July 21, 2017

Via: EBSA.FiduciaryRuleExamination@dol.gov

Timothy D. Hauser
Deputy Assistant Secretary for Program Operations
Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW,
Washington, DC 20210

Re: RIN 1210-AB82
Request for Information Regarding the Fiduciary Rule
and Prohibited Transaction Exemptions
Question 1: Delay in Applicability Date

Dear Mr. Hauser:

AARP[1] strongly opposes any further delay to the applicability dates of the Best Interest Contract Exemption, Principal Transaction Exemptions and amendments to PTCE 84-24 (Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies and Investment Company Principal Underwriters). These exemptions should go into effect no later than January 1, 2018.

[1] AARP is the largest nonprofit, nonpartisan organization representing the interests of over 38 million Americans age 50 and older and their families. Nearly half of our members are employed full or part-time, with many of their employers providing retirement plans. A major priority for AARP is to assist Americans in accumulating and effectively managing adequate retirement assets to supplement Social Security. The shift from defined benefit plans to defined contribution plans has transferred significant responsibility to individuals for investment decisions that will directly impact the adequacy of the assets available to fund future retirement needs. AARP has enthusiastically supported the Fiduciary Rule as a necessary protection for participants when they make investment decisions concerning their retirement monies. Without this protection, it is difficult for an individual to plan for a secure and adequate retirement.

The Prohibited Transaction Exemptions at issue provide significant protections for participants and beneficiaries, as they must. See ERISA § 408(a)(3), 29 U.S.C. § 1108(a)(3). Accordingly, a delay in these protections places the retirement security of participants and beneficiaries at risk every day inasmuch as the activities in question violate the statute. See ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1).

I. DOL May Issue Prohibited Transaction Exemptions But Only If The Exemptions Is In The Interests And Protective Of The Rights Of Plan Participants And Beneficiaries.

Title I of ERISA protects plans and their participants and beneficiaries by requiring plan fiduciaries to act prudently and loyally. 29 U.S.C. § 1104(a). Congress supplemented these fiduciary duty provisions by categorically barring certain transactions that are likely to injure employee benefit plans. 29 U.S.C. § 1106; *Comm'r v. Keystone Consol. Indus., Inc*., 508 U.S. 152,160 (1993). The prohibited transaction provisions apply, with only minor variations, to both Title I employee benefit plans under 29 U.S.C. § 1106 and to Title II IRAs under 26 U.S.C. § 4975.

Congress gave the Secretary of Labor broad statutory authority to grant administrative exemptions to prohibited transactions under Title I. 29 U.S.C. § 1108. DOL's exemption authority is broad in the sense that it allows an exemption to be either conditional or unconditional, but narrow in the sense that it cannot be granted unless the Secretary determines that it is (1) administratively feasible, (2) in the interests of the plan and of its participants and beneficiaries, and (3) protective of the rights of plan participants and beneficiaries. 26 U.S.C. § 4975(c)(2)(A)–(C); 29 U.S.C. § 1008(a)(1)–(3). Thus, prohibited transaction exemptions allow regulated parties to engage in transactions that are otherwise prohibited. However, they may only do so if DOL ensures that all of the statutory conditions are met before it can afford relief from the flat prohibitions set forth in ERISA and the Code.

II. The Public Has Demanded The Protections Of This Rule.

AARP members and the public generally have demanded and supported the protections of the Fiduciary Rule and its suite of Exemptions. In survey after survey, we have found that retirement savers overwhelmingly want advice that is in their best financial interest. In a 2013 AARP survey of over 1,400 401(k) or 403(b) plan participants, more than nine in ten (93%) respondents favored requiring retirement advice to be in their sole interest, and fewer than four in ten (36%) respondents indicated they would trust the advice from an adviser who is not required by law to provide advice that is in their best interests.[2] A survey taken after the Rule was promulgated demonstrated that an overwhelming percentage of respondents were in favor of the 2016 Rule and believe it is important for financial advisers to give financial advice in a client's best interests.[3] Among those individuals who have received professional financial advice, the support was the deepest, with nearly 8 in 10 (78%) strongly agreeing with the rule.

II. Delay Of The Prohibited Transaction Exemptions Will Undermine The Financial Security Of Americans Saving For Retirement.

To delay the protections of the suite of Exemptions at issue will be costly to retirement investors. Retirement investors are at risk of up to a 1% drop in annual returns on retirement savings without all of the protections of the 2016 Rule.[4] Increasingly, the way that most Americans save and invest is through their employer sponsored retirement plans, most typically a 401(k) type savings plan. The Government Accountability Office (GAO) has estimated that $20,000 in a 401(k) account that had a one-percentage point higher fee for 20 years would result in an over 17% reduction in the account balance, a loss of over $10,000.[5] We estimate that over a 30-year period, the account would be about 25 percent less. Even a difference of only half a percentage point — 50 basis points — would reduce the value of the account by 13 percent over 30 years. Conflicted advice resulting in higher fees and expenses can have a huge impact on retirement income security levels.

Risks caused by conflicted investment advice are also increasing as the baby boomers retire and are encouraged to move their money from protected ERISA plans to IRAs. The Department of Labor (DOL) found that advice from conflicted investment advisers could cost these retirees between 12 to 24 percent in lost retirement savings over thirty years.[6] The DOL found that IRA investors tend to be older as they are close

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[2] AARP, *Fiduciary Duty and Investment Advice: Attitudes of 401(k) and 403(b) Participants* (Sept. 2013), http://www.aarp.org/research/topics/economics/info-2014/fiduciary-duty-and-investment-advice---attitudes-of-401-k--and-4.html.

[3] S. Kathi Brown, *Attitudes Toward the Importance of Unbiased Financial Advice* 4, 6 (May 2016), http://www.aarp.org/content/dam/aarp/research/surveys_statistics/econ/2016/attitudes-unbiased-fin-advice-rpt-res-econ.pdf.

[4] U.S. Gen. Accounting Office, GAO-11-119, *401(K) Plans: Improved Regulation Could Better Protect Participants from Conflicts of Interest* 31 (2011), http://www.gao.gov/assets/320/315363.pdf.

[5] U.S. Gen. Accounting Office, GAO-07-21, *Private Pensions: Changes Needed to Provide 401(k) Plan Participants and the Department of Labor Better Information on Fees* 7 (2006).
[6] Department of Labor, Fiduciary Investment Advice: Regulatory Impact Analysis 3-4 (2015).

to or at retirement. These IRA investors are more vulnerable to the negative impact of conflicted advice because the amount of assets available for rollover are large, many older investors do not have strong financial literacy skills, and they are making significant and often one-time decisions to move their retirement savings from more protected employer based plans into significantly less protected IRAs.[7]

Lower and middle-income retirement investors need every penny of their retirement savings. “Among the 48 percent of households age 55 and older with some retirement savings, the median amount is approximately $109,000 — commensurate to an inflation-protected annuity of $405 per month at current rates for a 65- year-old.”[8] DOL likewise has established that “small investors” (that is, those with low balances or those with modest means) are most negatively impacted by the detrimental effects of conflicted advice. Those with small accounts have fewer economic resources, and consequently any additional costs or losses diminish what little savings they have worked so hard to amass.

Congress sought to protect the retirement savings of millions of workers, retirees, and their families when it enacted the Employee Retirement Income Security Act of 1974. ERISA, the result of a decade of legislative consideration, established far-reaching standards to protect consumers through timely disclosure of information, minimum standards for participation, funding rules, fiduciary duty over invested monies, and access to legal redress for violations of the law. ERISA specifically applies to financial service firms that handle retirement monies, including insurance companies, investment firms, and broker-dealers, even if they are also subject to standards promulgated by other agencies or self-regulating bodies. These entities have largely successfully complied with ERISA for over forty years.

Regardless of the method used to calculate the losses, every day the protections of the prohibited transaction class exemptions are delayed the retirement security of hard working Americans is put at risk, along with potential negative impacts on the economy as a whole.

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[7] *Id*. at 59-60.

[8] U.S. Gen. Accountability Office, GAO-15-419, *Retirement Security: Most Households Approaching Retirement Have Low Savings* at 11 (May 2015), http://www.gao.gov/assets/680/670153.pdf.

III. Delay Of The Prohibited Transaction Exemptions Will Leave Investors Confused And At Risk.

The regulatory imbalance between the duties of brokers and investment advisers has persisted for many years, even as evidence demonstrating that brokers have transformed themselves from salespersons into advisers has grown. Many brokers today call themselves "financial advisers," offer services that clearly are advisory in nature, and market themselves based on the advice offered. For example, one firm advertises that it "proudly strive[s] to embrace [its] own fiduciary responsibilities" and that its "highest value is to 'always put the client first,'"[9] even though its Form ADV brochure (a regulatory filing that the SEC requires to be given to clients after a transaction is completed) demonstrates otherwise, noting that "[d]oing business with our affiliates could involve conflicts of interest if, for example, we were to use affiliated products and services when those products and services may not be in our clients' best interests."[10] As a result of such deceptive statements, the average investor cannot distinguish between brokers and advisers and does not recognize that their "financial adviser" operates under a lower legal standard than that to which an investment adviser is held. Nor is it surprising that investors expect that those who advertise themselves as a trusted adviser will provide financial advice in the best interest of the investor.

Investors struggle to identify which financial professionals owe fiduciary duties and which do not, confusion that is further exacerbated by industry parlance and advertising. Non-fiduciary professionals, for example, frequently offer services identical to those offered by fiduciary advisers while using titles (e.g., "advisor," "financial advisor," and "financial adviser") that are inherently ambiguous and cause confusion. It was no surprise when a 2010 study concluded that fully 75% of investors incorrectly believed that all "financial planners" *already* operate under a fiduciary standard. InfoGroup, *U.S. Investors & The Fiduciary Standard: A National Opinion Survey* (Sept. 15, 2010). Similarly, that same study found that three of five investors believed that "insurance agents" owe fiduciary duties, and that two of three thought the same for stockbrokers. Thus, it is not surprising that investors typically believe that their advisers act in investors' best interests, even when lengthy legal disclosures state the opposite.

Other studies confirm this enduring, pervasive confusion. For instance, a 2008

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[9] Letter from Robert Reynolds, President and CEO of Putnam Investments, to the Department of Labor (July 20, 2015), https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA25/00077.pdf.

[10] Putnam Advisory Company, LLC, SEC Form ADV Part 2A at 25 (Mar. 30, 2016), http://www. adviserinfo.sec.gov/IAPD/Content/Common/crd_iapd_Brochure.aspx?BRCHR_VRSN_ID=375046. (Putnam Investments wholly owns Putnam Advisory Company through various subsidiaries.).

study sponsored by the U.S. Securities and Exchange Commission ("SEC") and conducted by the LRN-RAND Center for Corporate Ethics, Law, and Governance relayed that "[e]xisting studies suggest that investors do not have a clear understanding about the distinction between broker-dealers and investment advisers and their different levels of fiduciary responsibility." Angela Hung, et al., RAND Corp., *Investor and Industry Perspectives on Investment Advisers and Broker-Dealers* 33 (Jan. 3, 2008). Another study recounted that 82% of consumers believe a "financial planner" is essentially the same as a "financial advisor," and there is only slightly less confusion between the titles "financial planner," "wealth manager" and "investment advisor." Fondulas Strategic Research, *Quantitative Survey: Consumers' Beliefs About Financial Planners* (Jan. 2014).

Importantly, the distinction between fiduciary and non-fiduciary advice is far from academic. Professionals who are not constrained by the fiduciary "best interests" standard may take advantage of current loopholes in the regulatory framework to steer clients toward products that are more profitable for the adviser than other available options that would better serve the clients' needs. *See, e.g.*, Department of Labor, Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20946, 20949-51 (Apr. 8, 2016), *amended by* 82 Fed. Reg. 16902 (Apr. 7, 2017). The Financial Industry Regulatory Authority ("FINRA") has echoed this concern.

After completing a conflicts study that began in July 2012, FINRA declared that conflicts of interest "are widespread across the financial services industry." FINRA, *Report on Conflicts of Interest* 1 (Oct. 2013). The situation had not improved by 2015, when FINRA identified the failure to "put[] clients' interests first" as a "central failing" of the "past decade." FINRA, *2015 Regulatory and Examination Priorities Letter* 1-2 (Jan. 6, 2015). The organization noted that this "harm" is "especially devastating and lasting" "when it involves vulnerable investors (*e.g.*, senior investors) or a major liquidity or wealth event in an investor's life (*e.g.*, an inheritance or Individual Retirement Account rollover)." *Id.* at 2.

FINRA's assessment finds support in other studies as well. For instance, examining some innovations spurred by the Rule (*see infra* at 18-19), Morningstar concluded that "reducing conflicted advice" will save investors "50 basis points." Aron Szapiro & Paul Ellenbogen, Morningstar, *Early Evidence on the Department of Labor Conflict of Interest Rule* 9 (Apr. 2017). Moreover, based on a performance audit from May 2011 to March 2013, the GAO "found that service providers' call center representatives encouraged rolling 401(k) plan savings into an IRA even with only minimal knowledge of a caller's financial situation." GAO, *401(k) Plans: Labor and IRS Could Improve the Rollover Process for Participants* 1, GAO-13-30 (Mar. 7, 2013). According to the GAO, some advisers made "misleading statements" like claiming "that their IRAs were 'free' or had no fees with a minimum balance," even though the opposite was true. *Id.* at 36.

In a 2016 webinar concerning the DOL Fiduciary Rule and suite of Exemptions, some insurance brokers admitted that they will be “pushing their clients” to purchase indexed annuities before the Rule and exemptions are effective. Ins. News Net, *How Annuity Distribution Can Survive the DOL Rule* at 49:39 - 50:20 (Apr. 21, 2016), https://www.youtube.com/watch?v=eCU86v1ZJqc. Relatedly, in another webinar focused on plan sponsor duties under the new Rule, some attendees noted that service providers were contacting participants about purchasing certain investments, or leaving money in or taking money out of the plan, again before the effective date of the Fiduciary Rule and Exemptions. Mercer LLC, *New DOL fiduciary rule: What you need to know* at 42:15 - 44:20, 53:40 - 54:50 (May 19, 2016), http://www.mercer.com/events/webcasts/new-dol-fiduciary-rule-what-you-need-to-know.html (last viewed July 12, 2017). To the extent there is a delay in protections in the Exemptions, we can only assume that such examples will continue unabated.

Unfortunately, offering harmful and conflicted advice will remain perfectly legal for the broad swath of financial advisers who are not otherwise subject to a fiduciary standard when providing financial advice. In addition, the costs that those tactics inflict on consumers will likewise persist. Ensuring all professionals who offer investment advice to retail investors are subject to a fiduciary standard is needed to ensure a level and transparent market for investors seeking advice. Investors deserve a regulatory system that is designed to promote the best interests of the investor and imposes comparable standards on investment professionals who are performing essentially the same function as financial advisers. Research has found investors typically rely on the recommendations they receive from brokers and investment advisers alike. The trust most investors place in financial professionals is encouraged by industry marketing, leaving investors vulnerable not only to fraud but also to those who would take advantage of that trust in order to profit at their expense. Investors who place their trust in salespeople who market services as financial advisers can end up paying excessively high costs for higher risk or underperforming investments that only satisfy a suitability standard, but not a fiduciary standard. That is money most middle-income investors cannot afford to waste.

For all the above reasons, we urge you to reject any delay in the applicability date of the Best Interest Contract Exemption, Principal Transaction Exemptions and amendments to PTCE 84-24, and instead maintain the previously extended effective date of January 1, 2018.

If you have any questions, please feel free to contact me or Jasmine Vasquez of our Government Affairs office at 202-434-3711.

Sincerely,

David Certner
Legislative Counsel and
Legislative Policy Director
Government Affairs