March 17, 2017

Office of Regulations and Interpretations
Office of Exemption Determinations Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: Extension of Applicability Date: Definition of the Term ''Fiduciary''; Conflict of Interest Rule—Retirement Investment Advice; Best Interest Contract Exemption (Prohibited Transaction Exemption 2016–01); Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Prohibited Transaction Exemption 2016–02); Prohibited Transaction Exemptions 75–1, 77–4, 80–83, 83–1, 84–24 and 86– 128 (RIN 1210–AB79)

Dear Acting Secretary Hugler:

The American Association for Justice (AAJ), formerly the Association of Trial Lawyers of America (ATLA), hereby submits the organization's response to the Department of Labor' (DOL) request for comment on the conflict of interest rule delay.[1]

AAJ, with members in the United States, Canada and abroad, is the world's largest trial bar. It was established in 1946 to safeguard victims' rights and strengthen the civil justice system. In this capacity AAJ advocates to ensure access to the courts and to better protect investors from abuses that have become commonplace in the financial services market. The conflict of interest rule strengthens protections for retirement savers by requiring financial advisers and their firms to provide retirement investment advice that is in their clients' best interests. The rule further protects retirement savers by improving the enforcement mechanisms consumers have when financial advisers behave inappropriately. AAJ strongly supports the rule, believes that it already received full consideration during the rulemaking process, and that DOL should allow full implementation of the rule to proceed on schedule.

[1] 82. FR 12319.

A. The Fiduciary Rule Is Necessary to Protect Investors

Many private-sector investors do not realize that the people they turn to for financial planning advice may not owe them a legal obligation to serve their best interests. In fact, many financial professionals who are typically not fiduciaries nevertheless hold themselves out as trusted advisers and use titles like financial "adviser" or "consultant." Use of these titles is deliberate and intended to give investors the reasonable belief that they are receiving advice that is in their best interests and to otherwise convey that they are in a relationship of trust. According to a Rand Corporation survey of investors' beliefs about financial service professionals, 59 percent mistakenly believed that "financial advisors or financial consultants" are required by law to serve their client's best interest.[2] This study also indicated that many investors are incapable of telling whether their own adviser is a broker or an investment adviser, let alone whether he or she owes them a fiduciary duty.

When investors receive financial advice that is not in their best interest, it can cause severe and tangible harm. Financial professionals who are not required to act in their clients' best interest often steer retirement savers into excessively high-cost, low-performing investments that drain hard-earned savings while maximizing the professional's profits. Practices like theses can cost retirement savers a lot of money. Working from the various studies, the DOL estimated that retirement savers will lose between $210 billion and $430 billion over 10 years, and between $500 billion and $1 trillion over 20 years, because of conflicted advice solely with regard to mutual fund investments in IRAs. DOL also estimated that a retirement saver who rolls money out of a 401(k) plan and into an IRA based on conflicted advice can expect to lose 12 to 24 percent of the value of his or her savings over 30 years. Worse, these huge losses unduly impact those who can least afford it. According to the industry's own data, moderate income savers are disproportionately served by advisers who are not required to serve their best interests.[3]

If delayed, the rule's important legal protections for investors will also be delayed. The rule closes loopholes created by an advisor's extensive use of forced arbitration clauses which specifically shield financial advisors from accountability for class claims.[4] Closing this loophole benefits investors and the overall market by serving as a powerful deterrent to unlawful behavior while also allowing investors who lack the means to pursue their claims for losses on an individual basis to join together with others similarly affected in

[2] Angela A. Hung, et al., Investor and Industry Perspectives on Investment Advisers and Broker-Dealers, Rand Corporation, Sponsored by the United States Securities and Exchange Commission, January 2008, http://1.usa.gov/1nePF0L.

[3] Letter from Kent Mason, Partner at Davis and Harman, citing Oliver Wyman's "Assessment of the impact of the Department of Labor's proposed 'fiduciary' definition rule on IRA consumers," April 12, 2011, http://1.usa.gov/1CyB9V2.

[5] [4] 80 F.R. 21933.

order to recoup their losses. In addition, by restoring accountability, the DOL rule ensures that wrongdoers bear financial responsibility for their transgressions instead of passing losses along to retirement savers. Delaying implementation of the rule would deny investors the benefits of this important protection.

B. Delay of the Rule is Unjustified and Harmful

Delaying implementation of these new protections would allow financial advisers and their firms to continue to engage in harmful practices that threaten the retirement security of their clients. In addition to harming investors, the delay also threatens to harm financial services firms, many of whom have already spent a considerable amount of time and expense preparing for implementation of the rule. In fact, many are already in full compliance with the rule despite the rule not yet being fully implemented. The delay to the rule is not even supported by the analysis done by DOL. Lastly, opponents of the rule have not raised any new concerns regarding the rule. Their concerns have already been evaluated extensively and found lacking. To revisit them again is a waste of time and taxpayer resources.

According to the DOL's analysis, the proposed delay cannot be justified on a cost-benefit basis. The DOL projects that a 60-day delay could lead to a reduction in estimated investment gains of $147 million in the first year and $890 million over 10 years using a three percent discount rate. In contrast, the DOL projects cost savings to firms of $42 million during those 60 days. Thus, even the estimated harm to retirement savers calculated by DOL dwarfs industry savings from a delay. Moreover, the DOL's economic analysis greatly understates the harm to investors from a delay. It looks at only one segment of the market -- mutual funds in IRAs. This means that the DOL did not account for the costs that could accrue to retirement savers from other products, including various annuities and non-traded REITs, for example, or the costs that could accrue to plan investors, as discussed above. And, the harms to retirement savers are likely to persist well beyond a 60-day delay. As the proposal points out, "losses could continue to accrue until affected investors withdraw affected funds or reinvest them pursuant to new recommendations."

Further it is highly likely that this delay, if implemented, would last longer than 60 days. The current timetable would provide less than eight weeks for DOL to consider complicated changes to the rule, evaluate and respond to comments, and make a final decision on any re-proposal before the delay runs out. That is far too short a time to conduct such a complicated analysis. The harm to investors will be compounded if the delay drags on longer than expected.

The DOL should not delay implementation of the conflict of interest rule. This rule provides critical protections to retirement savers and they cannot afford to wait any longer for those protections to be in place. We urge DOL to protect investors and stand by their original rule. If you have any questions or concerns regarding AAJ's comment, please contact Sarah Rooney, Directory of Regulatory Affairs at 202 944-2805.

Sincerely,

Julie Braman Kane
President
American Association for Justice