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July 21, 2015

Office of Regulations and Interpretations,  
Employee Benefits Security Administration,  
Attn: Conflict of Interest Rule, Room N-5655, U.S.  
Department of Labor,  
200 Constitution Avenue NW.,  
Washington, DC 20210

**Re: Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice**

RIN 1210-AB32

Dear officers,

On behalf of more than 400,000 members and supporters of Public Citizen, we are pleased to provide these comments regarding the Department of Labor’s (DOL) proposed rule regarding the standards that agents of the financial sector must oblige when they receive monies from clients while providing this investment advice.

**The problem of conflicted advice**

Retirement savings dynamics differ substantially from when Congress enacted the Employee Retirement Income Security Act (ERISA) in 1974 and when the Department of Labor last crafted rules for how the financial sector helps savers manage their nest eggs. Since then, retirees depend less on defined benefit plans, where respectable annual payments covered living expenses, to defined contribution plans, where the ultimate payments are subject to the success of individual investors. That success is heavily dependent on the investment advice provided by

agents who earn a living selling various savings products to clients. Where that sales advice is compromised by the sales agents conflicted by their own pecuniary interests, the saver can suffer.

Look no further than Jane Austen's 1811 novel "Sense and Sensibility" to understand the value of fiduciary obligation. Here, Mr. and Mrs. Dashwood are entrusted with a fortune to manage for their niece. But the trust provides no "stipulations," leaving it to the Dashwoods to decide how to pass on the legacy. Rather than provide for her, however, the couple talks themselves into retaining the funds for themselves, and rendering only "neighborly acts" to their ward.<sup>1</sup>

The DOL's proposed rule stems from the understanding that those with access to fortunes should be given clearer direction, less they make selfish decisions.

The stakes are high. Most 401(k) and IRA account balances are modest, and rising life expectancy and health care costs put more Americans at risk of outliving their retirement savings than ever before. Currently, the average defined contribution plan balance is a little more than \$30,000 in the United States, and<sup>2</sup> less than half of the current workforce has access to or participates in an employment-based retirement plan. The retirement security for far too many of today's working households—especially low and middle income Americans is at serious risk. Households of color have substantially lower retirement savings than white households, with 74 percent of Black households and 80 percent of Latino households age 25-64 reporting less than \$10,000 in retirement savings, compared with 49 percent of white households. Among near-retirees, the per-household average retirement savings balance among households of color (\$30,000) is one-fourth that of white households (\$120,000).<sup>3</sup> These figures underscore the need to make every dollar count; savings should not be compromised by advisors who put their own interests first.

Evidence of conflicted advice harming retirement accounts abounds. Many savings accounts are maintained in brokerage houses that need not oblige a fiduciary standard where any advice must be made in the best interest of the client. Instead, these are subject to a suitability standard—a standard which only prevents clearly reckless ideas, or churning the clients account to generate commissions.

In some cases, this conflicted advice can be obvious and lead to disastrous results. In many cases, the conflicted advice can be subtle, with insidious results. For example, often, the best option for workers changing jobs is often either to keep the money in the existing plan or transfer it into a new employer's plan. That is because 401(k) plans have lower costs on average than IRAs and employers are required by law to manage their plans in the best interest of their plan

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<sup>1</sup> "Sense and Sensibility," by Jane Austen, Chapter 1, 1811. .

<sup>2</sup> See Letter from New York Comptroller Thomas DiNapoli, (July 2015), available at: <http://www.dol.gov/ebsa/pdf/1210-AB32-2-00195.pdf>

<sup>3</sup> See study, letter, Center for Global Policy Solutions, (July 2015), available at: <http://www.dol.gov/ebsa/pdf/1210-AB32-2-00249.pdf>

participants. However, financial firms' have a strong incentive to capture employer retirement assets because it increases their revenues. As a result, these agents may encourage workers to roll over their retirement accounts into IRAs, regardless of whether doing so is in the worker's best interest.

Studies show that conflicted advice leads to lower investment returns. Savers receiving conflicted advice earn returns of 100 basis points less than those receiving advice from fiduciaries. That means, for example, that instead of receiving a 5 percent return, the saver may receive a 4 percent return. Over the life of an investment, difference such as these can lead to substantially disparate results. The White House estimates that the aggregate annual loss to savers is \$17 billion each year.<sup>4</sup>

### **The DOL's proposed rule**

The DOL's proposed rule is intended to clarify the definition of fiduciary investment advice in the context of certain savings plans that the government has privileged with tax advantages. These include Individual Retirement Accounts and plans governed by section 401(k).

Under the proposed definition, a person renders investment advice by (1) providing investment recommendations, and (2) either (a) acknowledging the fiduciary nature of the advice, or (b) acting pursuant to an understanding with the client that the advice is individualized. When this advice is provided for a fee or other compensation the person giving the advice is a fiduciary.

The DOL provides a number of exceptions. For example, the rules provide that offering "education" does not make the financial agent a fiduciary.

The proposed rule allows customers to hold fiduciary advisers accountable through a private right of action for breach of contract. The contract can require that individual disputes be handled through arbitration but must give clients the right to bring class action lawsuits in court if a group of people are harmed.

Generally, we support the rule as proposed. The DOL has drawn clearer lines so that financial product purveyors will better understand that they must put their client's interests ahead of their own interests. The rule provides that clients may enforce violations of this standard.

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<sup>4</sup> The Effects of Conflicted Investment Advice on Savers, The White House, (February 2015), available at: [https://www.whitehouse.gov/sites/default/files/docs/cea\\_coi\\_report\\_final.pdf](https://www.whitehouse.gov/sites/default/files/docs/cea_coi_report_final.pdf)

## Responding to Industry arguments

The flip side of the financial harm suffered by savers is the profit enjoyed by financial agents. Industry advocates do not acknowledge that potential loss of revenue motivates their opposition to this proposal. Instead, they mount an altruistic claim that the rule will prevent them from serving lower income savers. That's a curious confession, as it means that lower income savers must be forced to pay higher fees than those with higher income. In practice, major financial advisors often ignore lower income savers altogether. Many of the larger broker-dealer firms mandate minimums for their registered representatives to receive compensation, according to Ron Rhoades, and industry consultant and member of the Committee for the Fiduciary standard. As a result, these smaller investors are often directed to advisors located in "call centers," if they are served at all. "Hence, to the extent Wall Street firms threaten to "abandon" small investors, it must first be realized that many of these brokerage firms have, in essence, already largely abandoned smaller investors."<sup>5</sup>

This rule threatens commissions for sales to all savers. The insurance sector has been especially vocal in opposition to this reform. That's because these firms sell products, not investment advice. And just as a hammer sees everything as a nail, a sales agent for a product can always find a reason why that product is the right one for the customer. For example, All State employs more than 23,000 sales agents. Their job is not to offer investment advice, wherein a client might be best served by purchasing a blue chip stock or bond. Their job is to sell Allstate products. Their job is certainly not to sell State Farm or Geico products. Allstate's compensation structure: "The compensation structure for Allstate exclusive agencies rewards agencies for . . . achieving certain business outcomes such as product profitability, net growth and household penetration. . . . The bonus is earned by achieving a targeted percentage of . . . Allstate Financial policies."<sup>6</sup> This rule can help ensure that those who sell any financial product under the mantle of rendering impartial investment advice are held to account.

The financial services industry does not lack for people willing to manage other people's money. There is an abundance of advisors who have self-selected themselves to oblige a fiduciary standard. Wealthfront, for example, is an SEC-registered investment advisor. It charges no fees for accounts under \$10,000, and 0.25 percent of account value for those of more than \$10,000. Generally, it advises passive index funds.<sup>7</sup>

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<sup>5</sup> "Why Wall Street's DOL Killer Threat is Hogwash," by Ron Rhoades, RIABiz, (June 2015), available at: <http://www.riabiz.com/a/5026127579971584/why-wall-streets-dol-killer-threat---that-millions-of-ira-investors-will-go-unadvised-under-new-rules---holds-no-water>

<sup>6</sup> All State annual report, 2014), available at: [http://www.sec.gov/Archives/edgar/data/899051/000104746915000935/a2223004z10-k.htm#bg79601a\\_main\\_toc](http://www.sec.gov/Archives/edgar/data/899051/000104746915000935/a2223004z10-k.htm#bg79601a_main_toc)

<sup>7</sup> See letter, Wealthfront, (July 2015), available at: <http://www.dol.gov/ebsa/pdf/1210-AB32-2-00273.pdf>

In conclusion, we welcome the DOL's effort to protect retirement savings. This rule can help protect savers from conflicts of interest that threaten penury for too many Americans. For questions, please contact me at [bnaylor@citizen.org](mailto:bnaylor@citizen.org), or 202.580.5626

Sincerely,

Public Citizen