AFL-CIO

AMERICA'S UNIONS

August 6, 2020

Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave., N.W.
Suite 400
Washington, D.C. 20210

Re: Application No. D-12011
Improving Investment Advice for Workers & Retirees

Submitted by email to www.regulations.gov at Docket ID number EBSA-2020-0003

Ladies and Gentlemen:

On behalf of the AFL-CIO and our affiliated unions, I am writing to express strong opposition to the U.S. Department of Labor's ("DOL" or "the Department") retirement investment advice rulemaking. This rulemaking includes a final rule that reinstates a 1975 loophole-ridden regulatory definition of fiduciary investment advice and a proposed exemption that will allow fiduciary investment advisors to earn conflicted compensation when providing retirement investment advice.[1] We oppose this package because it puts the retirement income security of millions of American workers and retirees at risk by exposing them to conflicted investment advice without any meaningful protections to mitigate the conflicts' detrimental impact. We, therefore, urge you to withdraw the entire regulatory package and begin anew with the objective of ensuring that those providing retirement investment advice truly are acting in retirement savers' best interests.

The AFL-CIO is a voluntary federation of 55 national and international labor unions that collectively represent 12.5 million working people. We work every day to improve the lives of all working people. We help those who want to join together in a union so they can bargain collectively with their employers for fair pay and working conditions. Our core mission is to ensure that working people are treated fairly and with respect, that their hard work is rewarded fairly, and that their workplaces are safe. Further, to help build a workforce with the skills and job readiness our nation requires, we operate the largest training network outside the U.S. military. We also provide an independent voice in politics and legislation for working families and make their voices heard in corporate boardrooms and in the financial system.

[1] The Notice was published in the Federal Register on July 2, 2020 (85 FR 4083) and is available at https://www.federalregister.gov/documents/2020/07/07/2020-14261/improving-investment-advice-for-workers-and-retirees.

Union members have much at stake in the private sector pension and retirement savings system.

- 82% of union workers employed in the private sector participate in workplace retirement plans, compared to just 49% of non-union workers.[2]

- While most private-sector union members are covered by defined benefit pension plans (66% compared to 11% of non-union workers), almost half of all union members also participate in defined contribution plans.[3]

- Thousands of union members serve as fiduciary trustees jointly responsible with management-appointed representatives for administering retirement plans and overseeing the investment of retirement plan assets.

- Union workers and retirees from both the private and public sectors have retirement money invested through Individual Retirement Accounts ("IRAs"). Many of them, along with their non-union counterparts, transfer assets from workplace retirement plans, both defined contribution and defined benefit plans, to IRAs when they leave a job.

Workers and Retirees Need and Deserve Reliable Retirement Investment Advice

Because IRAs and 401(k) plans have largely supplanted defined benefit pensions as Americans' primary source of retirement income, the sole responsibility for investing wisely for a secure retirement increasingly is falling on individual workers, despite how complicated and daunting is that task. Indeed, IRAs are the single largest and fastest growing form of retirement savings, with rollovers from employer-sponsored plans accounting for most IRA funding.[4]

While more union members than non-union workers in the private sector are fortunate to have a defined benefit pension plan, their vulnerability in retirement, too, is increasing, as employers

[2] U.S. Department of Labor, U.S Bureau of Labor Statistics, *National Compensation Survey,* Table 2. Retirement benefits: Access, participation and take-up rates, private industry workers, March 2019*, available at* https://www.bls.gov/ncs/ebs/benefits/2019/employee-benefits-in-the-united-states-march-2019.pdf

[3] Id.

[4] Last year, about six in ten households with traditional IRAs indicated that their IRAs contained rollovers from employer-sponsored retirement plans. *See* Investment Company Institute, *The Role of IRAs in US Households' Saving for Retirement*, 2019, ICI Research Perspective, December 2019, Vol. 25, No. 10, *available at* https://ici.org/pdf/per25-10.pdf.

across-the-board are backing away from them in favor of 401(k) plans.[5] And even where private sector union members bargain for a pension, they typically negotiate a companion defined contribution plan, like a 401(k) plan, that likely will be rolled into an IRA in the event an employee changes jobs or reaches retirement age.

Because most workers and retirees do not have the time or financial expertise required for retirement investing, many turn to financial professionals for investment advice. Many, if not most, of those professionals hold themselves out as completely trustworthy and unbiased advice providers, regardless of how they are, in fact, regulated. All too often—unbeknownst to the individual investor— the compensation of their "trusted" financial professional is based on a business model that is rife with conflicts of interest and subject only to weak regulation.

The Department's regulatory proposal would increase the risk of retirement savers relying on investment advice and sales recommendations dressed up as advice tainted by financial conflicts of interest. As a result, millions of workers and retirees—hard-working individuals who need to make every dollar count—will collectively continue to see billions of dollars a year unjustifiably siphoned out of their retirement accounts to line the pockets of well-heeled financial and insurance companies and investment professionals.

This Regulatory Package Allows Retirement Investment Advisors and their Firms to Easily Evade Their Fiduciary Duty

We strongly oppose the Department's decision to issue a final rule that reinstates the deeply flawed 1975 regulatory definition of fiduciary investment advice[6] and its five-part test without acknowledging that the definition requires updating and revision in order to protect retirement savers, given the intervening evolution of the retirement savings system and the investment environment. In the 45 years since that definition was issued, there have been dramatic changes in how Americans build and receive retirement income, with the responsibility for retirement investing increasingly falling on the individual, rather than her employer. The Department's failure to modernize the definition ensures that most of the investment advice retirement savers rely on, including most rollover recommendations, will not be subject to a fiduciary standard at all.

ERISA includes a broad definition of who is a fiduciary due to the provision of investment advice. The statute provides generally, "[A] person is a fiduciary with respect to a plan to the extent….(ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility

[5] Among the reasons for this change are the real and perceived volatility of employers' contribution obligations, the cost of required contributions, and complex counterproductive legal and accounting requirements. Congress and the regulatory agencies should consider action to reverse this trend.

[6] 29 CFR § 2510.3-21.

to do so…."[7] To the detriment of individuals who rely on professionals for retirement investment advice, this broad definition was narrowed considerably by the 1975 DOL regulation that the Department has just reinstated. Under the 1975 definition, only a person (or firm) providing advice on a "regular basis" to a particular client can be subject to a fiduciary standard. As a result, one-time recommendations—no matter how consequential—are excluded.

It is our experience that a plan sponsor may retain a financial professional to not only provide advice as to its 401(k) plan investment options,[8] but also to provide retirement advice on an ongoing basis to the entire participant population. If, however, a particular participant receives such advice infrequently, or perhaps just once as to the advisability of a rollover when leaving the employer, that advice, under the reinstated definition, need not be fiduciary advice. This means that that the advisor might not necessarily disclose all the important information she needs for a decision that is in her best interest, such as the availability and amounts of a periodic payment or annuitization of the account balance, if a rollover is not chosen, and, if a rollover is chosen, a comparison of alternative investment scenarios, including the past performance of recommended investments, net of fees, over different time periods and the impact of annuitization at normal retirement age.

Further, the definition contains another loophole, allowing an investment professional or firm that does provide advice to a client on a regular basis to still evade its fiduciary obligations by claiming it never intended for the advice to serve as "a primary basis" for the retirement saver's investment decision. As a result, financial firms and investment professionals will be retirement investment advice fiduciaries only when they choose to be, even if they market themselves as trusted advisers and offer services retirement savers reasonably will rely on as fiduciary advice. As a practical matter, reinstating the 1975 regulation with its five-part test also means that advice provided to retirement plan fiduciaries will almost never be considered fiduciary investment advice. Workers will, thus, continue to suffer the consequences in the form of workplace retirement plans loaded up with high-cost, substandard investment options that erode their retirement savings.

The harmful impact of this rulemaking on rollover recommendations is particularly significant. Because it did not formally reinstitute a 2005 Advisory Opinion with its illogical conclusion that advice to roll assets from an employer-sponsored plan to an IRA was not fiduciary advice, the Department proudly proclaims it is extending new protections to rollover recommendations. But the requirement that such recommendations satisfy the 1975 five-part test renders this claim an empty one. That is, only rollover recommendations made in the course of an on-going advisory relationship need be subject to a fiduciary standard even though individuals are not likely to seek such advice more than once in their career with a given employer, and deciding what to do with

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[7] 29 U.S.C. § 1002(21)(A).

[8] A plan sponsor's selection of such a professional is, itself, a fiduciary act subject to ongoing monitoring and review.

an accrued pension benefit paid as a lump sum, or with an accumulated 401(k) or IRA account, may be one of the most consequential financial decisions in a lifetime.

The rise of 401(k) accounts as the dominant retirement plan available to workers in the private sector means that vastly more people today will take lump sum distributions from their workplace retirement plans than when ERISA, or the 1975, rule was adopted. Even—perhaps especially—for workers covered by defined benefit plans, deciding what form of benefit to take for a rollover can be critical. These are one-time irrevocable decisions, often involving large dollar amounts.

Today, some pension plan participants are given the option of a lump sum distribution when they retire or separate from employment in addition to the default annuities required by law.[9] A decision about benefit form—whether to take a lump sum or whether to take a qualified joint and survivor annuity—may impact eligibility for other valuable benefits, such as retiree health benefits. Even if an individual settles on an annuity, the choice of a payment option can have significant implications, particularly for a surviving spouse.

Workers and retirees who can take a lump sum distribution from a defined benefit plan can fall prey to conflicted advice about what to do with their money. We have seen entire groups of union members targeted by financial advisors who encouraged them to take lump sum distributions from their pension plan so that the advisor could manage the money without any apparent regard as to what was in each worker's best interest. By specifically excluding these recommendations from the definition of fiduciary investment advice, the Department unleashes the ability of financial professionals to advise retirement savers to take a lifetime of hard-earned savings and sink it into a high-cost, low-quality investment marked by excessive risk and substandard returns.

The Proposed Exemption Does Not Protect Retirement Savers from the Detrimental Impact of Conflicted Advice

In addition to blessing loopholes in the definition of fiduciary investment advice, the Department has proposed a new exemption from ERISA's prohibited transaction provisions. It would allow investment advice fiduciaries who provide advice for both workplace retirement plan assets and IRA assets to receive conflicted compensation that otherwise would be illegal. The proposed exemption is modeled on the recently-implemented Securities and Exchange Commission (SEC) Regulation Best Interest (Reg. BI). Reg. BI, however, does not protect investors from the harmful impact of conflicts of interest within the broker-dealer business model. Rather, it

[9] Twenty-three percent in traditional defined benefit plans and nearly all participants in hybrid plans have a lump sum option. U.S. Department of Labor, U.S Bureau of Labor Statistics, *National Compensation Survey,* Table 2. Defined benefit plans: Availability of benefit features, private industry workers, March 2019*, available at* https://www.bls.gov/ncs/ebs/benefits/2019/employee-benefits-in-the-united-states-march-2019.pdf.

preserves the brokerage industry's ability to engage in practices that are profitable for brokers but harmful for investors.[10] Importing this industry-biased approach into the retirement space will only increase the harm that retirement savers suffer when they receive conflicted advice.

Among the primary deficiencies in Reg. BI that the Department incorporates into its proposed exemption is its hollow "best interest" standard. In adopting Reg. BI, the SEC expressly acknowledged that it is not a fiduciary standard. Moreover, the SEC has made clear that it will not interpret Reg. BI's non-fiduciary "best interest" standard to require what any reasonable investor would expect—that the broker must recommend the investments she reasonably believes are the investor's best available option the advisor can recommend. Instead of defining what "best interest" means, the SEC has provided firms with virtually unfettered discretion to decide their compliance obligations for themselves. As a result, it is not clear to what extent, if any, the Reg. BI standard is higher than FINRA's low "suitability" standard under which firms have been permitted to recommend high-cost, low-quality investments. We are astonished and dismayed that the Department believes Reg. BI to be an appropriate model for compliance with ERISA's high fiduciary standard.

The proposed exemption's requirement that firms mitigate conflicts of interest is insufficient, as it, too, is modeled on Reg. BI. The SEC has refused to say what types of conflicts of interest currently permitted under the FINRA suitability framework would be prohibited under Reg. BI. Neither has it provided any guidance on how permitted conflicts would have to be "mitigated" to satisfy Reg. BI. Rather, the SEC has signaled that firms can continue to structure their compensation and incentives in ways that are likely to encourage and reward harmful advice.

For example, Reg. BI expressly allows firms to pay differential compensation to their registered representatives, thereby creating an incentive to recommend products that pay the highest compensation, even when there are available alternatives that would be a better fit for the investor. Reg. BI also expressly allows firms to use a wide variety of sales contests, quotas, trips, and other special awards to encourage and reward production. Such incentives work to undermine, rather than promote, clients' best interest. By echoing Reg. BI's lax guidance on mitigating conflicts of interest, the Department's message is that the vast majority of conflicted practices in the retirement arena can continue unabated under the proposed exemption.

To make matters worse, the Department does not provide the millions of Americans who save for retirement through IRAs with any way to enforce the exemption's standard, however weak. Without a private right of action—DOL itself has no authority to enforce the standard as it applies to IRAs—IRA investors who suffer financial losses from the conflicted advice unleashed

[10] We joined other organizations in filing comments to the SEC that detailed the many deficiencies in Reg. BI. These comments are *available at* https://www.sec.gov/comments/s7-07-18/s70718-5417927-184568.pdf.

by this proposal will have no remedy and no way to recover their losses. And, as a consequence, firms will have no incentive to comply with the rule's requirements when advising IRA investors.

In sum, taken together, these flaws in the proposal dramatically increase the risk that retirement savers will rely on investment advice that is tainted by conflicts of interest and incur serious financial harm as a result. For this reason, the Department cannot reasonably conclude that the exemption is sufficiently protective for retirement plans, plan participants, or IRA investors.

Conclusion

The Department erroneously claims that this regulatory package will improve investment advice for workers and retirees. In fact, it instead protects the profitability of broker-dealers, insurance companies, and other financial firms at the expense of working Americans trying to save for a secure and dignified retirement. Particularly during a shaky economic time, such as we are currently experiencing with the COVID-19 pandemic, our government should be doing all it can to help working people stay afloat and that includes protecting hard-earned retirement savings. The rulemaking fails in this regard. We urge you to withdraw the rule in its entirety.

Thank you for your consideration of our views.

Sincerely,

William Samuel, Director
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