

May 19, 2017

Honorable R. Alexander Acosta  
Secretary of Labor  
United States Department of Labor  
200 Constitution Ave, N.W.  
Washington, D.C. 20210

Re: Oposing Further Delay to Conflict of Interest Rule

Dear Secretary Acosta:

Together, our organizations have members and beneficiaries across the country who are saving for retirement, and who now more than ever depend on every dollar that they can save. We have a particular interest in the Labor Department's 2016 "Conflict of Interest" or "Fiduciary" Rule that requires retirement advisers to put their clients' best interests before their own. Well before it was reported that you would like to "freeze the rule,"<sup>1</sup> many of the undersigned groups requested an urgent meeting with you about this Rule, but none of us has received one yet. Meanwhile, we understand that you are meeting with stakeholders who support freezing the Rule, often in the name of "small savers" whom they disingenuously suggest would be harmed by the Rule.<sup>2</sup> As organizations that actually represent the interests of small savers, we are compelled to write this letter to set the record straight, though we would still welcome the chance to meet and explain further.

We firmly believe that further delay of the Rule would be a serious mistake. By the Department's own calculations further delay would cost retirement investors (including small savers) hundreds of millions of dollars every 60 days.<sup>3</sup> It would also expose the Department and any delay vehicle to significant legal risk.

Our position is firmly rooted in the rule's existing administrative record. As described there, and summarized below, the Rule will clearly *increase*, not limit, small savers' access to financial advice – contrary to self-serving claims from the industry.<sup>4</sup>

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<sup>1</sup> See, e.g., NAPA, *Acosta Looking to Freeze DOL Fiduciary Regulation*, May 10, 2017, <http://www.napa-net.org/news/technical-competence/regulatory-agencies/acosta-looking-to-freeze-dol-fiduciary-regulation/>.

<sup>2</sup> *Id.*; see also Letter from Members of Congress to Sec'y Acosta (May 2, 2017), [https://ro.e.house.gov/uploadedfiles/fiduciary\\_letter\\_to\\_dol.pdf](https://ro.e.house.gov/uploadedfiles/fiduciary_letter_to_dol.pdf).

<sup>3</sup> Final Rule, Extension of Applicability Date for Fiduciary Rule, 82 Fed. Reg. 16902, 16908-10 (Apr. 7, 2017).

<sup>4</sup> See, e.g. Comment Letter from SIFMA to U.S. Dep't of Labor 2 (Apr. 17, 2017), <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/01395.pdf>. As one commentator recently pointed out, these claims have always been disingenuous since large brokerage firms – some of whom are among the fiercest opponents of the Rule – have historically had little interest in serving small account holders, often maintaining account-balance minimums of \$100,000 to \$250,000 for face-to-face advice. See Comment Letter from Better Markets to U.S. Dep't of Labor ("Better Markets

To begin with, the Rule does not reduce access to sound, impartial financial advice for savers with any size account. It is hard to argue that investors are “losing” impartial financial advice when their “advisers” are not currently providing impartial advice, and instead recommend investments that are profitable to them but not in the best interest of their clients.<sup>5</sup> Indeed, in an attempt to avoid coverage under the Rule, these groups have argued in court that such recommendations do not even constitute investment advice in the first place.<sup>6</sup> The Department has already definitively rejected any attempt to conflate harmful, conflicted investment advice with impartial investment advice,<sup>7</sup> and there is no basis to reconsider the distinction.

More importantly, however, the record is clear that the Rule will, in fact, *increase* small savers’ access to high-quality, impartial investment advice. This is because, when you consider the total costs of investing – the costs of the advice plus the cost of the investments recommended – advice will be cheaper and more transparent under the Rule. It is telling that this Rule has consistently been supported by organizations representing ordinary investors, low-income investors, women, and minority groups, including many organizations who have signed letters in support of the Rule.<sup>8</sup>

Commission-based compensation models, where the cost of investment advice was often hidden in fund-management fees kicked back to the adviser, have already been giving way to more transparent fee-based models.<sup>9</sup> The Rule has only accelerated this trend.<sup>10</sup> When investors know what advice actually costs, advisers begin to compete on price, and competition leads to more efficient operations.<sup>11</sup> Moreover, as advisers increasingly receive their compensation directly from investors, as opposed to having it masked by opaque fund-management fees and the like, the cost of investment

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Comment”) 12 n.14 (Apr. 17, 2017), <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/01306.pdf>.

<sup>5</sup> Comment Letter from Consumer Fed’n of Am. to U.S. Dep’t of Labor (“Consumer Fed’n Comment”) 61 (Apr. 17, 2017), <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/01386.pdf>.

<sup>6</sup> *Id.* at 61-62.

<sup>7</sup> See U.S. Dep’t of Labor, *Regulating Advice Markets, Definition of the Term “Fiduciary” Conflicts of Interest – Retirement Investment Advice, Regulatory Impact Analysis for Final Rule and Exemptions* 315 (Apr. 2016), <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/conflict-of-interest-ria.pdf>.

<sup>8</sup> See, e.g. Comment Letter from Americans for Financial Reform and Fifty Other Groups (Apr. 17, 2017), <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/01387.pdf>; Comment Letter from American Association of University Women (Mar. 17, 2017), <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/00820.pdf>.

<sup>9</sup> Consumer Fed’n Comment at 73; Comment Letter from Nat’l Employment Law Project to U.S. Dep’t of Labor (“NELP Comment”) 3 (Apr. 17, 2017), <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/01312.pdf>

<sup>10</sup> Consumer Fed’n Comment at 66.

<sup>11</sup> See NELP Comment at 6.

products comes down. Low- and level-load mutual fund share classes have been introduced, funds that enable brokers to charge for their services directly are on the way, fee-based annuities have been developed, and mutual funds and ETFs are lowering their prices.<sup>12</sup> Finally, technological advances are further lowering the price of financial advice. Already, account opening, rebalancing, and reporting has become automated,<sup>13</sup> lowering the marginal cost of new accounts. And the growth of low-cost fully automated advisory services puts downward pressure on advisory fees.<sup>14</sup>

These developments lower the cost of financial advice,<sup>15</sup> and so allow for advisers to profitably serve smaller accounts, which especially benefits lower-wage workers, those in dire need of retirement savings. Technology in particular has, as one commentator put it, “democratized high-quality, objective advice, once only available to high net worth investors.”<sup>16</sup> If opponents of the Rule fail to take advantage of these new opportunities, as some have threatened,<sup>17</sup> they do so at their own peril. Competitors will gladly take their market share.<sup>18</sup> To see this, you need look no further than the

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<sup>12</sup> See *id.* at 3-4; Consumer Fed’n Comment at 67; see also Comment Letter from Betterment LLC to U.S. Dep’t of Labor (“Betterment Comment”) 1-2 (Apr. 17, 2017) (“[T]he price of diversified index funds continues to fall.”), <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/01302.pdf>.

<sup>13</sup> Consumer Fed’n Comment at 69.

<sup>14</sup> See NELP Comment at 6-7.

<sup>15</sup> Arguments that any additional litigation or compliance risk caused by the Rule will increase the cost of advice are misplaced. Those firms already complying with it have generally not raised their prices. Comment Letter from AARP to U.S. Dep’t of Labor (“AARP Comment Letter”) 9 (Apr. 17, 2017), <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/01388.pdf>.

<sup>16</sup> Comment Letter from Financial Engines LLC to U.S. Dep’t of Labor (“Financial Engines Comment”) 5 (Feb. 24, 2017), <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/00001.pdf>; see also *id.* at 4-5 (“[W]e are confident the Conflict of Interest Rule or a similar regulation will further accelerate the trends toward low-cost, technology-based financial services and products, which will, in turn, make unconflicted advice increasingly cost-effective for advisors and accessible for investors of all means.”); Betterment Comment at 2 (“Today, more investors can access high-quality fiduciary advice regardless of balance.”)

<sup>17</sup> See, e.g., Comment Letter from Edward D. Jones & Co. L.P. to U.S. Dep’t of Labor 2-3 (Apr. 17, 2017), <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/01434.pdf>.

<sup>18</sup> Cf. Financial Engines Comment at 1 (“Our experience and market position demonstrate that it is possible to put the interests of customer first by providing personalized, unconflicted investment advice and still achieving solid business results, *even for investors with modest account balances.*” (emphasis added); AARP Comment Letter at 7 (“Given the trillions of dollars that continue to accumulate in 401(k) plans and IRA Market, there is no evidence – nor any reason to believe – that financial service providers will abandon this lucrative market.”).

advisory firms that have recently lowered minimum-account-balance requirements for individuals,<sup>19</sup> and those that have no such requirements at all.<sup>20</sup>

Of course, none of this information should be news to the Department, which concluded as much in its exhaustive regulatory impact analysis of the Rule last year. These findings – that the Fiduciary Rule would increase the availability of quality, affordable advisory services and that such would be the case even if some advisers left the market or adjusted their services – have been affirmed as reasonable by every court that has considered them.<sup>21</sup> In the face of supporting evidence described above, in addition to harming retirement savers, the Department would be exposing itself to significant legal risk to change course and further delay the Rule now.

Thank you for your consideration,

9to5, National Association of Working Women  
Americans for Financial Reform  
Consumer Federation of America  
Economic Policy Institute  
The Leadership Conference on Civil and Human Rights  
NAACP  
National Employment Law Project  
National Partnership for Women & Families  
National Women’s Law Center  
Pension Rights Center

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<sup>19</sup> See NELP Comment at 5.

<sup>20</sup> See Betterment Comment at 2.

<sup>21</sup> See Better Markets Comment 12-14 (discussing *Mkt. Synergy Grp. Inc. v. U.S. Dep’t of Labor*, No. 16-cv-4083, 2017 WL 661592 (D. Kan. Feb. 17, 2017); *U.S. Chamber of Commerce v. Hugler*, No. 16-cv-1476, 2017 WL514424 (N.D. Tex. Feb. 8, 2017); *Nat’l Ass’n for Fixed Annuities v. Perez*, No. 16-cv-1035, 2016 WL 6573480 (D.D.C. Nov. 4, 2016)).