NELA
Advocates for Employee Rights℠
National Employment Lawyers Association

April 13, 2017

VIA* electronic submission to *http://www.regulations.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Fiduciary Rule Examination, RIN 1210-AB79

Dear Madam/Sir:

The National Employment Lawyers Association (NELA) respectfully submits the following comments in strong support for the implementation of the Department of Labor's (DOL) final rule entitled, Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice, 81 Fed. Reg. 20946 (April 8, 2016) (hereinafter, the "Fiduciary Rule").

The Fiduciary Rule should be implemented because it will benefit workers, their families, and retirees, many of whom are elderly and most vulnerable to losses to their retirement savings due to conflicted advice from financial advisers. As discussed below, the Fiduciary Rule will protect the retirement savings of workers and retirees as more and more of their savings are in 401(k) plans and IRAs, and fewer workers have access to traditional pension plans. Additionally, it will ensure the availability of ERISA class actions, which have provided meaningful relief and positive outcomes to ERISA plan participants in the past. Most of the major financial firms agree that a fiduciary standard is necessary to protect the interests of workers and retirees.

NELA is the largest professional membership organization in the country of lawyers who represent employees in labor, employment, wage and hour, and civil rights disputes. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA members represent clients on a wide array of employee benefits issues, which includes issues related to employees' retirement savings. Thus, NELA has an interest in the DOL's decision regarding whether to proceed with implementation of the Fiduciary Rule.

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I. The Fiduciary Rule Protects The Retirement Savings Of Workers And Retirees From Significant Losses Due To The Conflicted Advice Of Financial Advisers.

The landscape of retirement income in America has changed drastically over the past four decades as employers have shifted away from sponsoring defined benefit plans (such as traditional pension plans) and toward defined contribution plans (such as 401(k) plans). Today, the majority of employees participating in a retirement plan at work are covered by employer-sponsored 401(k) plans. When 401(k) plan participants separate from their employers, they are presented with one of the toughest and most complex financial decisions in their lives: what should they do with their retirement savings?

The overwhelming majority of participants retiring or otherwise separating from their employers choose to roll over their retirement savings into Individual Retirement Accounts (IRAs). From 1996 to 2008, more than 90 percent of funds flowing to traditional IRAs came from rollovers primarily from employer-sponsored retirement plans. This trend has not slowed in the past decade. The most recent available data show that rollovers from employer-sponsored retirement plans to traditional IRAs exceeded $424 billion in 2014 and are expected to increase steadily in the coming years.

Deciding whether to roll one's retirement savings into an IRA can be confusing at best. The variety of financial products that can be held in an IRA is vast, and wisely selecting and managing IRA investments is a challenging and time-consuming task, requiring financial acumen beyond that of the overwhelming majority of workers. Accordingly, many 401(k) plan participants turn to professional financial advisers for assistance. However, financial advisers are often compensated through fees and commissions that depend on the types of financial products that their clients invest in. Thus, there are inherent conflicts of interest in these relationships because the best interest of the participant is not necessarily aligned with the recommendation that will be most lucrative for the financial adviser. Financial advisers are incentivized to steer 401(k) plan participants to products or investment strategies that provide larger fees or commissions to the adviser, but do not necessarily represent the most sound investment choices for the participant.

The conflicts of interest themselves and the potential for negative effects resulting from them are unknown to most 401(k) plan participants because they are often unaware of the differences in payment structures, legal obligations, and consumer protections that exist among those who advise 401(k) plans and those who advise IRA account holders. Most employees and retirees do not know that financial advisers of IRA account holders may be subject to lower standards of care than those who advise 401(k) plans, that fees are typically lower in 401(k) plans than IRAs, or that fee disclosure requirements make 401(k) plan fees easier to identify than IRA fees.

These problems are compounded by the fact that the information and assistance 401(k) participants receive regarding what to do with their retirement savings when they separate from their employers' 401(k) plans often comes from service providers to and financial advisers of the 401(k) plans. These service providers and financial advisers may be incentivized to sell their own retail investment products and services to participants in order to retain the participants' retirement assets even when such products and services may not be in the participants' best interests. Because participants receive this information from the 401(k) plans' service providers and financial advisers, they are often completely unaware that they are receiving biased marketing information as they decide what to do with their retirement savings when they separate from their employers.

These conflicts of interest can result in significant investment losses for workers and retirees. A survey conducted by the Council of Economic Advisors (CEA) in 2015 to assess the costs and benefits of the Fiduciary Rule found that:

- Participants receiving conflicted advice earn returns about 1 percentage point lower each year.

- The estimated aggregate annual cost of conflicted advice to participants is about $17 billion each year.

- A retiree who receives conflicted advice regarding whether to roll over a 401(k) balance to an IRA at retirement will lose an estimated 12 percent of the value of his or her retirement savings if drawn down over 30 years.[1]

The CEA survey concluded that 401(k) plan participants rolling over their retirement savings to IRAs based on conflicted advice leads to large and economically meaningful costs to their retirement savings.

The DOL reached the same conclusion in its Regulatory Impact Analysis of the Fiduciary Rule.[2] The DOL found that the risks caused by conflicts of interest from professional financial advisers would continue to increase as baby boomers retire and move their retirement savings from their employer-sponsored 401(k) plans to IRAs. The DOL estimated that conflicted advice could cost retirees 12 to 24% of their retirement savings over 30 years. The DOL also found that IRA investors are particularly vulnerable to conflicted advice because they are older and thus have greater retirement savings to roll over to IRAs, do not have strong financial literacy skills, and are making significant and often one-time decisions to move their retirement savings from protected 401(k) plans to significantly less protected and costly IRAs.

The extensive, thoughtful, and thorough economic analysis conducted by the DOL previously—and the deliberative and inclusive rulemaking process, which included six years of review, four days of hearings, numerous meetings with interested stakeholders, and more than 3,000 public comments from a wide range of interested stakeholders—supports the implementation of the Fiduciary Rule.

Without the implementation of the Fiduciary Rule, workers and retirees will continue to receive conflicted advice that will result in significant losses to their retirement savings because the current regulations[3] define the term "fiduciary" with respect to investment advisers narrowly to include only persons or entities who meet each separate element of a non-statutory five-part

[1] Council of Economic Advisers, The Effects of Conflicted Investment Advice on Retirement Savings, https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_coi_report_final.pdf, February 2015.
[2] Department of Labor, Regulating Advice Markets: Definition of the Term "Fiduciary" Conflicts of Interest – Retirement Investment Advice, Regulatory Impact Analysis for Final Rule and Exemptions, https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/conflict-of-interest-ria.pdf, April 2016.
[3] 29 C.F.R. § 2510.3-21(c)(1)(ii)(B).

test.[4] The five-part test was implemented when ERISA was in its infant stages and before 401(k) plans existed and IRAs were commonplace. Therefore, much of the advice 401(k) participants receive from financial advisers today is not protected by ERISA's fiduciary duties and restrictions. In fact, financial advisers frequently avoid ERISA's fiduciary duties and restrictions by marketing their retirement investment services in a manner designed to defeat the five-part test, such as including language in fine print specifically disclaiming one or more of the elements of the five-part test.

The Fiduciary Rule replaces the outdated and unduly restrictive five-part test with a new definition of the term "fiduciary" with respect to financial advisers that is not only simpler to understand for all parties involved (including consumers, courts, and financial firms), but is also better suited for the current reality of workers' and retirees' retirement income.[5]

II. The Fiduciary Rule Protects The Rights Of Workers And Retirees To Seek Redress Of Investment Losses Resulting From Conflicted Advice In Court By Ensuring The Availability Of Class Action Lawsuits.

The Fiduciary Rule also protects workers and retirees by ensuring the availability of class action lawsuits for investors to seek redress of investment losses due to conflicted advice. As the DOL explained in its Regulatory Impact Analysis of the Fiduciary Rule:

> [T]he option to pursue class actions in court is an important enforcement mechanism for retirement investors. Class actions address systematic violations affecting many different investors. Often the monetary effect on a particular investor is too small to justify an individual claim, even in arbitration. Exposure to class claims creates a powerful incentive for financial institutions to carefully supervise individual advisers, and ensure adherence to the impartial conduct standards. This incentive is enhanced by the transparent and public nature of class proceedings and judicial opinions, as opposed to arbitration decisions, which are less visible and pose less reputational risk to firms or advisers found to have violated their obligations.

The DOL's position is in line with efforts by Congress and other federal agencies to regulate the use of forced arbitration clauses and class action bans in standard-form contracts. These efforts are the result of the overwhelming research and data that show that companies across all sectors have succeeded in using forced arbitration clauses and class action bans in standard-form contracts to suppress lawful and serious claims and avoid liability under laws that are intended to protect disadvantaged consumers from the fraudulent and deceptive business practices of corporations. By preserving workers' and retirees' rights to bring their claims as class action lawsuits, the Fiduciary Rule provides them with an important enforcement tool to ensure that financial advisers act in their best interests.

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[4] Under the five-part test a person or entity is a fiduciary only if (1) it renders advice as to the value of securities or other property, or makes a recommendation as to the advisability of investing in, purchasing or selling securities or other property, (2) on a regular basis, (3) pursuant to a mutual fund agreement, arrangement or understanding, with the plan or fiduciary, that (4) the advice will serve as a primary basis for investment decisions with respect to plan assets, and that (5) the advice will be individualized based on the particular needs of the plan.

[5] The present regulation also may not be consistent with the statutory definition of the term "fiduciary" in ERISA.

Class action lawsuits involving ERISA claims have led to positive outcomes for ERISA plan participants. For example, at the urging of Enron Corporation's executives, many of the company's employees invested significant amounts of their retirement savings in Enron company stock. After Enron's stock plummeted from $90 per share to $0.25 following the discovery of its fraudulent accounting practices, Enron employees not only lost their jobs, but they also lost over $1.3 billion in retirement savings. Financial statements revealed that Enron's executives sold large shares of their Enron stock at the same time they were misleading their employees about the company's financial health and encouraging them to invest their retirement savings in Enron stock. Through an ERISA class action lawsuit, participants and beneficiaries in Enron's defined contribution plans were able to recover over $264 million. As a result of such ERISA class action lawsuits regarding company stock in defined contribution plans, employees, retirees and plan fiduciaries are now much more aware of the risks of investing in company stock.[6]

In addition, ERISA class action lawsuits have resulted in important changes to the retirement savings industry that have provided significant benefits to 401(k) participants, such as increased transparency about service providers' fees and conflicts of interest. For example, the recent settlement in *Haddock v. Nationwide Financial Services Inc.*, No. 01-CV-1552 (D. Conn.), resulted in a recovery of $140 million for participants and beneficiaries of 24,000 retirement plans who were charged excessive fees by their plans' service provider through alleged unlawful kickbacks and undisclosed conflicts of interest. The service provider also agreed to important changes to its financial disclosure. These changes will enable plan sponsors to determine whether conflicts of interest exist that may influence the service provider's investment recommendations. Because of such ERISA class action lawsuits regarding excessive fees, plan sponsors are now more diligent in monitoring their plans' fees and negotiating for lower fees with service providers.[7]

III. Financial Firms Agree That The Fiduciary Rule Is Needed To Protect Workers And Retirees.

In response to a letter sent by United States Senator Elizabeth Warren on February 7, 2017, several leading financial firms—including Charles Schwab, BBVA Compass, Capital One, John Hancock, U.S. Bancorp, Fidelity, RBC, Principal Financial Group, Prudential Financial, LPL Financial, Symetra Life Insurance, TIAA, Transamerica, and Wells Fargo—expressed their support for the goals of the Fiduciary Rule. Senator Warren noted that the financial firms' "overall message was clear: [the Fiduciary Rule] is good for workers saving for retirement and companies are prepared to meet the compliance deadline."

Many of the financial firms acknowledged that a fiduciary standard is needed to protect investors:

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[6] Robert Steyer, "Company stock options fading from 401(k) plans." *Pensions & Investments*, http://www.pionline.com/article/20150223/PRINT/302239977/company-stock-option-fading-from-401k-plans, 23 Feb. 2015.

[7] Robert Steyer, "Washington to keep things hopping for DC plans in 2014." *Pensions & Investments*, http://www.pionline.com/article/20140106/PRINT/301069985/washington-to-keep-things-hopping-for-dc-plans-in-2014, 6 Jan. 2014.

- **Betterment:** “The fiduciary rule is necessary to ensure that Americans receive investment advice that is in their own interests, instead of conflicted sales pitches for high-fee products. For years, the financial industry has put its own interests first, costing investors billions of dollars. The fiduciary rule . . . would change that.”

- **Charles Schwab:** “We support the intent of the rule, which is to protect the interests of investors by holding the industry to a high standard: acting in a client’s best interest when giving investment advice, and managing and disclosing any conflicts of interest. … In particular, we believe that a ‘best interest’ standard would be valuable for all investors, not just retirement investors.”

- **John Hancock:** “John Hancock believes that consumers saving for retirement should be protected by imposing a fiduciary standard of care upon all fiduciaries that provide advice to employer plan and IRA investors.”

- **LPL Financial:** “LPL Financial supports the establishment of rules creating a harmonized standard for broker/dealers and investment advisors, stipulating that any broker/dealers and investment advisors who provide investment advice to retail customers be subject to the same standard, no matter what license the professional holds.”

- **Transamerica:** “Transamerica confirms its continued support of a standard that requires investment advice fiduciaries to act in the best interest of their clients.”

- **U.S. Bancorp Wealth Management:** “We believe that the core objective of the Rule has merit. Providing timely information and advice on retirement products is of paramount importance to Americans saving for retirement. We are prepared to comply with the Rule, and to react to any impending changes.”

- **Vanguard:** “Consistent with our core purpose, Vanguard strongly believes that investors should receive investment advice that is in their best interest and that those who provide investment advice should be held to a fiduciary standard.”

- **Wells Fargo:** “We supported the core best interest concept underlying the Rule when it was originally proposed in 2010, when it was re-proposed in 2015, and when it was issued in final form last year.”

- **XY Planning Network**: “The Department of Labor’s rule appropriately rectifies [the confusion among investors between financial advisors and salespeople] and levels the playing field, by ensuring that *all* those who hold out as financial advisors to Retirement Investors, and give investment advice as such, should be held accountable to the only logical standard that has ever applied for true advice: a fiduciary standard, because the very definition of real ‘advice’ is that it’s in the best interests of the person receiving it!”

Some financial firms even acknowledged that the Fiduciary Rule had accelerated the pace at which they were making changes to improve their investment advice services and offerings to 401(k) participants and IRA investors, including lowering the account minimums and costs of their managed accounts and reducing or eliminating commissions for certain investment products.

Senator Warren's letter also noted that all of the financial firms that responded to her letter stated that they had invested significant time, money and resources into preparing for the Fiduciary Rule's implementation. Among other things, they have updated and built new IT systems, revised and created marketing and disclosure documents, and trained employees to comply with the technical requirements of the Fiduciary Rule. The considerable investment of time, money, and resources of these financial firms would be wasted if the Fiduciary Rule is not implemented.

Conclusion

The Fiduciary Rule is a much needed regulatory change that will better protect workers, their families, and retirees. It would facilitate more effective enforcement when professional financial advisers cause 401(k) participants and IRA investors to suffer investment losses because of their conflicted advice. For all of the above reasons, NELA strongly supports implementation of the Fiduciary Rule without further delay.

Respectfully submitted,

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Executive Director