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July 21, 2015

VIA EMAIL (e-ORI@dol.gov and e-OED@dol.gov)

Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
Attn: Conflict of Interest Rule/Fiduciary Definition Hearing
Room N-5655
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: **Comments on Department of Labor Proposed Redefinition of "Fiduciary" (RIN 1210-AB32); Proposed Best Interest Contract Exemption (ZRIN 1210 –ZA25); and Proposed Amendment to Prohibited Transaction Class Exemption 84-24 (ZRIN 1210-ZA25)**

Dear Sir or Madam:

On behalf of the companies of CUNA Mutual Group ("CUNA Mutual"), we are pleased to provide comments on the Department of Labor's proposed rule and prohibited transaction exemptions promulgated under Sections 3(21)(A)(ii) and 2510.3-21 of the Employee Retirement Income Security Act ("ERISA") (collectively, the "Proposal"). CUNA Mutual is the nation's leading provider of financial products and services to credit unions and credit union members. Credit unions, which have more than 100 million members, are organized as "not for profit" because their purpose is to serve their members rather than maximize profits. CUNA Mutual makes available various insurance and investment products to millions of credit union members across the United States and many of these members comprise the "retirement investors" of modest means impacted by the Proposal.

For over 75 years, CUNA Mutual has strived to provide financial security to credit union members and we embrace the credit union philosophy of "people helping people." Our purpose is to be the trusted insurance and investment partner empowering middle-Americans to achieve financial security. We are keenly aware that over the last several decades, the landscape of the private sector retirement system has changed and the growing reliance on retirement plans and IRAs for retirement income creates a significant need for individuals to receive appropriate products, education and advice. As such, we support the stated objectives of the Proposal: protecting Americans by acting in investors' best interests through transparency and disclosure.

With the spirit of advancing a best interest standard in mind, we believe the breadth, complexity and ambiguity of the Proposal undermines the goals of the Proposal. As written, the Proposal would effectively limit or disrupt access to appropriate financial products, information, education and advice to the very Americans it seeks to assist. The flaws in the Proposal generally fall into two categories: 1) the overly broad scope of the Proposal which would have numerous unintended consequences; and 2) many of the requirements laid out in the Proposal are unworkable.

In supporting a best interest standard, we believe a workable regulation should build upon the existing framework of regulation from various government agencies that has largely succeeded in protecting retirement plans, plan assets and investors. These regulations include existing remedies to address the bad actors that do exist - these remedies should be enforced. We agree that firms and advisors that take advantage of hard working Americans by recommending retirement investments that benefit themselves rather than their clients should be held accountable. Rather than dismiss these protections and embrace class-action litigation as the main enforcement mechanism, we should build upon the present framework in order to advance the interests of investors and protect Americans saving for retirement. The DOL should engage in a public dialogue with the SEC and other market participants to accomplish these objectives.

Rather than attempting to mesh with the existing framework, the Proposal casts an overly broad net of what constitutes investment advice that triggers fiduciary duties. This regulatory overreach will serve to restrict or place a chill on the products, services and information currently available to the American public. As noted above, we believe in a "best interest" standard but only where the context is appropriate for a fiduciary relationship to exist. For example, as proposed, an advisor or firm that simply sends an e-mail describing their services or responds to a request for information would trigger a fiduciary duty. Additionally, the Best Interest Contract exemption ("BICE") could arguably impose fiduciary status on "Financial Institutions" (such as banks and insurers) even when the Financial Institution is not a "fiduciary" under the proposed definition. Under the BICE, a "Financial Institution" is defined as an entity that retains an Advisor who is an independent contractor, agent or registered representative. Financial Institutions such as insurers and banks do not provide investment advice directly to investors; as such they would not be fiduciaries under the proposed regulatory definition. However, although not fiduciaries, Financial Institutions must nevertheless agree to be a fiduciary in order for the Advisor to qualify for the BIC exemption. In these circumstances, a fiduciary relationship is not intended, expected or agreed upon. The definition of "investment advice" and related fiduciary status should be tailored to cover only the situations where investors expect and deserve fiduciary type treatment.

A number of the mechanisms required by the Proposal and the procedures for meeting exemption requirements are simply not workable. The deficiencies largely fall under the following categories:

Ambiguity/exposure: The Proposal attempts to be "principles based" but is in fact inappropriately ambiguous. For example, the Proposal's "Impartial Conduct Standards" require an advisor to "warrant" that they will only receive "reasonable compensation." This warranty is required before a relationship is even formed or a product is even identified. Additionally what is "reasonable" is not adequately defined. Thus, it is unlikely a reputable firm striving for compliance would know whether or not it has achieved compliance. Also, a firm or advisor may not learn what is "reasonable" until many years later and only after years of costly private litigation. This ambiguity and uncertainty creates risk exposure for reputable firms and advisors which may lead to dislocations in certain markets and disrupt or limit products and services to investors that are most in need. It could also lead to credit unions not making these offerings available to their membership.

Inconsistency: The Proposal does not reduce inconsistent standards but instead adds to the inconsistency and complexity.

Under the Proposal, the duty owed to an individual investor would now turn on what account the money is drawn from – if the investment funds to purchase a new investment asset are drawn from a brokerage account, a suitability standard applies; if the investment funds are instead

drawn from an IRA account, a fiduciary standard applies. This discrepancy will certainly lead to confusion for investors, advisors and firms.

In the qualified plan market, the duty would turn on how many participants are in the plan – which does not necessarily correlate with investment sophistication or the need for investor protection. Under the Proposal, it is presumed that a 90 person law firm, investment firm or actuarial firm, by definition, needs more protection than a landscaping business with 110 employees. We currently work with thousands of credit unions that have fewer than 100 employees but are responsible for tens of millions of dollars in deposits and loans. These organizations are federally regulated and federally insured. They make loans, take deposits and engage in sophisticated financial transactions but under the Proposal are deemed incapable of prudently selecting a retirement plan asset. The sales activity relating to 401(k) plans should be consistent and the limiting language of "plans over 100 or more participants" should be removed. Alternatively, there should be a carve-out for organizations with fewer than 100 employees that are engaged in financial services or otherwise demonstrate significant financial sophistication.

Unworkable: There are numerous aspects of the Proposal that are simply not workable. The statutes that govern the DOL require Prohibited Transaction Exemptions (such as the Best Interest Contract, the "BIC") to be, among other things, "administratively feasible." There are many aspects of the BIC that do not meet this statutory requirement. For example, the BIC requires disclosure of "complete" information about all fees currently "associated" with the assets in which it is invested. This may require disclosure of information that does not currently exist and may not even be determinable for certain products such as insurance company "spread" products. Additionally, efforts to meet the requirements of the disclosure may require future performance and cost projections that conflict with existing regulatory schemes. Finally, the disclosure requirements may also result in thousands of pages of data that would overwhelm investors and negate any benefit. These few examples alone demonstrate that the BIC is unworkable and not "administratively feasible."

Timing: The Proposal would require the Best Interest Contract to be executed prior to making a recommendation. It is unreasonable to expect an investor to execute a lengthy legal document before even engaging in a substantive discussion and well before any products are identified or decisions are made. If a contract, such as the Best Interest Contract is required, the rule should allow for flexibility on when it is executed.

Enforcement: The primary enforcement mechanism of the Proposal is to create exposure to private causes of action and class action lawyers. This is not sound public policy. Also, this exposure may drive reputable firms and advisors out of the market and deprive Americans of products, information and advice. If the private right of action remains in the Proposal, there should be better guidance and standards as to when liability may be triggered to avoid frivolous lawsuits that only benefit the plaintiff's trial bar. For example, at the very least, there should be uniform standards and requirements for materiality, reliance and causation as is the case when claims are made under applicable federal securities laws. If the Proposal does not contain such standards, and instead leaves the issue entirely to case law developed across the 50 states, there will be further confusion and inconsistent treatment of investors. This, again, directly undermines the stated objectives of the Proposal, as well as those of ERISA.

In summary, we support properly assisting hard working Americans as they save for retirement and a "best interests" standard when providing investment advice. However, the potential for constraints or diminution of advice and investment services that would result from the Proposal, specifically for middle income Americans, will undermine retirement savings and not effectively and efficiently fulfill the stated objectives of the DOL. Accordingly, the Proposal should be

significantly revised to meet the stated objectives while not placing unnecessary burdens on market participants and costs on retirement investors.

Thank you for the opportunity to provide comments on this very important rulemaking and we appreciate the DOL in pursuing the common goal of helping credit union members prepare for retirement. We would be happy to answer any further questions from the Department or provide other assistance.

Sincerely,

Michael F. Anderson
Senior Vice President and Chief Legal Officer

cc: Robert Trunzo, CEO
Christopher Roe, SVP