July 21, 2015

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: Conflict of Interest Rule, RIN 1210-AB32
Proposed Best Interest Contract Exemption, ZRIN: 1210-ZA25

Dear Secretary Perez:

The National Employment Law Project, a non-profit organization that for over 45 years, has sought to ensure that America upholds for all workers her promise of opportunity and economic security through work, is pleased to submit comments on the Department of Labor's (DOL's) proposed conflict of interest. The proposed rule would significantly strengthen protections for workers who are saving for retirement and those who want to retire with dignity knowing that their retirement income is secure. It would require financial advisers and their firms to provide retirement investment advice that is in their client's best interests rather than their own financial gains. We urge the DOL to finalize and implement this rule as soon as possible.

Background

When workers decide to leave a job or retire, they must decide what to do with the savings they have accumulated in their retirement plans. It is often at this point that many workers realize they do not have the necessary financial expertise or tools to make important life changing decisions about how and where to invest their retirement savings. Many workers turn to financial professionals for help in navigating the complex and often confusing world of financial investments. While many of these professionals commit to serving their clients' best interests, others may not. Because of gaps in current law governing retirement accounts, financial advisers are not required to make recommendations that are in their client's best interest. Advisers are allowed to give imprudent and disloyal advice, steer plans and IRA owners to investments based on their own, rather than their customers' financial interests, and to act on conflicts of interest in ways that would be prohibited if the same persons were fiduciaries.

The cost to retirement savers of conflicted advice is staggering. Based on the best data available, the DOL estimates that investors will lose somewhere between $210 billion and $430 billion over 10 years and $500 billion and $1 trillion over 20 years as a result of conflicted advice with respect to mutual fund investments in Individual Retirement Accounts (IRAs). In addition, a retirement saver who moves money out of a 401K plan 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.

The proposed investor protection rule would update the fiduciary standard under our pension rules. It covers advice to traditional and defined contribution pension plans, such as 401(k) plans, as well as advice to plan participants and to those who save through IRAs. It clarifies and expands who, as a result of giving investment advice, is a fiduciary of an employee benefit plan under the Employee Retirement Income Security Act (ERISA). It would require financial advisers to be held to a fiduciary standard of putting their clients' interests first and foremost, free of conflict and subject to liability for harm resulting from the conflicted advice they provide. Advisers would no longer be allowed to profit from the advice they give, while their clients lose millions in unnecessary fees and low returns.

We support many of the provisions in the rule, most notably:

- Updating current retirement rules to reflect the modern financial marketplace where financially unsophisticated consumers are required to manage their own retirement savings;

- Protecting consumers from conflicted advice where they are steered into inappropriate investments that benefit the adviser but not the consumer;

- Requiring best interest contracts that would hold advisers and their firms liable for any losses that resulted from a breach of contract; and

- Requiring advisers to provide important point-of-sale and on-going disclosures showing the true costs consumers pay for investment advice upfront and over time.

I. Current rules need to be updated to reflect the modern financial marketplace where unsophisticated consumers are required to manage their own retirement accounts.

When the fiduciary rule under ERISA was first promulgated in 1975, the retirement landscape looked very different from today's ever evolving financial marketplace. Gaps in the rule do not require advisers to act in the best interest of the client when one-time or periodic advice is given. The current best interest rule only applies when there's a "mutual agreement" that the advice will be the "primary basis" for the investment decision. This requirement can easily be circumvented with fine print and legalese. In addition, the current rule does not apply to recommendations to roll over from a defined benefits plan into a self-directed Individual Retirement Account (IRA), one of the most important financial decisions many people will ever make.

We support the DOL's updates to the ERISA rule. Being a fiduciary creates a relationship of trust and requires the adviser to provide impartial advice and not accept any payments for that advice that would create a conflict of interest. The rule allows for conflicted compensation, and requires that advisors who receive conflicted compensation enter into a contract with their customers in which they acknowledge their fiduciary status and commit to giving advice that is in the customer's best interest despite the compensation.

The rule would specifically eliminate the outdated "regular basis" loophole that allows advisers to provide one-time or episodic advice without being subject to a fiduciary standard. It also would close the "mutual agreement" and "primary basis" loopholes that allow advisers and their firms to

evade the fiduciary standard. These updates are long overdue and will go a long way in securing the nest eggs consumers have spent a life-time building up.

Finally, the rule appropriately carves out education from its definition of retirement advice. This would allow firms and financial advisers to provide educational information and materials to consumers without being subject to a fiduciary duty as long as that information does not contain any specific investment recommendations that consumers can reasonably be expected to act upon.

II. ***The rule would protect consumers from conflicted advice*.**

Being personally responsible for one's own retirement investments comes with a lot of challenges. Most consumers are forced to rely on the advice of professional advisers. Because some advisers do not put their clients' interests first, they can freely steer them into excessively high costs, and low performing investments that drain their hard-earned savings while at the same time, increasing their advisers' profits. The compensation advisers receive for giving advice, works against consumers. If an adviser is paid based on the products the advisers sell, and selling one product makes the adviser an 8 percent commission instead of another product that makes the adviser a 3 percent commission, they may rationalize recommending the product with the 8 percent commission. And, if the adviser's firm is pressuring the adviser to hit specific sales quotas for selling the product with the 8 percent commission, and bases the adviser's compensation and bonus on hitting certain sales goals for that product, it creates conflicts that even the most ethical adviser would have difficulty avoiding. Many consumers may not know that their retirement savings are being slowly and deliberately drained because of these conflicts. The conflicts can be well hidden and are likely to result in excessive fees and low performing investments. Without adequate safeguards, retirement savers will remain at risk of being harmed by conflicted advice that is a direct result of skewed incentives and sometimes just greed.

We strongly support the proposed rule's requirement that firms adopt policies that are reasonably designed to minimize the harmful impact of conflicts of interest. Firms would remain free to recommend proprietary or in-house products but could no longer set quotas for the sale of such products and base bonuses on their success in meeting those quotas. Similarly while firms would be free to pay their advisers more to sell certain investments, those differential payments would have to be based on neutral and objective factors, such as the amount of time necessary to research and implement the investment strategy.

III. Consumer Contracts – If the firm or adviser breaches any of the terms of the Best Interest Contract Exemption (BICE), the retiree can hold them liable for any losses that resulted from the breach.

Perhaps the most important feature of the rule is the Best Interest Contract Exemption (BICE), which will provide important protections for consumers from conflicted advice in a manner that would allow advisers and their firms to collect commission and other sales-related compensation. The broker-dealer business model would be preserved. To qualify for the BICE, advisers and firms would be required to contractually agree that any recommendations that they provide are in their client's best interest, without regard to their financial or other interests. This would mean providing advice that a prudent and impartial expert would provide under the same circumstances. In addition, the fees that firms and advisers charge must be reasonable in light of the services that they provide.

If firms or advisers breach any of the contractual provisions, consumers can hold them liable for any losses that resulted from the breach. We believe that having a mechanism to hold firms and advisers accountable will force advisers and firms to compete better on cost and quality rather than on how much they stand to profit from their advice.

IV. Advisers would be required to make important point-of-sale and on-going disclosures showing the costs that retirement investors are paying

We also support the point-of-sale and on-going disclosures required by the rule. These disclosures will give consumers vital information about the long term costs they are likely to pay for the advice receive. This will give them the information needed to more effectively compare costs and services. Conflicts of interests like hidden fees that are often buried in the fine print, or kickbacks for selling certain investments, must be clearly and prominently disclosed and in some instances may be strictly forbidden. Consumers will also be able to see and understand the impact that costs can have on their retirement portfolios over the long-term. If firms or advisers breach any of the contractual provisions, retirement savers can hold them liable for any losses that resulted from the breach.

V. We strongly oppose the inclusion of pre-dispute mandatory arbitration clauses in the consumer contracts

The proposed rule would require retirement investment adviser contracts to preserve the right of consumers who have suffered harm as a result of a breach of the fiduciary standard to bring their claims as a group, in a class action, in court. We agree that, in situations where the adviser is committing the same kind of breach of duty against multiple consumers, allowing those consumers to join together in a class action is important. It makes the legal system a more effective means for consumers to recover damages and a more effective deterrent against adviser carelessness and misconduct that harms consumers.

However, while we strongly support this goal, and the inclusion of this requirement in the rule, we are concerned that including it as written may not be effective. As the Department states, the requirement adopts the approach taken by FINRA in its rules. But the FINRA requirement has been challenged in court, and the Second Circuit ruled just last month that the FINRA requirement does not prevent forced class action waivers from being inserted in contracts and enforced. Cohen v. UBS Financial Services, Inc., Docket No. 14–781–cv. (2d Cir. June 30, 2015).

Moreover, there is substantial evidence that consumers may "win" FINRA arbitrations but receive significantly less than they deserve. For example, a study analyzing 14,000 FINRA arbitration awards over a ten-year period found that investors with significant claims suing major brokerage firms could expect to recover only 12 percent of the amount claimed.[1] There is also evidence that brokers are easily able to expunge their records of consumer complaints, as if they

[1] Edward S. O'Neal, Ph.D. and Daniel R. Solin, Mandatory Arbitration of Securities Disputes — by Edward S. O'Neal, Ph.D. and Daniel R. Solin1 A Statistical Analysis of How Claimants Fare, Securities and Litigation and Consulting Group, June 2007, http://bit.ly/1LtUCgU.

never occurred.[2] In addition, arbitrators are not required to explain their decisions and their decisions are virtually impossible to appeal. The result is an opaque, unfair process that benefits the brokerage industry, not retail investors.

We continue to support legislation to protect consumers' right to bring claims such as these in court rather than be forced to rely on private arbitration, and their right to bring them in a class action in accordance with long-established procedures. But meanwhile, we urge the Department to look for a more effective way to safeguard this right for consumers in its rule, such as by conditioning whatever protections or defenses are provided to retirement investors under the rule on the contract not containing a forced class action waiver or forced arbitration clause.

Conclusion

We appreciate the DOL's hard work and thoughtful approach in developing a rule that would require financial advisors to put their client's interests first rather than their own when providing retirement investment advice. The harm that workers suffer as a result of conflicts of interest can profoundly effects their quality of life during retirement, including where they'll be able to live, what they will be able to afford to eat, their ability to be self-sufficient and independent, and their personal dignity. Once their retirement funds are gone, they may not have the time, ability or opportunity to rebuild. They deserve more than this.

We urge the DOL to finalize and implement this rule as soon as possible.

Sincerely,

Judith M. Conti
Federal Advocacy Coordinator
National Employment Law Project

[2] Susan Antilla, *A Murky Process Yields Cleaner Professional Records for Stockbrokers*, NEW YORK TIMES DEALBOOK, September 25, 2014, http://nyti.ms/1uqiwyn.