U.S. Department of Labor
Employee Benefits Security Administration

Definition of the Term ‘‘Fiduciary’’;
Conflict of Interest Rule—Retirement Investment Advice;
29 CFR Parts 2509, 2510, and 2550

RIN 1210-AB79

Comments of Michael J. Thompson

These comments are submitted in response to the proposed rule published at 82 Fed. Reg. 12319 (March 2, 2017) by the Department of Labor, Employee Benefits Security Administration ("Department"). The Department's notice solicited comments on (1) a proposal to extend by 60 days the applicability date of the Department's 2016 "Fiduciary Rule,"[1] and (2) the President's Memorandum to the Secretary of Labor, dated February 3, 2017 ("Memorandum"), "direct[ing] the Department of Labor to examine whether the final fiduciary rule may adversely affect the ability of Americans to gain access to retirement information and financial advice, and to prepare an updated economic and legal analysis concerning the likely impact of the final rule as part of that examination." 82 Fed. Reg. at 12319. These comments address only the second topic.

<u>Background</u>. I am submitting these comments as an individual investor and solely on my own behalf. I live in northern Virginia, and work in Washington, D.C. I have individual retirement accounts and participate in employer-sponsored 401(k) and profit-sharing plans that are subject to ERISA. I have held self-directed accounts such as these,

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1 *See Definition of the Term ‘‘Fiduciary’’; Conflict of Interest Rule—Retirement Investment Advice*, RIN 1210-AB32, Final Rule, 81 Fed. Reg. 20946 (April 8, 2016).

as well as non-retirement brokerage and mutual fund accounts, for more than 35 years. I am licensed as an attorney in the District of Columbia and the Commonwealth of Virginia. I have practiced administrative law, and have participated in numerous federal agency rulemaking proceedings, throughout my career—albeit matters not related to financial advice or retirement investing.

Comments. The Memorandum raises a threshold legal question: assuming that the Secretary's re-analysis of the 2016 rule supported an affirmative finding of any of the three factors identified in Section 1 of the Memorandum, would that factor or factors, of itself/themselves, be sufficient to justify rescinding or modifying the 2016 rule? Neither the Memorandum nor the Department's March 2 proposed rule addresses this question, but it is one the Department would have to address as part of any new rulemaking proposal. Barring the revelation of some striking new evidence that was not made available to the Department in the lengthy rulemaking process that preceded the 2016 rule, it would be difficult for the Department to develop a reasoned decision in support of materially changing or rescinding the 2016 rule.

The Memorandum questions whether the Department's 2016 rule is consistent with the administration's priority "to empower 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." This statement of priorities is inherently consistent with the Department's rule as it stands. The Memorandum's implication to the contrary suggests a lack of appreciation of the role of accurate information in the functioning of an efficient market.

The Department’s 2016 rule, by its nature and through its specific terms, is designed to give consumers of retirement-related investment advice more accurate information about the kinds of investment products, and about specific investments, that are best for them as they save and plan for retirement over the course of their working lives. The fiduciary obligations and duties created by the 2016 rule will mean greater transparency about investment risks and fees. The end result, as the Department concluded in 2016, should be better returns for investors. Improved returns are an incentive to greater savings, which in turn mean investors will accumulate more wealth over their investment horizons than they otherwise would.

In short, more complete and reliable information for retirement investors will make the market for retirement investment advice more efficient. Efficient markets, in turn, reward innovations that beget still greater efficiency, i.e., either lowering the cost of investment advice to investors or making better services available to them without increasing the price they pay.

Accordingly, the Memorandum’s purported concern that the Department’s 2016 rule will limit investors’ access to retirement investment options is misplaced. If and to the extent that some current “retirement savings offerings, retirement product structures, retirement savings information, or related financial advice” (Memorandum, Section 1(i)) may become unavailable after the rule becomes effective, that will not be a negative outcome. All the rule does is require an alignment of investors’ and advisors’ interests and the dissemination of more complete information—disclosures of advisors’ fees and potential conflicts. Investors will remain free to pick any investment they want, regardless of cost and regardless of whether they are advised against any particular alternative. If any particular investment option or type of investment advice becomes unavailable to accounts subject to ERISA after the fiduciary rule takes effect, that will be a market-driven outcome, a judgment that the affected investment or advice option is not viable in the more transparent and more efficient marketplace the Department’s rule has facilitated.

The bottom line is that the Department’s 2016 rule, as it stands, is fully consistent with the priorities stated in the Memorandum. The rule enhances Americans’ ability to make their own financial decisions by enabling them to get better retirement investment advice and, concomitantly, lower investment-related costs and better returns. Better returns facilitate Americans’ ability to save for retirement, and to build the wealth needed for lifetime expenses and to withstand financial emergencies.

Therefore, the Secretary should permit the 2016 fiduciary rule to take effect without revisions.

Respectfully submitted,

Michael J. Thompson

April 17, 2017