



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

**Re: Conflict of Interest Rule, RIN 1210-AB79
Proposed Best Interest Contract Exemption, ZRIN: 1210-ZA25**

Dear Acting Secretary Hughler:

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) request for comment regarding the examination described in the President's Memorandum on the Fiduciary Duty Rule.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 the President's Memorandum.

The President's Memorandum of February 3, 2017 directed DOL to reassess the Fiduciary Duty Rule, "to determine whether it may adversely affect the ability of Americans to gain access to retirement information and financial advice."² The resulting 60-day delay was detrimental to investors, and could lead to retirees losing an estimated \$147 million in investment gains in the first year alone.³

AAJ strongly supports the Fiduciary Duty Rule, which would require that investment advisors act in consumers' best interest by avoiding conflicts of interest and being transparent

¹ 82 Fed. Reg. 12319.

² 82 Fed. Reg. 6975.

³ 82 Fed. Reg. 12319.

about fees and kickbacks. American consumers have gone too long receiving faulty investment advice, and this rule would supply reforms to a system that for years allowed advisors to give self-serving and imprudent recommendations without fear of accountability. Furthermore, it would ensure that investors have greater protections when making decisions about their retirement and better protect their 7th Amendment right to access the courts.

I. The Memorandum’s Proposed Delay Harms Investors and Retirees

In his Memorandum, the President asked (1) whether the rule “[h]as 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,” and (2) whether the rule “has resulted in dislocations or disruptions in the retirement services industry that may adversely affect investors or retirees.”⁴

In fact, the President’s delay has harmed investors, not the carefully developed rule that protects retirees from deceptive investment advice. Per DOL’s analysis, a 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 10 years using a three percent discount rate.⁵ Cost savings to firms during those 60 days is projected to be a comparably insignificant \$42 million.⁶ The harm to retirement savers during those 60 days still dwarfs the industry savings from the delay.

It is no secret that backdoor payments and hidden fees hurt retirees. 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.⁷ 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.⁸

Turning to the question of dislocations and disruptions, many investment advisors have already incorporated the fiduciary standard of care into their practice in anticipation of required compliance. In addition to harming consumers, the delay harms these financial institutions who have spent a considerable amount of time, effort, and money preparing for implementation. The only “disruption” is to the financial service firms who have already begun to comply with the law.

II. The Fiduciary Duty Rule Will Not Result in an Increase in Litigation

The President’s Memorandum asks whether the final rule is likely to cause an increase in litigation because of the restrictions on class waivers.⁹ It will not. In fact, the institutional hurdles associated with the commencement of a class action have proven to be sufficient deterrents to litigation in the past. There is ample support of this conclusion, as other restrictions on class action waivers have been in effect for years, without litigation surges. Instead, the class action provision

⁴ 82 Fed. Reg. 9675.

⁵ 82 Fed. Reg. 12320.

⁶ *Id.*

⁷ 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

⁸ *Id.*

⁹ 82 Fed. Reg. 9675.

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.

The Fiduciary Duty Rule closes 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 rule’s safe harbor provisions are prohibited from blocking their clients from participating in class actions against them. The rule acts as a deterrent while ensuring that financial advisors that do not act in their client’s best interest are responsible 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.¹⁰

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. Finally, the prospective class must include adequate representatives that accurately reflect the interests of all putative class members.

These requirements are exceptionally difficult to meet and nearly impossible the smaller the scope of a business. 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 an 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 Fiduciary Duty Rule is permitted to go into effect—would only be cases where the harm in question is systemic, widespread, and a clear violation of the exemption 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 forced into binding arbitration.

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 an explosion of litigation. For example, the Financial Industry Regulatory Authority (FINRA)¹¹ 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)

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 FINRA Rule 13204 (2012).

found class action bans unenforceable in 2012.¹² Furthermore, the Fiduciary Duty Rule is 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.

III. Conclusion: This Memorandum Fails to Protect the American People.

In the Memorandum, the President claims he wants to “[E]mpower Americans to make their own financial decisions, to facilitate their ability to save for retirement and build the individual wealth necessary to afford typical lifetime expenses, such as buying a home and paying for college, and to withstand unexpected financial emergencies.”¹³ This Memorandum and resulting DOL delay do the opposite. Because of the stark contrast between the stated goal and its realistic effect, one is left at the only conclusion: this delay is about corporate money, not retirees.

There is no purpose to the imposition of this delay, as recommended in the President’s Memorandum. Every issue raised is one that has been addressed multiple times throughout the notice and comment and stakeholder processes. Delaying the implementation of the rule after the lengthy review process is unfair to the American consumer and to rule-abiding financial services institutions. At no point does the Memorandum raise an issue warranting additional scrutiny, nor does it make a reasoned case that this rule is superfluous.

AAJ encourages the DOL to implement the rule as it was originally written. If you have any questions or comments, please contact Sarah Rooney, Director of Regulatory Affairs at (202) 944-2805.

Sincerely,



Julie Braman Kane
President
American Association for Justice

¹² 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).

¹³ 82 Fed. Reg. 9675.