April 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

Via Email to EBSA.FiduciaryRuleExamination@dol.gov
Re: RIN 1210-AB79 Re-Examining the DOL Conflict of Interest - Fiduciary Rule

Ladies and Gentlemen:

I write to express my individual view on the current Administration edict to re-examine the DOL Conflict of Interest – Fiduciary Rule. I strongly support the implementation of the current (2016) DOL Conflict of Interest - Fiduciary Rule, beginning on June 9, 2017 with the current Impartial Conduct Standards and adding the balance of the 2016 Final rule, undiluted and with no further delay, on January 1, 2018. I would have preferred that the Rule become effective as written in the 2016 Final Rule.

I strongly oppose any further delay of the Rule or any weakening of its provisions.

There is no reasonable or justifiable basis for any delay. In fact, the DOL has already conducted a full review and justification including a legal and economic analysis, concluding that the Rule is necessary in order for Americans to save and invest for retirement. Courts have supported the Rule.

Any further delay of the Fiduciary Rule would be arbitrary and capricious. In addition, any delay or derailment would be unlikely to withstand legal scrutiny.

I am writing this letter as an individual and expressing my own views. It was not written on behalf of any entity I may be associated with. I have worked under, studied, written about and guided colleagues with regard to prudent investment fiduciary practices for many years. I have a consulting practice, FiduciaryPath. In my role as an Accredited Investment Fiduciary Analyst® with the Centre for Fiduciary Excellence (CEFEX), I am invited in as an independent third-party to analyze the fiduciary process of Registered Investment Adviser firms that wish to have their prudent practices assessed, verified, peer-reviewed and certified by CEFEX. I am also Editor of the fi360 Fiduciary Standard Survey.

I am a founder and immediate past Chair of The Committee for the Fiduciary Standard, and part of its all-volunteer Steering Group of fiduciaries and fiduciary experts. 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.

The Committee advocates for the fiduciary standard because we know fiduciary advice and/or investment management leads to optimal investor outcomes.

Better Retirement Investor Outcomes Are Strongly in the Public Interest.

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."[1]

A comprehensive 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."[2]

As stated in the Federal Register, "By Memorandum dated February 3, 2017, the President directed the Department to conduct an examination of the Fiduciary Rule to determine whether it may adversely affect the ability of Americans to gain access to retirement information and financial advice. As part of this examination, the Department was directed to prepare an updated economic and legal analysis concerning the likely impact of the Fiduciary Rule and PTEs, which shall consider, among other things:

- Whether the anticipated applicability of the Fiduciary Rule and PTEs has harmed or is likely to harm investors due to a reduction of Americans' access to certain retirement savings offerings, retirement product structures, retirement savings information, or related financial advice;
- Whether the anticipated applicability of the Fiduciary Rule and PTEs has resulted in dislocations or disruptions within the retirement services industry that may adversely affect investors or retirees; and
- Whether the Fiduciary Rule and PTEs is likely to cause an increase in litigation, and an increase in the prices that investors and retirees must pay to gain access to retirement services."

Sadly, the new Administration did not consult with fiduciaries already working in the best interest of investors both in retirement accounts and in taxable accounts. In my view, that was a serious mistake because the only views this Administration has received are from those who wish to continue a harmful-to-retirement-savers status quo, enriching themselves directly at the expense of retirement investors.

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[1] Consumer Federation of America, M Hauptman, http://216.30.191.148/RetirementRipoff/

[2] 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/

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

Investor access to advice will increase, not decrease under the Fiduciary Rule. 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.

Insurance agents (non-fiduciaries) who scare investors into rolling over into high commission, harmful annuities are not advising investors. But they claim to be, in title and advertising. I've seen firsthand how retirement investors are lied to in order to scare them into agreeing to an annuity purchase that is in the best interest of the salesperson – not the retiree. That harm can be irreparable, and often takes a horrific toll on the retirement investor.

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.

Choice

Nothing in the Rule insists that retirement investors must purchase advice. It only stipulates that when retirement investors seek or receive advice, the advice must be in the investor's best interest. That is very reasonable. **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.

Would there be "Disruption or dislocation in the retirement services industry that would adversely harm investors?" No, according to a 2012 Texas Tech study of the effect of state requirements for fiduciary duty for broker-dealer registered reps. The study found that, "the number of registered representatives doing business within a state as a percentage of total households does not vary significantly among states with stricter fiduciary standards. A sample of advisers in states that have either a strict fiduciary standard or no fiduciary standard are asked whether they are constrained in their ability to recommend products or serve lower-wealth clients. We find no statistical differences between the two groups in the percentage of lower-income and high-wealth clients, the ability to provide a broad range of products including those that provide commission compensation, the ability to provide tailored advice, and the cost of compliance."[3]

Might There Be An Increase In Litigation?

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, originally 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, <u>only firms that continue harming investors would likely be subjects of such suits.</u>

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.

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[3] Michael Finke, Ph.D., CFP®, and Thomas P. Langdon, J.D., LL.M., CFP®, CFA**,** The Impact of the Broker-Dealer Fiduciary Standard on Financial Advice, http://bit.ly/2ontDLH

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.

In the retirement context, the goal is ultimately a bigger nest egg, via a diversified portfolio to mitigate risk and improve risk-adjusted performance, so that retirement investors can retire with dignity and financial security. We advocate on behalf of investors, not ourselves. Can those who oppose the Fiduciary Rule say that? None that I can identify. In fact those who oppose this rule have financial axes to grind.

To be clear, Registered Investment Advisers – already fiduciaries – stand to lose an important competitive distinction when all firms working with retirement investors must act as fiduciaries. But it is so important that every American who sacrifices to save for their own retirement should have advice that is in their best interest, it supersedes that competitive differentiator. Retirement investors need – and believe they are already getting – advice that is in their best interest. Nothing less will help them to achieve their goal of a secure retirement.

I refer you to The Committee's letter of strong support for the current, 2016 Final Fiduciary Rule, and strong opposition to any further delay or weakening of any provision. The Committee's letter notes: "Since the [Fiduciary] 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. Courts, ruling in four[5] of the five cases so far, have found in favor of the DOL Fiduciary Rule and retirement investors, noting that delay 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.*" "

This confusion is already happening – but only because of the Administration's delay and re examination of the Fiduciary Rule.

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

[5] 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*." "

The 2016 DOL Fiduciary Rule has triggered a race to the top, rather than to the bottom in a way that benefits investors and also the firms that embrace genuinely placing investor's best interests before their own.

Investor Costs When Working With a Fiduciary

I don't know of any investor advocate who says that fiduciary advice should be provided for free. In fact, the model for firms whose investment fiduciary process is certified by independent fiduciary analysts, like me – and reviewed every year – is typically compensation via a reasonable, transparent, fee-only model. The fee-only model is typically based on a percentage of assets under management (AUM), hourly fee or flat fee. Fee-only fiduciary advisors receive no other compensation and therefore are free to choose the investments that best diversify client's assets, without regard to their own compensation.

This eliminates many of the most serious financial conflicts of interest inherent in the insurance and broker-dealer world. In addition, in a recent survey of financial intermediaries in the field, who work with investors every day, Nearly 91% say no, it does not cost more to work with a fiduciary advisor than a broker. Many respondents [6]commented that it costs less – and for more services.

Hidden Costs Investors Pay

While some 401(k)-type retirement plans may choose to use mutual funds that provide revenue sharing in order to defray the plan's costs for recordkeeping or administration, that revenue share does not go to salesperson. Instead, it is credited to the plan, strictly for those expenses. Any revenue share in excess of plan's costs is credited to plan participants annually. In other words, that kind of revenue sharing is not paid to the fee-only fiduciary advisor – it's used strictly for the plan's benefit. However, many fiduciaries encourage plan sponsors to move to lower expense share classes that do not have revenue sharing at all. The plan sponsor would simply pay the recordkeeping and administrative expenses directly. This separates the participant's investment performance from the plan's expenses and is considered a better practice. It is also a cost that can be less expensive if paid directly rather than through revenue sharing.

In contrast, when variable commissions and revenue sharing payments go to a non-fiduciary broker, insurance agent or other non-fiduciary as happens now, plan participants suffer, from expense drag and high costs that ultimately result in worse performance, less to reinvest and compound and smaller nest eggs. This can take away half of a retirement investor's nest egg over a career of saving for retirement.

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[6] p 32, "Seeking Trustworthy Advice for Individual Investors – Findings of the 2015 fi360 Fiduciary Standard Survey." http://www.fi360.com/uploads/media/2015fiduciarysurvey.pdf

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[7] that just 2% in excess commissions or fees, can reduce 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.

Over the long term, the fiduciary model helps plan participants in several important ways that contribute to better participant outcomes – a larger nest egg.

1. Mutual funds selected for a retirement plan are based on an Investment Policy Statement and sound investment theory, not how much they pay a non-fiduciary intermediary.

2. The fund choices reflect the plan's demographic make-up. This enhances the ability of the plan's participants to properly diversify their portfolio and modify that as their age requires.

3. Plan participants are often offered models to help with asset allocation often at no additional charge.

4. Plan expenses are kept reasonable or low and as a best practice, regularly benchmarked.

5. When participant outcomes are optimal, participants are encouraged and save more.

In the non-fiduciary model, a non-fiduciary intermediary is paid a commission and often revenue sharing fees as well as 12b-1 fees – without rendering additional services. This makes the plan more expensive for the participants and is a serious drag on performance and participant outcomes over the long term.

In the IRA marketplace the fiduciary model makes an even bigger difference. From The Committee's comment letter:

"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 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

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

greater when you consider the full range of products and the full range of conflicts that influence advisers' investment recommendations."

This means that when plan participants and IRA investors receive "advice" from non-fiduciaries, they retire with smaller nest eggs and often are more dependent on Social Security and other programs.

Vanguard, Schwab, Betterment, WealthFront and others offer inexpensive investment management for very low cost with very low account minimums: $5,000 minimum at some, no minimum at others. Some automated investment firms offer their services for $0 until an account grows to a certain level.

Some fiduciaries, such as Financial Engines, one of the largest RIAs in the US, have tackled both the "accumulation" phase as well as the "decumulation" phase, assisting plan participants with withdrawal plans at the same cost as their reasonable cost for the accumulation phase. Instead of rolling over from a plan into an IRA (with potentially higher costs), or a variable, fixed or fixed indexed annuity (with typically much, much higher costs and considerable, irreparable harm to the investor), a participant can stay in the plan and receive regular monthly or quarterly distributions from the plan. So if a participant pays, for example, .50 basis points annually for professional investment management in the plan, they pay the same amount for the investment management and distributions during the decumulation phase.

I am not advocating any one firm here, but it's important to note that this kind of continuous care model for accumulation and decumulation at very reasonable cost is a good thing for many investors and it's something that ought to be encouraged.

Conclusion

The Fiduciary 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 or diluting any of the important new investor protections would allow non-fiduciary financial advisers and their firms to continue to engage in harmful practices that threaten the retirement security of their clients. *According to the prior Administration's DOL's own analysis, as well as the Courts' rulings, this would be unjustified.*

As a fiduciary, I can see no reason to delay this important Fiduciary Rule. *When a firm wishes to serve the retirement market, advice they provide should be in the investor's best interest – from a fiduciary*. No firm should be allowed to pretend they act in investors' best interests while actually serving themselves.

Millions of Americans are counting on their 401(k)s and IRAs, and many employers depend on investment professionals for advice about managing these complex retirement plans. The advice investors get makes a difference in the success of their retirement savings outcome, and whether they will have a financially secure retirement. If they are steered into investments that are not in their best interest, but pay unreasonably high commissions or fees to non-fiduciaries, they may not be able to retire securely – or even at all.

The DOL rule:

- Closes unintended loopholes in the law, which allowed non-fiduciaries to evade their duty to serve investors' best interest.
- Strengthens protections for retirement savers, requiring firms and their representatives to provide retirement investment advice that is in investors' best interests.
- Means there will be more fiduciary advice available, in the best interest of investors, at a reasonable cost.

As a result, retirement savers will be confident that when they engage an advisor, they will receive competent, objective advice, instead of a sales pitch disguised as advice. Americans who've worked hard to save for retirement need and deserve these basic, common sense protections.

Further delaying implementation or weakening these new protections would allow non-fiduciaries and their firms to continue to engage in harmful conflicts of interest that threaten the retirement security of American retirement investors.

If the current Administration's DOL decides to further delay or weaken the rule, it would be taking the position that those who oppose the Fiduciary Rule – whose model is, instead, to act in their own interests – should prevail, rather than American retirement savers' interests in receiving the critical protections from the rule.

Retirement savers need and deserve to receive the protections that the current DOL Conflict of Interest - Fiduciary Rule provides, without further delay. The DOL should conclude that the 2016 Final DOL Conflict of Interest - Fiduciary Rule should be implemented beginning now on June 9th with all other parts of the Rule, undiluted, implemented on Jan 1st, 2018.

Sincerely,

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