



February 25, 2015

Re: Attempts to Stop the Public from Commenting on a Retirement Security Rule

Dear Senators:

On Monday, February 23, 2015, the Department of Labor (DOL) submitted a proposed rule to the Office of Management and Budget (OMB) to update and close loopholes in the 40 year old rules governing retirement advice under the Employee Retirement Income Security Act (ERISA). While this action has been the subject of debate for some time, the discussion has for the most part been based on speculation, because the actual contents of the rule have not been made public. While some of that speculation is well-meaning and well-intended, much of it is biased and self-interested. Indeed, much of it has been directly contradicted by statements from DOL officials about its expected regulatory approach.

It is therefore imperative that the rulemaking process be allowed to go forward, so that the public and all stakeholders have an equal opportunity to see the actual content of the rule, evaluate it, and offer comment. As required by law, at the close of the public comment period, DOL will consider all of the comments and input and decide the best course of action consistent with the law. By sending the rule to OMB, DOL is simply starting the process to release the actual proposed rule for public comment.

Thus, the only issue at this point is whether or not the actual proposed rule should be made public and open for public comment by everyone, or, whether the public should be denied the right to see the contents of the actual proposed rule and to offer their views on it. Put differently, everyone should be in favor of ending the speculation and discussion about what might or might not be in the proposed rule. The debate should be an informed one, focused on the actual proposed rule.

Efforts to prevent the proposed rule from even being publicly released are especially troubling, since, as you know, retirement savings, security, and dignity are issues of enormous importance to the American people. We therefore write to correct the record on a number of arguments and hypotheticals being advanced to deny the public its most basic right to a public, transparent rulemaking process.

1. We agree that everyone saving for retirement needs and deserves unbiased investment advice, especially low and middle income families.

All Americans saving for retirement must have access to sound, unbiased investment advice that is in their best interest. And low and middle income workers and retirees have the most to gain from a rule that prevents advisers from steering their clients to overpriced and underperforming investments. It is small savers who can least afford to see their retirement income eaten away by high fees and poor performance.

Yet some opponents of the DOL rule proposal claim it will hurt just those low and middle savers by preventing brokers and others from earning commissions, forcing them to abandon such clients. However, there is no reason to believe that advisers will not be able to serve low and middle income families under the DOL's proposal. According to repeated public statements from DOL officials, the proposal will not prohibit the types of compensation that brokers and other advisers commonly rely upon. Rather, it will seek to ensure that those advisers have the appropriate policies in place to manage conflicts of interest and to act in their client's best interest regardless of any such conflicts.

In the unlikely event that some brokers and others conclude they can no longer provide advice to their clients if required to act in their best interest, then the many advisers who already comply with the best interest standard will be ready to fill any gap.

2. The DOL has the Congressionally mandated responsibility for safeguarding retirement assets, and the expertise to do so, not the SEC.

Some opponents argue that even if workers and retirees are suffering from the loopholes in the current DOL rule, it is the SEC rather than the DOL that should solve the problem. This argument has no basis in the law or the facts, including the DOL's 40 years of experience protecting retirement assets.

In 1974, Congress deliberately tasked the DOL, not the SEC, with the primary responsibility for overseeing retirement plans, protecting retirement assets, and establishing the rules for those who give retirement investment advice. Congress made this decision – fully aware of the SEC and its mission – because it recognized the uniquely important status of retirement assets in Americans' lives. Accordingly, Congress established a strong fiduciary standard for DOL to administer. That standard applies to all types of retirement assets, including but not limited to, securities. In contrast, the SEC has no authority or ability to administer ERISA, update ERISA rules, or even regulate all of the assets that are often the subject of retirement investment advice.

Equally misplaced is the argument that the DOL lacks the expertise to regulate advice given to IRA holders. In fact, the DOL has received delegated legal authority to interpret ERISA, including the provisions on advice, as they are applied to IRAs. In any case, the challenge is fundamentally the same whether an asset happens to be held in a 401(k) plan or an IRA: Are the client's best interests being served? DOL has the experience and expertise to implement those protections for all retirement savers.

The SEC's inaction with respect to advisory standards of care only reinforces these conclusions. Brokers under the SEC's jurisdiction are currently subject to a much weaker suitability standard, not a fiduciary duty, when they provide securities investment advice. That is because the SEC has taken no action to require brokers, who market themselves as unbiased advisers, to meet the fiduciary standard appropriate to that role. Retirement savers who are making perhaps the most important financial decision of their lives need stronger protections than current regulations provide to protect them from advisers who seek to profit at their expense. While we hope the SEC will eventually get around to strengthening its standards in the securities realm, it has been actively considering regulatory action for nearly a decade with nothing concrete to show for it. But as noted above, even if the SEC finally takes this step, it cannot provide the breadth of protection that Congress intended for all retirement assets under ERISA.

Nevertheless, the DOL has taken pains to ensure that its updated rule will create no conflicts with the SEC's regulatory regime. Both the DOL and SEC have been quite clear that they are sharing information related to this rulemaking. SEC Chair Mary Jo White herself said in a July 2013 Senate Banking Committee hearing, "I've personally met with senior officials of the Department of Labor and directed [SEC] staff to really engage even more actively than they have in the past to try to coordinate."¹

A number of other arguments have been presented recently, including arguments about the effectiveness of the SEC and FINRA's current enforcement regime. These are just distractions that ignore the fundamental issue: Don't all retirement savers deserve to get advice that puts their best interest first? The success, or lack thereof, of the securities regulators to carry out their missions has no bearing on DOL's ability to act in an area that is clearly within its statutory authority.

We look forward to the day when the DOL's rule will be put out for public comment so that all sides can have a debate over the merits of the rule that is grounded in fact, not speculation. That's why we hope that you will join us in making sure that the rulemaking process can go forward, and the rule can see the light of day.

Should you have any questions about this issue please don't hesitate to contact Barbara Roper, 719-543-9468, or Dennis Kelleher, at 202-618-6464.

Sincerely,



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Director of Investor Protection
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¹ Testimony of Mary Jo White before the Senate Banking Committee (July 30, 2013).