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Via submission to the rulemaking portal:
www.regulations.gov
Docket ID number: EBSA-2020-0003.

July 7, 2020

Office of Exemption Determinations
Application No. D-12011
U.S. Department of Labor, EBSA
Office of Exemption Determinations
200 Constitution Avenue NW,
Suite 400
Washington, DC 20210

Re: ZRIN 1210-ZA29 [Application No. D-12011]
"Improving Investment Advice for Workers & Retirees"

Ladies and Gentlemen:

I write on my own behalf to request an extension of the comment period from 30 days to 90 days for the submission of public comments on the notice of proposed rulemaking entitled "Improving Investment Advice for Workers & Retirees," (ZRIN 1210-ZA29). I am a registered investment adviser and Certified Financial Planner™ who often provides advice to participants in ERISA-covered plans. I am also an attorney, university professor,[1] and a researcher and writer/presenter on topics relating to the application of fiduciary duties to the delivery of investment and financial advice and recommendations. As a university professor, I have taught classes in Retirement Planning, Applied Investments, Advanced Investments, Insurance and Risk Management, Business Law, and Money and the Capital Markets, as well as several others relating to topics in financial planning. I have also served as a consultant to broker-dealer firms. As a result of my unique perspective, I believe my comments can assist the U.S. Department of Labor to effect a more reasoned rule-making.

The Employee Benefits Security Administration ("EBSA") had this proposed regulation published in the Federal Register today. The DOL only provided 30 days to submit comments on the proposed rule, an insufficient time for the American public to review and respond to a complex, 123-page proposed rule. Specifically, the proposed rule requires familiarity with the U.S. Securities and Exchange Commission's (SEC's) 770-page "Regulation Best Interest: The Broker-Dealer Standard of Conduct," and significantly impacts the retirement savings landscape for broker-dealers, registered investment advisers, insurance agents, plan sponsors (corporations both large and small), and plan participants. The DOL's proposed rule also significant

[1] This letter, and my views contained herein, are submitted on my own behalf, and do not necessarily represent the views of any university, other institution, organization, nor firm in which I have or currently am involved.

impacts capital accumulation, capital formation, the growth of the U.S. economy, and future economic burdens likely to be thrust upon federal, state and local governments.

The very brief 30-day comment period for this proposal is also far shorter than what DOL provided during its prior fiduciary rule proposals:

- In 2010, the DOL issued a proposed fiduciary rule and initially provided a 90-day comment period. However, the DOL extended it for two additional weeks so as to give the public a total of 104 days to comment on the proposed fiduciary rule.4 At the time, the DOL noted that it would "ensure that all interested parties have the opportunity to prepare and submit comments."
- When the DOL revised and re-proposed its fiduciary rule in April 2015, it initially provided a 75-day comment period. In response, certain elected officials, business groups, and others weighed in and requested an extension. Dozens of U.S. Senators wrote to the DOL, stating that 75 days was "not an appropriate amount of time." The Senators asked the DOL to extend the comment period to 120 days "in order to afford consumers and stakeholders the best chance to thoroughly review the rule and provide informed opinions and comment." Several business groups and financial services-related associations also wrote to the DOL, requesting a 45-day extension. They argued that "the 75-day comment period does not provide adequate time for the Associations and their respective members to determine whether they can effectively service the needs of retirement investors within the framework presented in the Proposal." The DOL again agreed to extend its fiduciary rule comment period, providing a total of 90 days.

A 30-day comment period is an unreasonably short amount of time for this significant rulemaking, involving a significant impact upon the potential liability of U.S. corporations who serve as plan sponsors, the tens of millions of participants in such plans and their need for retirement security, and the economic impact on capital formation and the growth of the U.S. economy. Specifically:

1. Personally, I doing our best to navigate the many challenges that stem from the COVID-19 pandemic and the accompanying economic turmoil that our nation is facing. I personally am faced with the need to restructure my university classes to effect hybrid and online teaching. With deadlines for the resumption of classes fast approaching, there is insufficient time to adequately research all of the issues presented by this proposal and to submit constructive written comments. Additionally, I plan to request to testify on this matter, and there is insufficient time to adequately prepare such testimony, should such testimony be scheduled by the DOL in a rushed fashion.
2. The U.S. Security and Exchange Commission's (SEC's) Regulation Best Interest ("Reg BI") was effective just one week ago – June 30, 2020. This very significant rule alters the duties of broker-dealers with respect to their customers. In the proposal, the DOL suggests that its new proposed regulation will be interpreted according to how the phrase "best interests" is applied under Reg BI. Yet, how Reg BI is to actually be applied is a subject of great discussion in the securities industry today. As firms implement their compliance policies and procedures, no doubt there will occur insights into the application of Reg BI, which in turn would impact the application of the DOL's proposed rule. In fact, the term "best interests" is undefined in Reg BI, itself. An indication of the difficulty encountered by broker-dealer firms is reflected in the SEC's Office of Compliance, Inspections and Enforcement (OCIE)'s notification to broker-dealer firms the SEC would focus their initial examinations on assessing whether firms have made a "good faith effort" to implement Reg BI.

3. The DOL's proposed rule is highly complex in its application, as it involves its own interplay with the prudent investor rule, the application of ERISA's prohibited transaction rules, the statutory requirements for a grant of a class exemption from the prohibited transactions, the intent of the U.S. Congress as discerned from prior case law and from other authorities as to the strictness of the application of ERISA's requirements, the complex array of different types of revenue-sharing and other forms of compensation paid to broker-dealers, the ongoing criticism of 12b-1 fees (a form or revenue-sharing) as possibly violative of the "no special compensation" requirement for the broker-dealer exemption from the registration and other requirements of the Investment Advisers Act of 1940, the interplay of common law and its application of fiduciary standards to those who are "in relationships of trust and confidence" with their entrustors, the intent of the U.S. Congress in establishing exceptions to functional regulation in the financial services industry, and the impact of fees and costs upon investment returns seen by plan participants.
4. The economic impacts of the DOL's proposed rule are extreme, and rather than rush forward with a rule, time is required to assess these economic impacts:
    a. Potentially, U.S. corporations (plan sponsors), many of whom have already been sued for breach of their fiduciary duties as plan sponsors – and many of whom have endured multi-million-dollar judgments and settlements – could bear substantial additional liability exposure.
    b. U.S. corporations will be disincentivized, as a result, from establishing or maintaining ERISA-covered defined contribution plans, which could in turn substantially impact the retirement security of individual Americans.
    c. The economic impact of the proposed rule upon the retirement security of individual Americans in extreme, and greater time is necessary to assess this impact. Generally, the DOL's proposed rule expands greatly the economic incentives to drive broker-dealer behavior in new ways in providing advice to plan sponsors and plan participants, and will lead to higher fees and costs associated with investments. As has been demonstrated through academic studies, and as reflected in court decisions applying ERISA, higher fees and costs reduce the returns of plan participants, which in turn can significantly reduce the amount of their retirement plan balances at the time of retirement, which affects their retirement security.
    d. The economic impact of the DOL's proposed rule upon federal and state governments, faced with a larger percentage of the population which are insufficiently prepared for retirement as a result of the DOL proposed rule's impact, and their need to more greatly fund government services to retirees, needs to be studied and assessed.
    e. The economic impact of the DOL's proposed rule upon the U.S. economy, due to the reduction in the accumulation of retirement account balances resulting from the proposed rule, the available of capital and the cost of capital to U.S. corporations, and the impact of the reduction of available on U.S. economic growth, must be adequately researched, considered, and commented upon.

I further note that the Administrative Procedure Act's ("APA") seeks to encourage public participation in the rulemaking process. Under the APA, agencies are required to provide the public with adequate notice of a proposed rule followed by a meaningful opportunity to comment on the proposed rule's content. *See Rural*

Cellular Ass'n v. F.C.C., 588 F.3d 1095, 1101 (D.C. Cir. 2009) *(citing Gerber v. Norton,* 294 F.3d 173, 179 (D.C. Cir. 2002). This includes giving "interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments…." 5 U.S.C. § 553(c). Courts have emphasized that the APA's notice and comment requirements "serve important purposes of agency accountability and reasoned decision making" and impose a significant duty on the agency" to allow for meaningful and informed comment." *Am. Medical Ass'n v. Reno*, 57 F.3d 1129, 1132-133 (D.C. Cir. 1995). Given the unreasonably compressed time to comment on this proposal, I will not have a meaningful opportunity to research the law and the economic impacts, and to submit written data to properly inform this rulemaking.

The legislative history of the APA supports extending the comment period. It suggests that "[matters] of great importance, or those where the public submission of facts will be either useful to the agency or a protection to the public, should naturally be accorded more elaborate public procedures." Administrative Procedure Act: Legislative History, S. Doc. No. 248, at 259 (1946). Clearly, the retirement security of American workers and retirees is a matter of great importance. The fact that this rulemaking has been deemed a "significant regulatory action" underscores the substantial impact that this rulemaking will have on retirement savers.

My request for a reasonable comment period finds additional support in the executive orders governing the rulemaking process at Executive Branch agencies. For example, Executive Order 12866 directs federal agencies to "afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of *not less than 60 days*." Executive Order 12866, Regulatory Planning and Review, § 6(a) (Sept. 30, 1993) (emphasis added). Likewise, Executive Order 13563 affirms that comment periods for proposed agency rules "should generally be *at least 60 days*." Executive Order 13563, Improving Regulation and Regulatory Review, §2(b) (Jan. 18, 2011) (emphasis added). As explained above and below, in light of the significance, complexity, and near-term uncertainty regarding critical components of the proposal, as well as the unprecedented circumstances in which we are living, commenters will require more than the minimum number of days directed by executive orders in order to meaningfully and comprehensively comment on the proposal.

It would be imprudent for the Department to hastily rush through with a rulemaking that didn't allow meaningful comment and neglected critical considerations. To do so would suggest that the Department is not interested in considering these important aspects of the problem it is seeking to address, is not keeping an open mind, and has predetermined the outcome of this rulemaking.

Given the significance, the complexity of its interplay with ERISA's own requirements, the just-implemented (but yet to be discerned) SEC's interpretation of a "best interest" standard (which the DOL purports to incorporate and apply to the interpretation of the DOL's rule), and the incredibly large potential economic impacts on a multitude of parties regarding critical components of the proposal, as well as the unprecedented circumstances in which we are all living, a 30-day comment period is simply not a reasonable amount of time to facilitate that type of feedback. Extending the comment period to 90 days will provide a more reasonable opportunity to provide that type of substantive feedback. For these reasons, I respectfully request that you extend the comment period from 30 days to 90 days for the proposed exemption rulemaking.

Sincerely,

Ron A. Rhoades