

July 8, 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:

On behalf of the undersigned organizations representing retirement savers, consumers, working families, and financial planning professionals, we are writing 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). The Employee Benefits Security Administration (“EBSA”) announced its proposed regulation on June 29, 2020 and the proposal was published in the Federal Register on July 7, 2020.

A 30-day comment period is an unreasonably short amount of time to provide thoughtful and comprehensive comments on this complex and highly technical proposal, which would affect our constituencies—including virtually all Americans struggling to save for retirement—in varied and far-reaching ways. This would be an unreasonably short comment period for such a significant rulemaking under any circumstances, but that is particularly the case given the unprecedented times in which we are living. While we are all 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, many of our organizations have extremely limited staff and resources and are not able to operate at full capacity. These obstacles hinder our and others’ ability to comment meaningfully on the proposal.

The Administrative Procedure Act (“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, many organizations and members of the broader public likely to be affected by the rule will not have a meaningful

opportunity to comment. Even organizations that manage to submit comments under these unduly rushed circumstances will be denied the opportunity to do so fully, including the opportunity to conduct research and 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.

Our request for a more 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). This proposal affords only half that minimum comment period, without providing a persuasive justification. In fact, 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.

Thirty days is an insufficient amount of time to truly digest and dissect the many complex and highly technical issues that this rulemaking raises. These include, for example, how the reinstatement of the 1975 five-part test for determining who is an investment advice fiduciary will impact retirement savers and providers of retirement investment advice, how the proposed exemption would interact with the reinstated definition of investment advice fiduciary, how the proposed exemption’s conditions would be satisfied by various firms, how firms’ implementation would affect retirement savers, directly and indirectly, and how the exemption’s conditions would be interpreted and enforced.

The interplay between the proposal and the Securities and Exchange Commission’s (“SEC’s”) recently-finalized Regulation Best Interest (“Reg. BI”) adds yet another layer of complexity to this rulemaking. The proposed exemption appears to be largely based on Reg. BI, but that is an experimental new regulation that only took effect last week. It is not yet clear how firms will implement that rule, what effects it will have on broker-dealers’ and their competitors’ practices, or how those practices will impact investors. It is certainly possible, for example, that Reg. BI could result in certain unintended consequences that could come to light during the initial phases of implementation that commenters could analyze and comment on. Among these possibilities, Reg. BI could harm the very people it is intended to protect: low- and moderate-income Americans. This outcome could properly inform the Department’s views on how to

modify a final rule so that such unintended consequences do not arise in the ERISA/Internal Revenue Code context. Without additional time however, commenters will be precluded from analyzing the initial implementation and providing that vital analysis to the Department. In addition, it is not yet clear how Reg. BI's requirements would transfer over to or be workable within the ERISA/Internal Revenue Code context. There appear to be some subtle differences and nuances between Reg. BI and the proposed exemptions. It will take time to understand and comment thoughtfully on those differences and nuances.

The Department has been considering how to properly regulate retirement investment advice markets for well over a decade. It has struggled to find an approach that balances retirement savers' need for advice with adequate protections to ensure that advice is not tainted by conflicts. Given this history that has been so fraught with problems, 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.

All interested parties deserve a meaningful opportunity to offer thoughtful and comprehensive feedback on this proposal. Given the significance, complexity, and near-term uncertainty regarding critical components of the proposal, as well as the unprecedented circumstances in which we are 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, we respectfully request that you extend the comment period from 30 days to 90 days for the proposed exemption rulemaking.

Sincerely,

AFL-CIO

American Federation of State, County and Municipal Employees (AFSCME)

Americans for Financial Reform

Better Markets

Center for American Progress

Center for Economic Justice

Communications Workers of America (CWA)

Consumer Action

Consumer Federation of America

Financial Planning Association

Fund Democracy

Institute for Agriculture and Trade Policy

Institute for the Fiduciary Standard

International Brotherhood of Electrical Workers (IBEW)

International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW)

National Association of Personal Financial Advisors

National Employment Law Project
Public Investors Advocate Bar Association (PIABA)
Public Citizen
The Committee for the Fiduciary Standard
U.S. PIRG