



Carl B. Wilkerson
Vice President & Chief Counsel
Securities & Litigation
(202) 624-2118 t (866) 953-4096 f
carlwilkerson@acli.com

April 30, 2015

Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Request for an Extended Comment Period on the Proposed Rule Addressing the Definition of “Fiduciary” and Conflict of Interest Requirements for Retirement Investment Advice [RIN 1210–AB32] and Related Proposed Exemptions and Amendments [ZRIN 1210-ZA25] (“the Fiduciary Proposal”)

The Department of Labor recently invited comment on its Fiduciary Proposal. The initiative appeared in the Federal Register on April 20, 2015 and established a comment deadline expiring on July 6, 2015. The proposal will directly impact life insurers, individuals providing advice to employee benefit plan fiduciaries, plan participants, seniors seeking guaranteed lifetime income, small business employees wanting access to a retirement plan, and individuals starting or preserving their retirement savings. This detailed and significant initiative merits careful analysis that will be challenging to fully execute within the comment period. An extended comment period will generate more valuable and informed input.

Life insurers have actively participated in numerous Department of Labor (DOL) rulemakings over many years, including a 2010 proposal addressing similar issues involving retirement investment advice and accompanying fiduciary responsibility. DOL reconsidered and reworked the 2010 proposal over a 4 ½ year period and issued the Fiduciary Proposal in 2015. Life insurers are eager to again offer constructive input on this significant, detailed initiative.

ACLI promptly circulated the Fiduciary Proposal to its membership and convened meetings of its Retirement Plans Committee. Four other ACLI Committees are also monitoring and evaluating the Fiduciary Proposal. This process ensures broad, consensus-based policy development and provides valuable substantive feedback. It is, however, meticulous and time consuming.

The important task of identifying and thoroughly analyzing the full implications of the Fiduciary Proposal requires concentrated analytical resources. We will continue to evaluate the regulatory, structural and financial implications of the proposal. Moreover, each of these considerations must be analyzed against unique fact patterns, business models, and organizational structures.

Industry groups like our trade association circulate regulatory proposals, elicit membership input, develop a consensus, and circulate draft letters of comment before submission. This worthwhile,

but time intensive, process is difficult to execute in a 75 day comment period, particularly given the proposals' significance and complexity.

The special time burdens confronting regulated industries and large organizations in digesting regulatory proposals were explicitly recognized by the Administrative Conference of the United States in its publication entitled *A Guide to Federal Agency Rulemaking*¹ ("*Guide*"), which notes that:

[i]nterested persons often are large organizations, which may need time to coordinate an organizational response, or to authorize expenditure of funds to do the research needed to produce informed comments.²

The *Guide* reviews the legislative history of the Administrative Procedure Act and emphasizes that the notice of proposed rulemaking "must be sufficient to fairly apprise interested parties of the issues involved, so that they may present responsive data or argument."³ The *Guide* further explains that rules developed through notice and comment procedures must be rational, and that notice and opportunity for comment under §553 of the APA should properly "give interested persons a chance to submit available information to an agency to enhance the agency's knowledge of the subject matter of the rulemaking."⁴ The *Guide* also points out that "informal rulemaking procedures should provide interested persons an opportunity to challenge the factual assumptions on which the agency is proceeding and to show in what respect such assumptions are erroneous."⁵ Our request for an extended comment period comports with these goals.

Need for an Extended Comment Period

Unlike some other commentators, ACLI's submission will reflect the views of 284 life insurance companies representing 90% of the life insurance and annuities business. Our consensus-based position, therefore, will provide substantial, broad input for DOL on this initiative. By the same token, however, the process of achieving consensus is more time consuming for a large organization representing diverse interests.⁶

The Fiduciary Proposal appears in a series of complex releases spanning 359 Federal Register pages with 458 substantive footnotes and numerous targeted questions. The initiative is profound, and merits thorough analysis and input. In responsibly formulating comment, our members will hold multiple meetings to digest the initiative. This high-level conceptual review of all the proposal's features is essential, time consuming, and fundamental to any rulemaking review. Many of the specific requests for comment present valuable queries requiring substantial analytical or conceptual effort.

In addition to evaluating the initiative's substance, several other significant statutory, procedural and cost considerations merit careful analysis, such as the proposal's:

¹ See, *A Guide to Federal Agency Rulemaking* (1983) at 124. The American Bar Association updated and republished this *Guide* in 1998. See Lubbers, *A Guide to Federal Agency Rulemaking*, Third Edition (1998), American Bar Association, Government and Public Lawyers Division and Section of Administrative Law and Regulatory Practice. Subsequent citations to the *Guide* are to the updated and revised ABA publication.

² See *Guide* at 196.

³ Administrative Procedure Act: Legislative History, S. Doc. No.24879-258 (1946) [hereinafter legislative history of the APA].

⁴ See *Guide* at 197.

⁵ *Id* at 182 and 196.

⁶ This sentiment is drawn directly from the *Guide* text cited in footnote 3 *supra*.

- Regulatory Impact Analysis;
- Effects on competition and efficiency;
- Paperwork Reduction Act considerations; and,
- Regulatory Flexibility Act analysis.

We would appreciate the reasonable opportunity to review and respond to the important, requirements and practical realities of the proposal. An extended comment period would enable scrutiny and input in response to these matters. The DOL has devoted over 4 ½ years developing the Fiduciary Proposal. The 75 day comment period, as a matter or relative comparison, is unreasonably short. Indeed, the 75 day comment period is less than 5% of the time DOL devoted to developing the Fiduciary Proposal. There is no apparent emergency necessitating such a short comment period. Given the significant time DOL has devoted to the Fiduciary Proposal, a short comment period extension of 60-90 days is very insubstantial, as a relative matter, concerning a rule that will have regulatory impacts for decades.

DOL's detailed 244 page Regulatory Impact Analysis is a fundamental element of the Fiduciary Proposal. Providing adequate time for interested parties to conduct the same level of analysis will fulfill the mandates of the Administrative Procedure Act (APA). The Regulatory Impact Analysis states that DOL "has adopted what it intends to be a balanced approach" weighing existing exemptive relief, commenters' request for relief in 2010, and risks that adviser conflicts pose to consumers. The Regulatory Impact Analysis further explains that DOL "conducted and in-depth economic assessment of current market conditions and the likely effects of reform" and developed "supporting evidence" that includes "among other things, statistical analyses of conflicted investment channels, experimental studies, government reports documenting abuse, and economic theory on the dangers posed by conflicts of interest." The Regulatory Impact Analysis cites numerous outside reports and studies. All of this detailed and significant information merits careful review by interested parties that cannot be conducted within the 75 day comment period consonant with the protections under the APA. As the Guide to Federal Agency Rulemaking emphasizes, "informal rulemaking procedures should provide interested persons an opportunity to challenge the factual assumptions on which the agency is proceeding and to show in what respect such assumptions are erroneous."⁷

A consistent line of Executive Orders mandate careful cost-benefit analysis in federal agency rulemaking.⁸ Likewise, the APA, 5 U.S. Code Section 552, provides comprehensive standards

⁷ *Guide* at 182 and 196.

⁸ Executive Branch mandates for cost-benefit analysis began with Executive Order 12,291 (1981) that created a new procedure for the Office of Management and Budget (OMB) to review proposed agency regulations, and ensured the President greater control over agencies and improve the quality and consistency of agency rulemaking. The order unequivocally stated that "regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society." 46 Fed. Reg. 13193, 13193 (Feb. 17, 1981). In 1993, Executive Order 12,866 superseded the 1981 order, but retained cost-benefit analysis as a fundamental requirement in rulemaking. Executive Order 12,866 instructs that "in deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating." President Obama has reaffirmed the importance of cost-benefit analysis in 2011 through Executive Order 13,563, and reinforced the core principles in Executive Order 12,866 by emphasizing that "each agency must . . . propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify). Exec. Order 13,563, § 1(b), 76 Fed. Reg. 3821 (Jan. 18, 2011). See also, Helen G. Boutrous, *Regulatory Review in the Obama Administration: Cost-Benefit Analysis for Everyone*, 62 ADMIN. L. REV. 243, 260 (2010).

governing federal agency rulemaking, and includes guideposts for judicial review of agency rulemaking under an arbitrary and capricious threshold.⁹ In a trilogy of significant cases involving recent SEC rulemaking, the U.S. Court of Appeals for the D.C. Circuit overturned major initiatives due to cost-benefit issues and procedures, which the court viewed as arbitrary and capricious actions contrary to the mandate of the APA.¹⁰ An unnecessarily short comment period with thwart interested parties' ability to fully review the proposal and the Regulatory Impact Analysis. The three rulings provide a template for measuring appropriate cost-benefit analysis and procedures in federal agency rulemaking, and provide a roadmap to avoiding litigation.¹¹

In deference to these many legal and policy considerations, interested parties need more than 75 days to meaningfully evaluate the Fiduciary Proposal and offer feedback to DOL. It makes sense, therefore, to elongate the proposal's comment period for 60-90 days.

Conclusion

Neither the APA¹² nor the DOL's administrative procedures establish a "standard" period of comment on rulemakings. Rather, the goal of robust public comment on administrative rulemakings is best served by selecting a time period based on the unique factors and complexity of the individual initiative, and not "routine" practices. Some proposals should properly have longer comment periods than others.

In this instance, an extended comment period of 60-90 days will promote the most informed feedback given the size and diversity of ACLI's membership, as well as the profound complexity and importance of the issues under examination. The depth and quality of comment are higher priorities than the speed of completing the project.

ACLI has actively and constructively participated in numerous DOL rulemaking initiatives over many years. We will likewise devote substantial resources and time in developing policy positions and providing useful feedback that will be mutually beneficial. Our consensus-based process is neither dilatory nor obstructionist. Our request for a comment extension will allow the most useful input on this significant initiative.

We fully understand DOL's interest in resolving the important regulatory issues in the Fiduciary Proposal. While it is important to complete regulatory agendas, it is equally important to execute

⁹ As one tool in this process, the OMB provided federal agencies with extensive guidance to perform cost-benefit analysis in its Circular A-4.21 C, which identifies three fundamental elements to federal agency rulemaking: (i) a statement of the need for the proposed regulation; (ii) discussion of alternative regulatory approaches; and, (iii) an analysis of both qualitative and quantitative costs and benefits of the proposed action and the leading alternatives. DOL's 359 page Regulatory Impact Analysis attempts to fulfill these standards. By the same token, interested persons need a meaningful opportunity to review the detailed statement of need, alternative regulatory choices, qualitative and quantitative costs and benefits of the proposal and alternatives that cannot reasonably be executed in the short span of 75 days. Relatedly, the time period for public input on the OMB stage of review was also extremely short. An extended comment period can mitigate these administrative and procedural aspects of the proposal.

¹⁰ See *Chamber of Commerce v. SEC*, 412 F.3d 133 (D.C. Cir. 2005), *Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166 (D.C. Cir. 2010), and *Bus. Roundtable & U.S. Chamber of Commerce v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011).

¹¹ See generally Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 176-78 (1994).

¹² See Guide at 196.

rulemaking within a deliberative process allowing proper identification of issues and development of recommended solutions.

For all of the reasons stated above, we respectfully request that the comment period be extended for 60-90 days after the July 6, 2015 comment deadline. We greatly appreciate your courtesy in evaluating our request. Please let me know if we can provide any additional background, or answer any questions that may develop.

Sincerely,

/S/

Carl B. Wilkerson

cc: Phyllis C. Borzi, Assistant Secretary, Employee Benefits Security Administration,
Department of Labor
Luisa Grillo-Chope, Office of Regulations and Interpretations, Employee Benefits Security
Administration, Department of Labor
Fred Wong, Office of Regulations and Interpretations, Employee Benefits Security
Administration, Department of Labor
Karen Lloyd, Office of Exemption Determinations, Employee Benefits Security
Administration, Department of Labor
G. Christopher Cosby, Office of Policy and Research, Employee Benefits Security
Administration, Department of Labor