longer defending the arbitration provision at issue. The Court has scheduled a teleconference with the parties for Wednesday, July 26, 2017.

sometime next year, well after the January 1, 2018 applicability date. And, given the fact that we have already seen the Department change course on one aspect of the Rule, it is not unreasonable to expect additional changes in response to the pending litigation. It is therefore prudent to extend the applicability date until after the final resolution of the several lawsuits to avoid further disruptions in the retirement services industry.

4. **Delaying the transition compliance period beyond January 1, 2018 will not carry any risk to consumers.**

   The fact that the Rule's Impartial Conduct Standards were implemented on June 9 militates against the Department's concern regarding risks to consumers if the current compliance transition period were to be extended beyond January 1, 2018. The standards of conduct for all annuity sales in the IRA marketplace that are in operation during this transition period will continue to be in place for whatever time the Department needs to complete its careful and thorough analysis of the Rule pursuant to the President's Memorandum. Thus, from the Department's perspective, much of the alleged harm pre-Rule is now being addressed through the measures already taken during the transition period.

   During the transition period, the entire annuity marketplace is operating under PTE 84-24, which includes the Impartial Conduct Standards, and, what we can tell you now is that every insurance annuity carrier has adopted new PTE 84-24 disclosure requirements for agents to utilize – and usually attest to – for all fixed annuity sales transactions. These new consumer disclosures help consumers understand the commission earned by the salesperson and provide the opportunity for him or her to have a conversation with the consumer regarding the range of services offered with each sale. The disclosures also put the consumer in a more educated position regarding the standard of conduct required of the insurance producer pursuant to the Rule.

   But the Impartial Conduct Standards have only been in place for the past six weeks. There simply hasn't been enough time to assess the impact of these new standards on our industry and its consumers. Accordingly, delaying the January 1, 2018 implementation date of the Rule will provide the additional time necessary to collect and analyze the data and information the Department needs, without any risk to consumer protection.

Conclusion

In testimony before Congress on June 9, 2017, Secretary Acosta said that the concern that the Rule will reduce access to investment options were raised during the original rulemaking process but that those concerns were unfortunately "not heard" by the prior administration.[8] NAFA

[8] http://www.investmentnews.com/article/20170607/FREE/170609956/labor-secretary-acosta-concerns-with-dol-fiduciary-rule-not-heard.

agrees with the Secretary and would point out that we have repeatedly expressed that very concern to the Department throughout the rulemaking process. The Department's RFI asks whether delaying the January 1, 2018 applicability date of the Rule would carry any risk. Speaking on behalf of NAFA members and the fixed annuity industry, it would not. But not getting this Rule right and rushing to implementation would carry great risk – risk to industry, to be sure, in the form of unrecoverable and unnecessary compliance costs and a tremendous loss of jobs and businesses. But the real risk of moving ahead with the Rule "as is" on January 1, 2018 will fall most heavily on the fixed annuity consumers, many of whom are low and medium income Americans, who will see access to retirement product choices and availability shrink and access to trusted retirement advisors diminished.

NAFA believes that the Rule contravenes this Administration's priorities as expressed in President Trump's Memorandum: "to empower Americans to make their own financial decisions [and] to facilitate their ability to save for retirement and build the individual wealth necessary to afford typical lifetime expenses…."[9] Secretary Acosta is correct in recognizing that the Rule may not align with the President's regulatory goals.[10]

The Secretary cautions that the process to revise the Fiduciary Rule requires patience.[11] NAFA could not agree more and urges the Department to delay the January 1, 2018 applicability date.

Again, NAFA appreciates the opportunity to share our concerns with the Department. Please do not hesitate to contact me if you would require any additional information.

Sincerely,

Chip Anderson

Charles "Chip" Anderson
NAFA Executive Director

[9] 82 FR 9675, February 7, 2017.
[10] Alexander Acosta, *Deregulators Must Follow the Law, So Regulators Will Too*, Wall St. J. (May 23, 2017).
[11] *Ibid.*