



July 20, 2015

Office of Regulations and Interpretations
Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

**RE: Conflict of Interest Rule Proposal (RIN 1210-AB32) and Related
Exemption Proposals (ZRIN 1210-ZA25)**

Dear Sir or Madam:

The University of Miami School of Law Investor Rights Clinic (“the IRC”)¹ appreciates the opportunity to comment on the Department of Labor’s (“the Department’s”) Conflict of Interest Rule proposal (RIN 1210-AB32) and related Exemption proposals (ZRIN 1210-ZA25). Over the past few years the IRC has assisted and represented a range of investors who have suffered financial losses in their retirement accounts, or to funds intended for retirement. In our experience, the increasing availability and complexity of investment products—while beneficial in many respects—has also increased the opportunity for investor exploitation. And notably, it is not just the most vulnerable who have suffered losses: The IRC has represented well-educated investors who hold bachelor’s and advanced degrees. Thus, as the Department is already aware, we reiterate that a typical retirement investor is simply no match for the sophistication of today’s broker-dealer industry when it comes to ensuring a level playing field. Something more than the current suitability standard is needed for retirement accounts.

The IRC often encounters clients of particularly modest means who have been let down by the very individuals and firms whom they trusted to help build and/or protect their nest eggs. In certain respects, the regulatory system has let them down, particularly investors who have done everything “right”: made a responsible choice to save a portion

¹ Launched in January 2012, the IRC was initially funded with a \$250,000 grant from the FINRA Investor Education Foundation. Like other law school securities arbitration clinics, the IRC provides *pro bono* representation to investors of modest means who have suffered investment losses as a result of broker misconduct but, due to the size of their claims, cannot find legal representation. Under faculty supervision, law students provide legal assistance and advice to investors who have potential claims involving misrepresentation, unsuitability, unauthorized trading, excessive trading, and failure to supervise, among other claims. For more information, please see <http://investorrights.law.miami.edu>.

of their income for retirement; decided to invest those savings; accepted normal market risks; and sought out investment expertise—most often from a broker-dealer employing trusted professionals to guide those investors through a complex and intimidating investment landscape. Oftentimes, these same investors are then recommended fee-laden investments that could in no rational way be considered in the investors' best interest. For low-income investors, losing as little as \$10,000 can mean the difference between making ends meet and having to rely on family members or social welfare programs.

IRC clients have suffered losses in retirement accounts at smaller firms as well as some of the nation's best known broker-dealers. Thus, the IRC strongly believes that the conflicts of interest targeted by the Department's proposal are pervasive throughout the broker-dealer industry.

We believe that a fiduciary standard for retirement accounts will provide a strong deterrent against misconduct, preventing harm before it occurs in many cases. The current suitability standard simply leaves too much room for abuse in retirement accounts.

Best Interest Contract Exemption

The IRC supports the Department's Best Interest Contract Exemption that would allow investment advice fiduciaries to receive otherwise prohibited compensation from various sources, provided those fiduciaries fulfill various contractual disclosure requirements. We think this exemption is key to ensuring that broker-dealers can adapt their business models and continue serving investors of all means. Even assuming, without agreeing, that low-balance accounts subject to a fiduciary standard will become unprofitable under certain existing business models, we believe investors will be better off under a fiduciary standard in the long run. We are confident that the resourcefulness of the broker-dealer industry, coupled with competition within it, would soon lead to viable business models for servicing low-balance retirement investor accounts under a fiduciary standard.

The Department proposes that multiple disclosures accompany the use of the exemption. We have two related comments. First, we support the proposed mandatory "web page" disclosures. We agree that once investors can access publicly disclosed fees, useful and accessible comparisons will result. Better educated, discerning customers and increased competition should follow. Second, we believe the "Individual Transactional" disclosure format should draw from at least two of the ideas proposed by the Department. The model chart released by the Department is a good starting point. But instead of simply providing an example, the Department should require use of a standardized chart. Such standardization would help prevent subtle data manipulation in presentations to investors.

A "cigarette warning"-style disclosure—another Department idea—should accompany the standardized chart. Without some eye-catching and authoritative text, we fear that trusting investors could be easily misled by a lack of emphasis on the costs reflected in the chart. Also, the Department should consider requiring a separate signature

line beside the chart for investor acknowledgment. We do not think a “cigarette warning”-style disclosure alone is sufficient.

Streamlined Low-Fee Exemption

The Department has requested comments on a contemplated streamlined high-quality low-fee exemption. This exemption would permit otherwise prohibited compensation without fiduciaries meeting many of the Best Interest Contract Exemption requirements. Implemented appropriately, we believe this exemption could both empower investors and further incentivize competition within the industry.

Well-publicized low-fee products could act as guideposts to the most vulnerable investors. Many retirement investors have little idea how their retirement funds should be allocated, or what constitutes a reasonable fee. These investors enter their relationships with broker-dealers at a distinct disadvantage. The low-fee exemption, however, could help change that. An informed investor would be able to request the low-fee exemption option from a broker and to compare that broker’s offerings with other brokers’. Although compelling reasons might exist for an investor to ultimately select a higher-fee product, the low-fee products would at least serve as good starting points for many who are otherwise uninformed.

We encourage the Department to limit the “streamlined” exemption to mutual funds—both equity funds and bond funds, including target-date funds. Inclusion of more complex products, with separate low-fee thresholds, into the exemption could be counterproductive. The Department’s objectives may be frustrated if a greater than appropriate number of investors were inappropriately recommended (for example) annuities that, though offering the lowest fees among their peers, can be orders of magnitude more expensive than alternatives such as diversified bond or equity funds.

We believe that competition within the industry should obviate the Department’s concern that the cost of already-low-fee products might rise to meet a devised cut-off. And even if certain products were to increase in cost, a low cut-off should limit harm to investors’ portfolios.

We suggest that the Department require yearly cost-data submissions from fund providers who desire low-fee status. The data submitted by providers should mirror the expense ratios published in fund prospectuses. The Department could then release an annual list of funds that meet the cut-off for the low-fee exemption. This web-accessible list could help ease industry’s compliance costs. Sales loads should be permitted but implicitly discouraged. Any sales loads, as a percentage of initial investment, should be added to the fund’s annual expense ratio. Only the smallest of loads could survive. The negative effect that sales loads have on ultimate returns supports an approach that limits their use within retirement accounts. Relatedly, we believe empirical evidence sufficiently demonstrates that no-load funds offer the most compelling options for the vast majority of retirement investors.

To set the low-fee cut-off, we suggest that the Department first collect the annual

expense ratios for all broad-based index-tracking funds available in the marketplace for the previous year (e.g., those tracking the Wilshire 5000, S&P 500, Barclays Aggregate). The Department could then calculate a simple average of those expense ratios; this average, plus a reasonable charge for one-time sales costs, would serve as the upcoming year's low-fee cutoff. This process could be repeated yearly. Because target-date funds may have higher operating expenses than non-target-date funds, the Department should consider establishing a separate low-fee cut-off for those products alone.

Modifications to Prohibited Transaction Exemption (PTE) 84-24

The Department proposes to modify PTE 84-24 so that compensation related to the purchase of security-designated annuity products and mutual fund shares in IRAs must meet the Best Interest Contract Exemption requirements. We support this modification. However, we disagree with the Department's intent to continue to allow non-security annuity and life insurance product compensation under PTE 84-24.

In our experience, annuities and life insurance products of virtually all varieties are a minefield for investors. Though these products are suitable in certain scenarios, attendant complexity, commissions, illiquidity, and fees (oftentimes hidden) require strong investor protection measures. Thus, the IRC believes compensation stemming from all annuities and life insurance products in retirement accounts should be permitted only through the Best Interest Contract Exemption.

The IRC strongly supports the Department's efforts to protect retirement investors through its proposed rule and related exemption proposals. We thank you for the opportunity to comment on these proposals.

Respectfully submitted,


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