April 16, 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: RIN 1210-AB79, Fiduciary Rule Re-Examination

Ladies and Gentlemen:

This comment letter is submitted by the Steering Group[1] of The Committee for the Fiduciary Standard (www.thefiduciarystandard.org). The Committee, consisting of over 1,100 members via LinkedIn, is led by a volunteer Steering Group of practitioners and financial and investment experts, and seeks to inform and nurture a public discussion on the bona fide fiduciary standard of conduct as applied to the delivery of investment and financial advice.

We strongly support Department of Labor's (DOL's) Conflict of Interest – Fiduciary Rule and urge you to implement the current Fiduciary Rule without revising, weakening or further delay to the Rule's applicability dates. *There is no reasonable argument for any delay and any delay would be arbitrary and capricious. In addition, any delay would be unlikely to withstand legal scrutiny.*

Since the Rule was made effective, there have been five lawsuits (consolidated from nine) from non-fiduciary entities protesting that they would now have to place retirement investors' best interests before their own and seeking to stay the Rule. The courts, ruling in four[2] of the five cases so far, have found in favor of the DOL Fiduciary Rule and retirement investors, and in so ruling these courts have found that petitioned delays would not be in the public interest.

Kansas U.S. District Court Judge Daniel Crabtree said, "*An injunction will lead to confusion about the law and likely produce unwarranted delay. This is not in the public's interest. Any injunction thus will produce a public harm that outweighs any harm that plaintiff may sustain from the rule change.*"

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[2] Washington DC Court Case 1:16-cv-01035-RDM Document 55 Filed 11/23/16
https://assets.documentcloud.org/documents/3224894/NAFA-20161123.pdf
Kansas Court Case 5:16-cv-04083-DDC-KGS Document 59 Filed 11/28/16
https://assets.documentcloud.org/documents/3226360/Market-Synergy-DOL-20161128.pdf
Texas Court Case 3:16-cv-01476-M Document 137 Filed 02/08/17
http://courthousenews.com/wp-content/uploads/2017/02/Adviser-Rule.pdf
Minnesota Court CASE 0:16-cv-03289-SRN-HB Document 44 Filed 02/21/17
https://assets.documentcloud.org/documents/3472998/Thrivent-Order-Minnesota.pdf

Judge Crabtree added: DOL "*has concluded that significant public interests favor the proposed regulatory changes. As already explained, evidence in the administrative record supports the DOL's determination, and the court finds no basis for contradicting those findings*."

This 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. Further delaying implementation, or weakening 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. Even according to the DOL's own analysis, further delay is unjustified.

Under current law, many financial advisers that retirement savers turn to for retirement investment advice are legally allowed to make recommendations that serve their own self-interest, at their client's expense. In its Regulatory Impact Analysis (RIA), the DOL extensively chronicled the nature and extent of advisory conflicts of interest. The RIA found, based on a wide body of economic evidence, that conflicted advice is widespread and causes serious harm to retirement plan and IRA investors. It also found that advisers' conflicts can take a variety of forms and can bias their advice in a variety of ways. In addition, the DOL found that advisers' compensation arrangements and practices align the interests of firms, advisers, and product manufacturers, and this alignment of interests directly harms investors' interests.

The losses that result from conflicted advice can be significant. After a careful review of the evidence, which consistently points to a substantial failure of the market for retirement advice, the DOL estimated that IRA holders receiving conflicted investment advice can expect their investments to underperform by an average of 50 to 100 basis points per year over the next 20 years. Based on this careful review of the evidence, the DOL concluded that the underperformance associated with conflicts of interest – in the mutual funds segment alone – could cost IRA investors between $95 billion and $189 billion over the next 10 years and between $202 billion and $404 billion over the next 20 years. An ERISA plan investor who rolls her retirement savings into an IRA could lose 6% to 12% and possibly as much as 23% of the value of his or her savings over 30 years of retirement by accepting advice from a conflicted financial adviser. These DOL estimates are conservative. The harm to retirement savers is far greater when you consider the full range of products and the full range of conflicts that influence advisers' investment recommendations.

In addition to the harm to IRA investors from conflicts of interest, plan investors can also experience losses as a result of conflicts of interest. For example, the RIA pointed to a GAO study, which found that defined benefit pension plans using consultants with undisclosed conflicts of interest earned 1.3 percentage points per year less than other plans. Other recent research supports this finding. One recent study by the Center for Retirement Research at Boston College found that mutual fund companies involved in plan management often act in ways that appear to advance their interests at the expense of plan participants.[3] The authors found that this bias is especially pronounced in favor of affiliated funds that delivered sub-par returns over the preceding three years. And participants do not shift their savings to undo this favoritism, especially the favoritism shown to sub-par affiliated funds, according to the study. The study also found that the lackluster performance of these sub-par funds usually persists.

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[3] Veronika K. Pool, Clemens Sialm, and Irina Stefanescu, Are 401(k) Investment Menus Set Solely for Plan Participants?, Center for Retirement Research Boston College, August 2015, http://crr.bc.edu/wp-content/uploads/2015/08/IB_15-13.pdf

The DOL rule directly addresses the problem of conflicted retirement investment advice in the plan and IRA contexts by requiring all financial advisers who provide retirement investment advice to serve their clients' best interest, not their own self-interest. Importantly, the rule applies this protection not only to individual investors, but also to employers operating small company plans and relying on financial institutions for advice on investment selection. While the rule clearly allows firms to charge commissions for this advice, firms must ensure that charging in this way is consistent with the client's best interest. The rule requires firms and advisers to charge no more than reasonable compensation based on the value of products and services provided. And, it requires firms to rein in their very harmful array of conflicts of interest that encourage and reward advice that is not in their clients' best interest. The Fiduciary rule aligns advisers' and their clients' interests, leading to better investor and firm outcomes.

Access to Advice, Reasonable or Low Costs, and Investor Choice

Investor access to advice will increase, not decrease. Currently, investors who do not work with a fiduciary often get misleading sales pitches – frequently for the products that pay representatives and their firms the most. A sales pitch, even when crafted to appear as advice, is not advice. In fact, under the Securities Exchange Act of 1934, brokers do not provide substantive advice. In addition, many broker-dealer reps are discouraged from working with smaller investors. But when they do, they're not currently required to provide advice in the investor's best interest.

For IRA investors who wish to make their own investment decisions and do not need or want advice, costs of trading in their IRA accounts have come down in the year since the Fiduciary Rule became effective. Their choices are limited only by they firm they choose. Many online brokers have no minimum account size anymore for self-directed investors. Costs to those investors are very low. For example, Schwab and Fidelity have just lowered the cost of online trades to $4.95. TD Ameritrade and E-Trade charge $6.95 to trade online. There are many mutual funds available at online brokers for self-directed retirement investors that have expense ratios in the single digits, 0.07 or 0.09 basis points for index funds, for example, and investment minimums are falling.

The DOL Fiduciary rule has, even before its applicability date, made investor access to both fiduciary advice and self-directed investing more available, at reasonable or low costs. For some investors who just want advice on how to allocate their assets in a diversified portfolio, low-cost automated advisory accounts can be accessed easily, with low or no minimum investment, and at a very low cost.

Fiduciaries Already Work in Investor's Best Interest

It should be noted that there are already many fiduciaries at work in the best interest of investors. The 36.4 million investors who work with fiduciary Registered Investment Advisers already receive advice in their best interest, at a reasonable cost, from the 11,800-plus RIA firms that serve investors as fiduciaries – in all types and sizes of accounts – not only in retirement accounts. RIAs employ 781,000 individuals, and manage $66.8 trillion, according to the Investment Adviser Association's 2016 Evolution Revolution[4] report.

[4] "Investment Adviser Association's 2016 Evolution Revolution Report" https://www.investmentadviser.org/eweb/Dynamicpage.aspx?webcode=evrev

In fact, DOL's Fiduciary Rule will also benefit the financial services industry, as many firms already acknowledge. Many financial services firms have already put in place the fiduciary processes and compliance needed to work within the Fiduciary Rule. This benefits both firms and clients over the long term.

Firms with fiduciary processes in place can more effectively gather assets to advise or manage, serving in the investor's best interest, and thereby earning a reasonable fee – on more assets. This also leads to a more stable client base and revenue stream.

"A strong and credible regulatory regime is essential to the smooth functioning of our economy."

The New York Times recently published a column[5] by William S. Ruckelshaus, administrator of the Environmental Protection Agency under Presidents Richard M. Nixon and Ronald Reagan. After running the agency from 1970 to 1973, he was asked to return to lead it again in 1983. Mr. Ruckelshaus noted:

> *"While I awaited Senate confirmation hearings that April, several chemical industry chief executives asked to meet with me. I expected to hear complaints that over-regulation was stifling economic growth, just as I had heard 10 years earlier.*
>
> *Instead, I was stunned by their message. The public, they told me, was spooked about the turmoil at E.P.A. Americans didn't believe anything was being done to protect their health and the environment. They didn't believe the E.P.A., and they didn't believe the chemical industry. These executives had concluded that they needed a confident, fair and independent E.P.A. They knew that an environmental agency trusted by the public to do its job gave their businesses a public license to operate.*
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> *A strong and credible regulatory regime is essential to the smooth functioning of our economy. Unless people believe their health and the environment are being safeguarded, they will withdraw their permission for companies to do business. The chemical industry executives who came in to see me that day felt this loss of public support and were asking me to reassure Americans that the government would do its job to protect them.*
>
> *Our collective freedom and well-being depends on a set of restraints that govern society and how it operates. Those restraints need to be clear and effective."*

Mr. Ruckelshaus voices a perfect analogy for the DOL Fiduciary Rule. Most investors know, either firsthand, or from family or friends, of the harm that comes from conflicted, misleading "advice" from non-fiduciaries under the regulatory regime before the DOL Fiduciary Rule eliminated these harmful conflicts. In many ways, "advice" to investors from non-fiduciaries has been, in Mr. Ruckelshaus' words, "a race to the bottom."

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[5] "A Lesson the Trump EPA Should Heed," *The New York Times*. https://www.nytimes.com/2017/03/07/opinion/a-lesson-trump-and-the-epa-should-heed.html?_r=1

The DOL has crafted, with the Fiduciary Rule, "*A strong and credible regulatory regime [that] is essential to the smooth functioning of our economy.*" "*Unless people believe their ~~health and the environment~~ [financial well-being and retirement] are being safeguarded, they will withdraw their permission for companies to do business*." Mr. Ruckelshaus said it and it fits perfectly.

The loopholes, that opponents to the rule wish to preserve, permit the systematic overcharging of American retirees' nest eggs, allowing companies to siphon off half of a retirement nest egg over the years. Yale University's endowment manager, David Swenson, notes[6] that just 2% in excess commissions or fees can reduces retirees' nest eggs by at least half. As investors save during their working years, DOL's own research pointed out that just 1% in excess fees strips out 28% of their nest egg, leaving retirees with less to put to work in the American economy during the retirement years, and more reliant on Social Security.

Recent developments have shown how the DOL rule is transforming the way commission-based advice is offered, with enormous potential benefits for all investors, not just those saving for retirement. For example, the Securities and Exchange Commission recently approved a proposal from Capital Group to create a new class of mutual fund shares for its American Funds that will greatly ease compliance with the DOL rule while preserving investors' ability to get commission-based advice,[7] if that is in their best interest. The approved "clean shares" will allow the broker, rather than the fund, to determine how much to charge for their services. By allowing brokers to separately price commissions, just as they do when recommending ETFs and individual securities, these shares make it easier for firms to adopt compensation policies that pay standardized amounts across different funds and different investments, eliminating the conflicts that are the target of the DOL rule without eliminating the commission-based advice model.

In addition, a number of major firms, including Schwab, Blackrock, Fidelity and Prudential, among others, have announced plans to reduce costs on certain investment products, such as ETFs and mutual funds, at least in part to be more competitive under the DOL rule.[8] And, large firms have announced that they are reducing advisory account minimums and costs as a result of the rule. For example, Edward Jones and LPL announced shortly after the DOL rule was finalized that they would lower the minimums on their fee accounts, to $5,000 and $10,000 respectively.[9] Schwab just announced a new advisory program with a minimum initial investment of $25,000, all-in-costs between 0.36% and 0.52%, and comprehensive financial and investment planning from a CFP professional.[10] Vanguard's Personal Advisor Services offers fee-based advisory and financial

[6] "Three Investment Gurus Share Their Model Portfolios, NPR. http://www.npr.org/2015/10/17/436993646/three-investment-gurus-share-their-model-portfolios

[7] John Waggoner, "American Funds gets SEC approval for clean shares," Jan. 13, 2017, http://www.investmentnews.com/article/20170113/FREE/170119955/american-funds-gets-sec-approval-for-clean-shares.

[8] Consumer Federation of America, "The Department of Labor Conflict of Interest Rule is Already Delivering Benefits to Workers and Retirees: Delay Puts Those Benefits at Risk," Jan. 31, 2017, http://consumerfed.org/wp-content/uploads/2017/01/1-31-17-DOL-Rule-Delivering-Benefits_Fact-Sheet.pdf.

[9] Michael Wursthorn, Brokerages Adapt to Pending Labor Rule, Wall Street Journal, March 16, 2016, https://www.wsj.com/articles/brokerages-adapt-to-pending-labor-rule-1458151260

[10] Press Release, Schwab, "Schwab Announces Schwab Intelligent Advisory™" December 13, 2016, http://pressroom.aboutschwab.com/press-release/schwab-investor-services-news/schwab-announces-schwab-intelligent-advisory

planning services, charging only 0.30% for accounts with $50,000. This platform has gathered almost $40 billion in less than two years.[11]

The financial industry has spent a considerable amount of time and money preparing for implementation of the rule, and firms have made some very impressive improvements to their business models in order to comply. In response to a letter sent by United States Senator Elizabeth Warren, a number of firms, including Charles Schwab, BBVA Compass, Capital One, John Hancock, U.S. Bancorp, Fidelity, RBC, Principal Financial Group, Prudential Financial, LPL Financial, Symetra Life Insurance, TIAA, Transamerica and Wells Fargo, responded they had devoted time and resources to meeting the original April 10, 2017 implementation date and all expressed confidence that they would indeed be ready to comply on that date.[12]

However, any further delay of implementation threatens to halt the progress that has already been achieved from firms' efforts. Worse, it could result in firms' rolling back their pro-investor changes to recoup costs that they'd spent to comply. *As a result, all of the benefits from firms' efforts that would flow to retirement savers would be in jeopardy if there is further delay or if provisions are weakened. Simply put, further delay or weakening of the DOL rule will harm retirement savers.*

Moreover, the current DOL's economic analysis "supporting" the delay to June 9th greatly understates the harm to investors from the current 60-day or any further delay. It looks at only one segment of the market – mutual funds in IRAs. This means that the DOL did not account for the harm and 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. <u>Not considering these additional costs, as well as other sources of conflicts of interest that ultimately harm retirement savers is a major deficiency in the new analysis.</u>

Yet even according to the current DOL's incomplete analysis, further delay cannot be justified on a cost-benefit basis. The DOL projected that the current 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 3% discount rate. In contrast, the DOL projects cost savings to firms of $42 million during those 60 days. Thus, the even the limited harm to retirement savers calculated by DOL dwarfs industry savings from a delay.

And, the harms to retirement savers are likely to persist well beyond the 60-day delay. As the proposal pointed out, "losses could continue to accrue until affected investors withdraw affected funds or reinvest them pursuant to new recommendations." This would especially be the case if a retirement investor receives a rollover recommendation during the delay to invest in a product with a long surrender period and hefty surrender charge. In that scenario, the cost of the conflict could persist for over a decade. Even if affected funds are withdrawn or reinvested after the 60-day delay according to best interest advice, the damage will have been done and those losses will never be able to be recovered because the accumulated losses from conflicts will have eroded the asset base that would be available later for investment or spending.

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[11] Vanguard, Personal Advisor Services, https://investor.vanguard.com/advice/personal-advisor

[12] Letter from United State Senator Elizabeth Warren to Acting Department of Labor Secretary Edward Hugler, Feb. 7, 2017, http://www.warren.senate.gov/files/documents/2017-2-7_Warren_Ltr_to_DOL.pdf.

The DOL's own rigorous analysis before proposing the Fiduciary Rule notes that conflicted advice or recommendations cost investors $17 billion a year, in excess costs and their drag on performance. However, the Consumer Federation of America notes: "The estimate of $17 billion in losses is extremely conservative. It didn't include other investments that result in much greater losses to investors. For example, it didn't include fixed indexed annuities and non-traded REITs. Nor did it include an estimate of the harm that befalls retirement savers in the 401(k) space. The Fiduciary Rule will stem the losses retirement savers are suffering."[13]

A rigorous analysis by the Economic Policy Institute concludes that just the current delay until June 9th costs retirement savers $532 a minute, $1.9 an hour, or $46 million a day. EPI concludes that, conservatively, a retiree who receives conflicted advice when rolling over from a 401(k) to an IRA would "run out of savings 5 years earlier than someone who did not receive conflicted recommendations."[14]

As DOL itself noted when publishing the June 9 applicability date for portions of the Fiduciary Rule, of the 193,000 comments and petition letters the DOL received about the Delay Proposal, 178,000 opposed any delay whatsoever, and only 15,000 supported a delay. That overwhelming support for the Fiduciary Rule *in its current form* is very important.

One of the elements of the Fiduciary Rule, scheduled to become applicable on April 10, and now delayed until January 2018, is the retirement investor private right of action, including the right to form a class. This is a very important investor protection and deterrent to harmful advice, and should become applicable as soon as possible. Eliminating the private right of action and ability to form a class would not be in the public interest – as Courts have opined. While non-fiduciaries have expressed concern, the DOL should ask itself how many class actions has DOL noted being filed against fiduciary advisory firms? If conflicts were eliminated, as the Fiduciary Rule requires, only firms that continue harming investors would likely be subjects of such suits.

A note about "investor access" to products of all types: the DOL Rule did not disallow any insurance or investment products, rather it requires that advice be in the best interest of the recipient. If a product is not in the best interest of the investor it should not be recommended. There are harmful products out there that are not in the best interest of many investors. That's a flaw in the product and incentives, not a flaw of the Fiduciary Rule. Private right of action, including class action, should stay in the Rule.

Conclusion

The DOL should ensure that industry opponents' interests in avoiding having to comply with the rule should not win out over retirement savers' interests in receiving the critical protections from the rule.

Retirement savers, particularly small savers, cannot afford to wait any longer for those protections to be in place. Small savers are disproportionately served by non-fiduciaries today and therefore

[13] Consumer Federation of America, M Hauptman, http://216.30.191.148/RetirementRipoff/
[14] EPI "Methodology for estimating the losses to retirement investors of fiduciary rule delay "http://www.epi.org/publication/addendum-methodology-for-estimating-the-losses-to-retirement-investors-of-fiduciary-rule-delay/

most susceptible to being given conflicted, harmful advice. As a result, small savers have the most to gain from having this rule be implemented as scheduled and undiluted because it will ensure that every dollar that they save for retirement counts—that investment returns are maximized and unnecessary and hidden costs are minimized.

Retirement savers need and deserve to receive the protections of the rule without delay. Accordingly, the DOL should conclude that any further delay or dilution of the Fiduciary Rule is unjustified and would not be in the public interest.

Respectfully submitted,

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