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January 2, 2024

Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave. NW
Washington, DC 20210

Re: Definition of Fiduciary—RIN 1210–AC02; Application No. D–12057; Application No. D–12060

Dear Officers,

On behalf of more than 500,000 members and supporters of Public Citizen across the country, we offer the following comment in support of the Department of Labor's (DOL) proposal regarding the definition of fiduciary in certain retirement product sales.

This proposal, part of President Biden's widespread campaign to end "junk fees," will strengthen protections for retirement investors who seek professional investment advice. The proposal accomplishes this by requiring that all investment professionals provide advice that is in retirement investors' best interest. Further, it forbids any conflicts of interest that degrades this so that investment advisors do not taint their advice.

Background

The financial landscape for retirees has become more treacherous in the last half-century. Defined contribution retirement accounts, where the retiree must make sound investment decisions, have replaced defined benefit pensions, where the retiree was guaranteed a set retirement income, as the primary form of workplace retirement plan. Workers must not only be capable brick layers, or brewers, or bank tellers, they must also be smart brokers of their savings.[1] The self-directed Investment Retirement Account (IRA) is a major source of retirement

[1] Employee Benefits Security Administration, *Private Pension Plan Bulletin Historical Tables and Graphs 1975-2017,* U.S. DEPARTMENT OF LABOR (September 2019) https://www.dol.gov/sites/dolgov/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletin-historical-tables-and-graphs.pdf at p. 1 and p. 32.

protection for some 36 percent of U.S. households.[2] And gone are the days when the basic options were either bonds or stocks. The landscape is crowded with new devices, some useful, but others designed to separate the saver from her savings.

This new reality makes honest investment advice critical. It is obvious from the very names of major financial institutions that investment advisors know that enduring security, honesty and fair dealing rank high on the investors' minds, such as Fidelity, US Trust, Blackrock. Yet history shows that names can deceive: Lincoln Savings & Loan[3] (presumably named for Honest Abe) and Bankers Trust[4] both failed after scamming depositors and Proctor & Gamble derivatives customers respectively. This list of deceptively named institutions that scammed customers is very long and thus large is the need for our government to ensure financial institutions put the best interest of their customers at the forefront of their actions.

At stake is the retirement security of American workers and retirees who may fall prey to sales agents who promote inferior investment products that generate better commissions than a product that is better for the client. To many customers, these differences may be obscure and the difference in returns, when measured annually, may appear slight. But over the lifetime of a retirement plan, the inferior product may fall 20 percent short of the better one. The average American may naturally assume that the sales agent has their best interest in mind and lack the financial literacy to detect marginal problems.[5]

Because of loopholes in the 1974 Employee Retirement Income Security Act (ERISA), certain financial professionals may provide investment advice without being held to the high professional standards appropriate to their consequential role. They may steer retirement investors into products, services, or account types that maximize their own revenues but come with excessively high costs, poor performance, and/or other problems that undermine the financial security of retirement savers. The problem is real for people whose savings may evaporate as they age.

The main loophole in the current rule applies to one-time advice. For example, if an individual leaves a job, advice surrounding a recommendation to roll over their 401(k) to an IRA does not currently fall under the best interest standard. Because of the substantial funds that may be involved, sales agents can generate significant rewards for steering their clients. A report by Sen. Elizabeth Warren (D-Mass) found that of the 15 largest annuity companies in the nation, 13 offered "kickbacks to their agents in exchange for sales to retirees." These kickbacks included "luxurious, all-expenses-paid vacations to destinations like Aruba, the Bahamas, Ireland, and

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[2] Investment Company Institute, *The Role of IRAs in US Households' Saving for Retirement, 2019,* ICI RESEARCH PERSPECTIVE, (December 2019) https://ici.org/pdf/per25-10.pdf

[3] *The Lincoln Savings & Loan Investigation: Who is Involved*, NEW YORK TIMES (Nov. 22, 1989) https://www.nytimes.com/1989/11/22/business/the-lincoln-savings-and-loan-investigation-who-is-involved.html

[4] *Two Early Derivative Blow Ups,* FRONTLINE (website visited Aug. 4, 2020) https://www.pbs.org/wgbh/pages/frontline/warning/etc/warnings.htm

[5] Indeed, Bernie Madoff successfully fleeced victims who were otherwise leaders in their respective fields, such as Steven Spielberg, Elie Wiesel, and Larry King. *Bernie Madoff: Six Famous Victims of his Ponzi Scheme,* BIOGRAPHY (June 24, 2019) https://www.biography.com/news/bernie-madoff-famous-victims

South Africa, golf outings, iPads and other electronics, expensive dinners, theatre or professional sports tickets, and sports memorabilia."[6]

An associated loophole in the current rule is that the advice must form a primary basis for the investment decision. Firms can exploit this by simply including a fine print disclaimer that investors should not rely on their recommendations as a primary basis for their investment decisions. This ignores the reality that this may indeed be the only advice the saver receives.

The Proposed Rule

The DOL proposal closes the current regulatory loopholes. It applies a best interest standard to rollover recommendations. This helps protect retirement investors at a time when they may be exposed to conflicted advice. The rule also applies to advice given to employers who sponsor 401(k) plans. And the rule applies to all retirement investments, which includes not only securities, but insurance products and other options not currently provided federal protections.

Firms will not be permitted to escape the standard through legal disclaimers. The rule provides that the agent rendering investment advice will be considered a fiduciary and held to the best interest standard when they maintain discretionary authority over the client's investments, or when they declare themselves as fiduciaries.

Public Citizen enthusiastically endorses these reforms.

Industry Opposition

Depending on the venue, the insurance industry argues against these changes. In a recent set of hearings by the Department of Labor's Employee Benefits Security Administration, several industry representatives asserted that they are sales agents (while capitalizing on the mistaken assumption of investors that the standard already applies) and therefore not obliged to adhere to a best interest fiduciary standard.[7] Yet some of the same insurance firms feature websites where they advertise how "customer needs should always come first."[8]

Elsewhere, industry contends that if they're held to a higher standard, they'd be unable to serve lower balance customers, leaving those savers vulnerable to unscrupulous agents. Yet the industry is well populated with purveyors of retirement options and leaving lower income customers exposed to an inferior standard is the last policy the DOL should adopt.

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[6] Sen. Elizabeth Warren, *Villas, Castles and Vacations,* OFFICE OF SEN. WARREN (Feb. 2017) https://www.warren.senate.gov/files/documents/2017-2-3_Warren_DOL_Rule_Report.pdf

[7] *Hearings*, EMPLOYEE BENEFITS SECURITY ADMINISTRATION (December 2023) https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/public-comments

[8] *Bryon Holz and Associates,* (website accessed Dec. 19, 2023) https://www.bryonholz.com/Meet-Bryon.1.htm

Finally, industry has claimed that small businesses oppose this rule because it would jeopardize their relations with trusted advisors. Public Citizen explored this claim in 2016 when the DOL proposed a similar rule in 2016 and found it specious. Industry claimed that small business owners were "speaking out" in opposition, yet most of those named would not "speak out" to Public Citizen. Another business representative opposed the rule because he thought it should be stronger. A third business owner, who claimed that the retirement plan her trusted advisor established helped her attract and retain employees, noted that she had one occasional employee, and it was her son. The retirement plan was an IRA.[9]

We ask the DOL to view these specious claims, past and present, for what they are and not provide them weight in the DOL's analysis of this current proposal.

Conclusion

American retirement savers deserve protection. Many financial professionals already support and successfully operate under a strong fiduciary standard while serving clients all along the income spectrum. Savers with smaller accounts especially deserve protection.

We appreciate the DOL's work to close loopholes that have kept savers from receiving advice that is in their best interest and thank you for the opportunity to submit this comment. We support this proposal and urge the Department to finalize it expeditiously.

For questions, please contact Bartlett Naylor at bnaylor@citizen.org.

Sincerely,

Public Citizen

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[9] Bartlett Naylor, *Sacrificing the Pawns*, PUBLIC CITIZEN (2016) http://chamberofcommercewatch.org/wp-content/uploads/2016/06/Sacrificing-the-Pawns-final.pdf