

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

Ladies and Gentlemen:

As the manager of the National Association of Social Workers' (NASW) Department of Social Justice and Human Rights, I am writing to express my strong support for the Department of Labor's (DOL's) conflict of interest rule proposal. In a nation facing a retirement crisis, people of color are among those who can least afford to have their retirement savings drained because of conflicted advice. This rule would provide necessary protections for all Americans, including people of color, who are saving for retirement by guaranteeing that any retirement investment advice that they receive is in their best interests and free from harmful conflicts of interest.

The DOL conflict of interest rule comprises one part of the larger framework toward addressing the retirement security crisis that people of color face

Our nation is facing a retirement crisis, and people of color face particularly severe challenges in preparing for retirement. According to a National Institute on Retirement Security Race and Retirement Insecurity Report:¹

- Households of color are more likely than white workers to work in jobs that **do not offer** retirement benefits. Only 54 percent of Black and Asian employees and 38 percent of Latino employees age 25-64 work for an employer that sponsors a retirement plan, compared with 62 percent of white employees. These racial disparities are much more pronounced in the private sector than in the public sector.
- Households of color are far less likely to have dedicated retirement savings than white households of the same age. A large majority of Black and Latino working-age households—62 percent and 69 percent, respectively—**do not have any** retirement savings, compared with 37 percent of white households. The racial gap in retirement account ownership persists across age groups and income levels.
- Households of color have substantially lower retirement savings than white households, even after controlling for age and income. 74 percent of Black households and 80 percent of Latino households age 25-64 have **less than \$10,000** in retirement savings, compared with 49 percent of white households. Among near-retirees, the per-household average retirement savings balance among households of color (\$30,000) is one-fourth that of white households (\$120,000).

¹ Nari Rhee, Race and Retirement Insecurity in the United States, National Institute on Retirement Security, December 2013, <http://bit.ly/1cmSEtk>.

These findings are reinforced by research by Ariel Investments and Aon/Hewitt,² which found that across all ages and income levels, African Americans and Hispanics have lower average 401(k) account balances than similarly situated Whites. For example, in 2010:

- Within the salary bracket capturing median income between \$30,000 and \$59,999: African-Americans had accumulated on average about \$24,500 in 401(k) savings, while Hispanics in the same salary bracket had accumulated on average about \$28,000. Both demographic groups had substantially less than Whites, who had accumulated on average more than \$42,000.
- Within the salary bracket capturing median income between \$60,000 and \$89,999: African-Americans had accumulated on average about \$68,000 in 401(k) savings, while Hispanics in the same salary bracket had accumulated on average about \$76,000. Again, both demographic groups had accumulated substantially less than Whites, who had accumulated more than \$98,000.

Due to the lack of access to workplace retirement accounts and, by extension, lower retirement account balances, all too many members of these communities reach retirement without any significant savings to supplement Social Security. To remedy these problems, efforts must be made to improve pay for lower income workers, promote middle income job growth, increase both the availability of workplace retirement plans and the participation in those plans, and preserve and strengthen Social Security to ensure that the significant shortfall in retirement security is covered and that people of color are able to meet basic expenses.

Making every dollar count

For those who do manage to set aside a retirement nest egg, they need to make every dollar count by investing in products that perform well and have the lowest costs. However, like other savers with low account balances, African American and Hispanic workers who receive retirement investment advice are more likely to receive recommendations that result in their investing in products with inferior performance and excessive fees that deplete their account balances over time. This is because they are disproportionately likely to receive retirement advice from a financial professional who has financial incentives to steer them into high-cost investments and who is not legally required to put their financial interests first. According to industry's own estimates, 98 percent of accounts of investors with \$25,000 or less in their Individual Retirement Accounts (IRAs) were in brokerage accounts.³ Brokerage accounts are subject to a suitability standard, which allows financial advisers to recommend the least suitable of all the suitable options rather than the options that are in the client's best interest.

African American and Hispanic workers are at particular risk when it comes to saving for retirement for one additional reason. They change jobs somewhat more often than Whites, and they are much more likely to cash out their retirement plan when they do. According to the Ariel and Aon Hewitt study discussed above, 63 percent of African Americans and 57 percent of Hispanics who left their employer in 2010 chose to cash out their balances rather than leave them where they were or roll them over.⁴ Cashing out is generally considered to be a worker's worst possible option, both because it depletes retirement savings and because it can trigger taxes and penalties. While it is understandable that individuals facing tough financial choices would make this decision, it contributes to the risk that people of color will be unable to afford a secure and independent retirement.

The best option for workers changing jobs is often either to keep the money in the existing plan or transfer it into a new employer's plan. That is because 401(k) plans have lower costs on average than IRAs and employers are required by law to manage their plans in the best interest of their plan participants. However, financial firms'

² 401(k) Plans in Living Color, A Study of 401(k) Savings Disparities Across Racial and Ethnic Groups The Ariel/Aon Hewitt Study 2012, <http://bit.ly/1Ii08IV>.

³ Letter from Kent Mason, Partner at Davis and Harman, citing Oliver Wyman's "Assessment of the impact of the Department of Labor's proposed 'fiduciary' definition rule on IRA consumers," April 12, 2011, <http://1.usa.gov/1CyB9V2>.

⁴ 401(k) Plans in Living Color, *supra* note 2.

have a strong incentive to capture employer retirement assets because it increases their revenues. As a result, they often encourage workers to roll over their retirement accounts into IRAs, regardless of whether doing so is in the worker's best interest. Any investment advice that is provided to a worker should consider all the facts and circumstances and make a recommendation that is genuinely in the best interests of the worker. That is particularly important for those with limited retirement savings, including many people of color, who need to make every dollar count.

However, as discussed above, financial firms have a profit-motive to capture assets and recommend rollovers. Under current law, firms and their advisers are allowed to make recommendations to roll over, regardless of whether those recommendations are in the best interests of their customers. Financial advisers can also take advantage of loopholes in the antiquated fiduciary investment advice rule to make recommendations that are not in their customer's best interest. For example, so long as they provide advice that is not on a "regular basis," they can provide advice that is in their interests rather than their customer's. In addition, as long as they don't agree that any advice that they provide will form the "primary basis" for the investment decision, they can provide advice that benefits them at their customer's expense. These rules allow advisers to steer their clients into products that provide hefty compensation to them and their firms and deplete retirement savers' retirement security. As explained above, people of color already are facing daunting retirement challenges; protecting against conflicts of interest from advisers whom they trust for objective, high-quality advice should not be one of them.

Research shows that investors of all demographics lack the tools to protect themselves against harmful advice. According to the SEC's financial literacy study, many investors "do not understand the most elementary financial concepts, such as compound interest and inflation."⁵ They also do not understand basic ideas, such as diversification or the differences between stocks and bonds, and are not fully aware of investment costs and their impact on investment returns. Additionally, investors lack critical knowledge about investment fraud. Moreover, certain subgroups, including African-Americans and Hispanics have an even greater lack of investment knowledge on the average than the general population.⁶ This lack of financial sophistication makes people more dependent on professional financial advisers when saving for retirement and less able to detect when the advice they receive does not serve their financial interests.

While many people of color currently do not have considerable retirement assets, it does not stop them from seeking investment advice. A 2010 survey commissioned by Ariel Investments comparing and contrasting middle class African-American and White households in terms of their saving and investment attitudes and behaviors found, for example, that 42 percent of African-Americans indicated that they had sought advice from a financial planner or advisor, a mutual fund company, or some other financial professional. That represents a significant portion of the population and is only slightly less than the 49 percent of White respondents who indicated the same.⁷

Furthermore, the market for providing financial advice to people of color is expanding, and people of color are becoming an attractive business target for firms. According to Jesse Abercrombie, a financial adviser with Edward Jones, "African-Americans and Hispanics are an increasingly large part of our client base... We are seeing more and more minorities moving into the upper-middle class."⁸ These changes can be positive if the goal is to

⁵ Study Regarding Financial Literacy Among Investors, As Required by Section 917 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Staff of the Office of Investor Education and Advocacy of the U.S. Securities and Exchange Commission, at vii-viii, August 2012, <http://1.usa.gov/1fMABVZ>.

⁶ *Id.*

⁷ Ariel Investments, Black Investor Survey 2010: Saving and Investing Among Higher Income African-American and White Americans, July 21, 2010, <http://bit.ly/1GxB6ur>.

⁸ Carl O'Donnell, *Financial advice business grapples with diversity challenges*, INVESTMENT NEWS, January 15, 2014, <http://bit.ly/1Ja7vdJ>.

provide access to products and services that help savers of color improve their retirement security. However, there is a risk that certain members of the financial industry see an opportunity to profit at people of color's expense, similar to how financial industry participants viewed people of color when they engaged in widespread predatory lending in the mortgage and payday loan spaces.

The best safeguard against these risks is the fiduciary rule that the DOL has proposed. This rule seeks to ensure that any retirement investment advice that financial professionals provide is in their customers' best interest. The rule would stop firms and their advisers from taking advantage of loopholes in the antiquated fiduciary investment advice rule to make recommendations that are not in their customer's best interest. The "regular basis," "mutual agreement" and "primary basis" loopholes would be removed from the rule, and rollover recommendations would be covered. These represent significant improvements over the status quo, particularly for people of color who are disproportionately likely today to get advice from a non-fiduciary adviser.

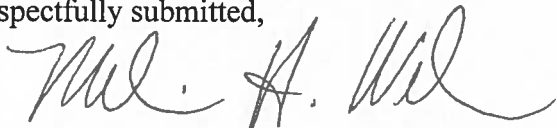
The proposal also allows for commission-based compensation, subject to certain safeguards designed to ensure that sales-related conflicts are mitigated. Under the Best Interest Contract Exemption, firms and advisers would have to agree to provide recommendations that are in their client's best interest, without regard to their financial incentives or other interest. The fees that they charge would have to be reasonable and clearly disclosed at the time the recommendation is made, and annually thereafter. In addition, firms would have to warrant that they have policies and procedures in place to address any harmful impact that sales-driven conflicts of interest may have on the recommendations they make. These policies and procedures would ensure that advisers are not being paid more to recommend products that serve them and their firm, at the investor's expense. If a firm or adviser violates the terms of the contract, they could be held accountable for their actions. These required provisions in the contract will provide the necessary safeguards for retirement investors while still preserving the broker-dealer compensation model.

Conclusion

With so much money on the line, it isn't surprising that financial firms and their industry associations are fighting so hard against this proposed rule. In a particularly cynical ploy to protect their profits, they have argued that the rules could hurt middle income families and people of color in particular by depriving them of access to advice. What they are really saying is that, if the firms can no longer take advantage of these workers and retirees, they may not be willing to advise them at all. In reality, however, minority retirement savers are among those with the most to gain from new protections for retirement savers precisely because they are most in need of making every dollar count.

I urge the DOL to finalize these rules to ensure the necessary protections are in place for people of color who are saving for retirement.

Respectfully submitted,



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