



September 15, 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: Best Interest Contract Exemption, etc.; Extension of Transition Period and Delay of Applicability Dates (EBSA-2017-0004-0002)

Dear Secretary Acosta:

The American Association for Justice (AAJ), formerly the Association of Trial Lawyers of America (ATLA), hereby submits the organization's response to the Department of Labor's (DOL) recent notice regarding a proposed delay (the "proposal") of the provisions of the Best Interest Contract Exemption (BIC Exemption), Principal Transactions Exemption and amendments to PTE 84-24 (together the "Exemptions").¹

AAJ, with members in the United States, Canada, and abroad, is the world's largest trial bar. It was established in 1946 to safeguard victims' rights and strengthen the civil justice system. AAJ members represent victims of fraud. It is in this capacity, as representatives of those who have been on the receiving end of the abuses that have permeated the financial services market, that we voice our concerns with any further delay of the Exemptions' January 1, 2018 implementation date.

The Department's August 31, 2017 proposal to further delay the implementation dates of these crucial components of the Fiduciary Rule is a transparent handout to industry, based off a blatantly incorrect cost-benefit paradigm that effectively erases the potentially devastating cost to consumers of a further delay. If the Department's objective is truly to "avoid unnecessary confusion and uncertainty in the investment advice market, facilitate continued marketplace innovation, and minimize investor losses"² then the proposal is a resounding failure, as it adds confusion and uncertainty to the market for retirement products while more than doubling the

¹ 82 Fed. Reg. 41365 (Aug. 31, 2017).

² *Id.* at 41373.

losses forced upon investors by the Department's previous delays.³ AAJ strongly urges the Department to abandon this flawed, incoherent proposal and implement the full Fiduciary Rule as originally written—it is not too late to minimize the harm that these delays have already caused to investors.

1. The Proposal is Based on a Flawed Cost-Benefit Analysis that Does Not Incorporate the Cost to Investors of a Further Delay

The Department bases its proposed delay on a cost-benefit analysis that does not incorporate an analysis of the projected cost to retirement savers of any further delay of these crucial exemptions. In fact, while the Department recognizes that the delay “may result in deferral of some of the estimated investor gains,” the Department quickly dismisses this analysis by, ironically, noting that most financial institutions “already have completed or largely completed work to establish policies and procedures to [. . .] support compliance with the Fiduciary rule.”⁴ We struggle to understand how the Department, which only a few months ago projected investor gains of up to \$36 billion over ten years of full implementation of the Fiduciary Rule,⁵ would so quickly dismiss the compounding cost to savers of a delay in full implementation.

As we previously stressed,⁶ every single earlier delay has harmed investors, and any further delay would augment this problem rather than alleviate it. In fact, DOL's own analysis indicates that even a tiny 60-day delay could lead to a reduction in estimated investment gains—direct losses for American retirees—of \$147 million in the first year and \$890 million over just 10 years using a three percent discount rate.⁷ Cost savings to firms during those 60 days is projected to be a comparably insignificant \$42 million.⁸ The harm to retirement savers during those 60 days still dwarfs the industry savings from the delay.

We note once again⁹ that when consumers receive financial advice that is not in their best interest, it can cause real harm. Financial professionals who are not required to put their client's interests first are free to steer retirement savers into excessively high cost, low performing investments that drain hard-earned savings while maximizing the professional's profits. Practices like these can cost retirement savers a lot of money. Working from the various studies, the Department estimated that retirement savers will lose between \$210 billion and \$430 billion over 10 years, and between \$500 billion and \$1 trillion over 20 years, as a result of conflicted advice

³ See, e.g., Heidi Shierholz, DOL proposes 18 month delay of full implementation of fiduciary rule, setting the stage for retirement savers to lose \$10.9 billion, Economic Policy Institute (Aug. 30, 2017) (noting that previous delays have already cost savers \$7.6 billion) available at <http://www.epi.org/press/stage-is-set-for-retirement-savers-to-lose-10-9-billion/>

⁴ 82 Fed. Reg. at 41372.

⁵ See *id.*

⁶ American Association for Justice, Comment on the President's Memorandum on the Fiduciary Duty Rule RIN 1210-AB79 (Apr. 17, 2017).

⁷ 82 Fed. Reg. 12320.

⁸ *Id.*

⁹ American Association for Justice, Comment on the Department's July 6 Request for Information, EBSA-2017-0004-0001 (Aug. 7, 2017).

just with regard to mutual fund investments in IRAs. The Department also estimated that a retirement saver who rolls money out of a 401(k) plan and 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. Ultimately, retirees who receive conflicted advice end up losing significant savings—conflicts of interest likely lead to a one percentage point reduction in each year’s expected annual return.¹⁰ A 2015 report by the Council of Economic Advisors (CEA) found the estimated aggregate annual cost of conflicted advice to be about \$17 billion to retirees every year.¹¹

Thus, an additional 18-month delay would result in over \$10 billion in losses to retirement savers—on top of the more than \$7 billion loss the Department has already caused through its previous delays.¹²

These costs dwarf the Department’s projected savings for the banking industry, much as the previous DOL analysis¹³ showed: using various discount rates and assumptions, the Department estimates that an 18-month delay could save industry members between \$551.6 million and \$2.2 billion.¹⁴ Putting aside the question of which side of the cost-benefit analysis should bear the cost (the banks and investment companies or everyday retirement savers), the Department has simply failed to demonstrate in any reasonable way how the savings to industry outweigh the monumental cost to investors of any further delay—particularly because, as the Department has already argued, most industry members are already prepared to “support compliance with the Fiduciary Rule.”¹⁵ If anything, then, this delay would only accrue to the benefit of those industry members who have refused to begin compliance with the full rule as written.

2. The Exemptions are Necessary to Protect Investors and Ensure Industry Compliance with the Fiduciary Standard

Furthermore, any additional delay would continue to leave harmed retirement savers without recourse to the courts. By enforcing a ban on class action waivers (a fundamental part of the BIC Exemption), the Department achieves the President’s stated goal of “American empowerment” by preventing financial advisors from taking advantage of retirees while enabling the latter to save more money. Importantly, if the Department should decide not to implement the entire rule as written, the DOL would solidify the legality of the current loopholes that allow advisors not to be held publicly accountable for any losses to investors caused by their misconduct.⁵ Only the full fiduciary rule, with the Exemptions applied as written will help fix this problem by providing a mechanism to hold firms and advisors accountable.

¹⁰ Counsel of Economic Advisors, *The Effects of Conflicted Investment Advice on Retirement Savings* (Feb. 2015) available at https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_coi_report_final.pdf

¹¹ *Id.*

¹² Heidi Shierholz, Another fiduciary rule delay would cost retirement savers \$10.9 billion over 30 years, Economic Policy Institute (Aug. 10, 2017) available at <http://www.epi.org/publication/another-fiduciary-rule-delay-would-cost-retirement-savers-10-9-billion-over-30-years/>

¹³ 82 Fed. Reg. 12320.

¹⁴ 82 Fed. Reg. at 41373.

¹⁵ *Id.*, at 41372.

The Exemptions close loopholes created when investment advisors use forced arbitration clauses to shield themselves from class action claims. Although forced arbitration clauses are still permitted under the rule, investment advisors seeking to benefit from the BIC Exemption's safe harbor provisions are prohibited from blocking their clients from participating in class actions against them. The Exemptions act as a deterrent while ensuring that financial advisors that do not act in their client's best interest are accountable for their own behavior, rather than passing that burden on to retirement savers. These transgressions cost working and middle class Americans an estimated 17 billion dollars a year—money that, at the very least, could be saved by allowing investors to threaten class actions.¹⁶ As we have stressed in previous comments, class actions are a free-market solution to dispute resolution, and function as a way to hold bad actors publicly accountable. Class actions can, in fact, take the place of stringent and market-altering government regulation, allowing disputing parties to settle disagreements in a cost-efficient manner.

Allowing the Exemptions to take effect on schedule would not lead to a huge spike in costs for financial institutions due to class action litigation. Class action plaintiffs must already satisfy stringent requirements to be certified as a class under Federal Rule of Civil Procedure 23, including demonstrating commonality and typicality of facts and law across the entire class, a large enough size, and adequate representation. Similarly, Rule 23 requires that the injury incurred by all members of the class is comparable in size and scope, and that the application of the relevant law to each plaintiff be substantially the same. The class must also be large enough to warrant a court certifying it as a class action—rather than simply deciding to join multiple, individual cases. Additionally, the prospective class must include adequate representatives that accurately reflect the interests of all putative class members. These long-standing, procedural barriers to class action that are constantly reviewed and revised by a committee of judges that seek to update them to maximize efficiency and judicial economy—there is no need for additional extra-judicial limits on class action.

These requirements are exceptionally difficult to meet for small businesses with limited consumer bases. Thus, large corporations tend to be more affected by class actions than small businesses because the smaller entities simply don't have enough clients impacted by the same illegal activity to warrant class relief. Clients of a local investment advisor offering individual advice to retirees on a case-by-case basis, for example, likely could not form a class, because the numerosity requirement of Rule 23 designed to encourage judicial economy would never be met. This system ensures that the class action cases that would go forward—when the Exemptions are permitted to go into effect—would only be cases where the harm in question is systemic, widespread, and a clear violation of the Exemptions under the Fiduciary Duty Rule.

For cases that do not meet the onerous requirements proscribed in Rule 23, they simply would not be joined as a class, and the individuals would be permitted to pursue their claims individually. If the individual signed a forced arbitration agreement with their investment advisor, then any legal disputes would be adjudicated by arbitration.

¹⁶ Counsel of Economic Advisors, *The Effects of Conflicted Investment Advice on Retirement Savings* (Feb. 2015), available at https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_coi_report_final.pdf

Investment advisors are not the first to be banned from including class action waivers in forced arbitration agreements—and the markets that have banned class action waivers have not experienced any increase in litigation. For example, the Financial Industry Regulatory Authority (FINRA)¹⁷ has prohibited the inclusion of class action waivers in forced arbitration agreements since 1992, and has not seen abuses of the system or drastic changes in price. Similarly, overall workplace class action activity has decreased since the National Labor Relations Board (NLRB) found class action bans unenforceable in 2012.¹⁸ Furthermore, the Exemptions are based on common law developed in state courts, where there are also no skyrocketing costs for investment advisors or state-wide surges in class action litigation—which is in part due to the onerous complexity of bringing class action claims under the current rules.

3. Conclusion

Throughout this misdirected and incoherent proposal, the Department continually stresses the cost to industry participants of implementing the full rule as written. While we recognize that industry cost is an important consideration when regulating the financial markets, we strongly encourage the DOL to examine its own previous analysis which balanced projected cost to the industry with the utility (and cost savings) of protecting investors from conflicted investment advice, as well as the numerous studies that we have provided *supra* which expand upon the full cost of any additional delay. As we previously discussed, conflicted advice can cause real harm to middle-income savers; these everyday market participants, many working their way towards a stable and secure financial future for themselves and their families, should not be overlooked in the Department's maniacal drive to marginally reduce compliance costs for huge financial institutions.

As we stated *supra* and in past comments,¹⁹ and repeat now, the Department itself estimated that retirement savers will lose between \$210 billion and \$430 billion over 10 years, and between \$500 billion and \$1 trillion over 20 years, as a result of conflicted advice just with regard to mutual fund investments in IRAs. The Department also estimated that a retirement saver who rolls money out of a 401(k) plan and 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 White House Council of Economic Advisers estimated that retirees who receive conflicted advice end up losing significant savings—conflicts of interest likely lead to a one percentage point reduction in each year's expected annual return.²⁰ In this same report the Council found the estimated aggregate annual cost of conflicted advice to be about \$17 billion to retirees every year.²¹ Compounding this, an 18-month delay of the provisions the Department itself designed to ameliorate these market

¹⁷ FINRA Rule 13204 (2012).

¹⁸ Seyfarth & Shaw LLP, Workplace Class Action Report (2017) *available at* <http://www.workplaceclassaction.com/2017/02/the-story-behind-workplace-class-action-filings-in-2016-trend-4/>. *See also* In Re D. R. Horton, Inc., 357 NLRB 2277 (2012).

¹⁹ *See, e.g.,* American Association for Justice,

²⁰ Counsel of Economic Advisors, The Effects of Conflicted Investment Advice on Retirement Savings (Feb. 2015) *available at* https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_coi_report_final.pdf

²¹ *Id.*

inefficiencies would cost retirement savers \$10.9 billion—on top of the \$7.6 billion the Department has already cost consumers through similar delays.²²

Surely the Department agrees that these costs should not be borne by retirement savers—and, at the very least the Department can see that these costs massively outweigh the marginal savings for industry members of any further delay. The Department already designed appropriate regulations over the course of many years and careful input from all stakeholders: we encourage the Department to follow its own analysis and implement that regime. It is not too late to minimize the harm these delays have already had on everyday retirement savers.

AAJ encourages the DOL to implement the rule as it was originally written without any further delays. If you have any questions or comments, please contact Sarah Rooney, Director of Regulatory Affairs at (202) 944-2805.

Sincerely,

A handwritten signature in black ink, appearing to read "Kathleen L. Natri". The signature is written in a cursive, flowing style with a small dot at the end.

Kathleen L. Natri
President
American Association for Justice

²² See Economic Policy Institute, *supra* at note 12.