

August 5, 2020

Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave., N.W.
Suite 400
Washington, D.C. 20210

Re: Application No. D-12011
Improving Investment Advice for Workers & Retirees

To whom it may concern:

The undersigned organizations and individuals, advocating on behalf of workers, consumers, investors, and retirees, are writing to express our strong opposition to the Department's proposed new retirement advice rulemaking package. We oppose both the final rule reinstating the 1975 regulatory definition of fiduciary investment advice and the proposed exemption allowing investment advice fiduciaries to earn conflicted compensation when providing advice regarding retirement plan and individual retirement account (IRA) investments.

Together, these rules would put the retirement security of millions of American workers and retirees at risk by exposing them to conflicted retirement investment advice without adequate protections to limit the harmful impact of those conflicts of interest. We therefore urge you to withdraw the regulatory package in its entirety and to begin again on a rulemaking proposal that prioritizes protecting retirement savers from the toxic conflicts of interest that pervade the financial services industry.

Workers and Retirees Need Reliable Retirement Investment Advice

In recent decades, defined contribution retirement accounts have replaced defined benefit pensions as the primary form of workplace retirement plan, leaving workers increasingly responsible for making the investment decisions necessary to fund a secure and independent retirement. According to Department of Labor data, 93.4 percent of pension plans in 2017 were defined contribution plans, and roughly 68 million Americans were responsible for directing some or all of their investments in a 401(k) type retirement plan.¹ Millions more, roughly 36 percent of U.S. households, owned an IRA as of mid-2019 either in addition to a workplace retirement plan or as their only retirement account, according to the Investment Company

¹ Employee Benefits Security Administration, U.S. Department of Labor, Private Pension Plan Bulletin Historical Tables and Graphs 1975-2017, September 2019
<https://www.dol.gov/sites/dolgov/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletin-historical-tables-and-graphs.pdf> at p. 1 and p. 32.

Institute.² At the same time as workers have taken on the burdens, and risks, of funding their own retirement, the investment choices available to these retirement savers have grown both more complex and riskier.

Unfortunately, workers and retirees have not kept pace with their evolving responsibilities for their retirement security and the increasing complexity of investing. As a result, many of these financially unsophisticated retirement savers turn to financial professionals for advice on how best to save and invest for retirement. But the choice among investment professionals can be equally difficult. Regardless of how they are otherwise regulated, most of the financial firms and professionals retirement savers turn to hold themselves out as trusted advice providers, including those who are regulated exclusively as salespeople. Given how these firms market their services and the relationships of trust and confidence that they cultivate with their clients, it is neither surprising nor unreasonable that retirement savers rely on these financial professionals as fiduciary advisers and most function as trusted advisers. All too often, however, the financial professionals retirement savers rely on operate in a business model that is rife with conflicts of interest and subject to weak, sales-oriented regulation.

Instead of protecting workers and retirees, the Department’s regulatory proposal would increase the risk that retirement savers would rely on conflicted advice, and sales recommendations dressed up as advice, while doing little to prevent conflicts of interest from tainting that advice. As a result, millions of financially vulnerable workers and retirees – individuals who need to make every dollar account – will continue to see billions of dollars a year siphoned out of their retirement accounts to enrich powerful financial firms and investment professionals.

The Department Has Made it Easy for Firms to Evade their Fiduciary Duty Entirely

We strongly oppose the Department’s decision to adopt a final rule reinstating the deeply flawed 1975 regulatory definition of fiduciary investment advice, with its five-part test, without even considering whether the definition should be revised to better protect retirement savers. By doing so, the Department is ensuring that most of the advice retirement savers rely on, including most rollover recommendations, will not be held to a fiduciary standard at all. Extensive changes to the definition are needed, including with regard to its application to rollovers, if retirement savers are to be adequately protected.

Under the definition, only advice that is provided on a regular basis is considered fiduciary investment advice. As a result, one-time recommendations, no matter how consequential, are carved out. When a firm does provide advice on a regular basis, it can still evade its fiduciary obligations by claiming it never intended for the advice to serve as “a primary basis” for the retirement saver’s investment decision. The reinstated definition also makes it easier for firms to disguise their advice as investor education and evade the fiduciary standard in that way. As a result, financial firms and investment professionals will only be retirement investment advice fiduciaries when they choose to be, even as they market themselves as trusted advisers and offer services retirement savers will reasonably rely on as fiduciary advice.

² Investment Company Institute, The Role of IRAs in US Households’ Saving for Retirement, 2019, ICI Research Perspective, December 2019, Vol. 25, No. 10 <https://ici.org/pdf/per25-10.pdf>.

As a practical matter, reinstating the five-part test also means that advice to retirement plan fiduciaries will virtually never be considered fiduciary investment advice. Workers will continue to suffer the consequences in the form of workplace retirement plans loaded up with high-cost, substandard investment options that erode the retirement savings of financially vulnerable retirement savers. They will lose out on billions of dollars in potential retirement savings as a result.

The impact on rollover recommendations will be particularly harmful. The Department pretends to extend new protections to rollover recommendations, by virtue of the fact that it has not reinstated a 2005 advisory opinion that took the absurd position that advice to roll assets out of a plan did not generally constitute fiduciary investment advice. However, by requiring rollover recommendations to satisfy all five parts of the five-part test, the DOL accomplishes much the same thing. Only rollovers to an ongoing advisory relationship will meet the test, and not always even then. As a practical matter, this means that few rollovers beyond those that are already subject to regulation under securities laws are likely to be covered by the DOL standard.

When it comes to recommendations to rollover to non-securities, the DOL standards will seldom if ever apply. For example, the Department is explicit in stating that a one-time recommendation to roll assets out of a plan to purchase an annuity would not be considered fiduciary investment advice. But this is precisely where the protections of a fiduciary standard are needed most. Non-securities, including certain annuities, commodities, and real estate, are among the most complex, opaque, illiquid, and costly investments sold to retail investors. They are typically sold subject to some of the most toxic compensation conflicts and the weakest sales standards.

By specifically excluding these recommendations from the definition of fiduciary investment advice, the Department unleashes financial professionals to advise retirement savers to take a lifetime of hard-earned savings and plunge it into a high-cost, low-quality investment that saddles the retirement saver with excessive risks and substandard returns. Misled into relying on these recommendations as trusted advice, workers and retirees are likely to lose billions of dollars a year as a result of this bad advice.

Because it strips retirement savers of the protections of a fiduciary standard precisely when the risks to the investor and the conflicts of interest are greatest, we urge you to withdraw this final rule and begin again on a definition of fiduciary investment advice that ensures that the full range of advisory services reasonably relied on by retirement savers as fiduciary investment advice is captured by the definition.

The Proposed Exemption Would Not Protect Retirement Savers from the Harmful Impact of Conflicted Advice

In addition to reopening loopholes in the definition of fiduciary investment advice, the Department is proposing a broad new exemption to the prohibited transaction provisions under ERISA and the tax code. This new PTE would allow investment advice fiduciaries who give advice with respect to workplace retirement plan and IRA investments to receive conflicted compensation that would otherwise be prohibited. The proposed exemption is largely based on the Securities and Exchange Commission's (SEC's) recently implemented Regulation Best

Interest (Reg. BI). Unfortunately, Reg. BI was drafted, not to protect investors from the harmful impact of conflicts of interest, but to preserve the brokerage industry’s ability to engage in a variety of practices that are profitable for brokers but harmful for investors. Importing such an industry-friendly approach into the retirement context will only increase the harm that retirement savers suffer when they receive conflicted advice.

Among the primary deficiencies in Reg. BI that the Department incorporates into the proposed exemption is its meaningless “best interest” standard. The SEC explicitly acknowledged in adopting Reg. BI that it is not a fiduciary standard. Moreover, the SEC has made clear that it will not interpret Reg. BI’s non-fiduciary “best interest” standard to require what any reasonable person would expect – that the broker recommend the investments she reasonably believes are the best available option for the investor from among those she has available to recommend. Instead of explaining what “best interest” means, the SEC has provided virtually unfettered discretion to brokerage firms to decide for themselves how to comply with the standard. As a result, it’s not clear to what extent, if any, Reg. BI actually raises the standard above the FINRA suitability framework. Under FINRA suitability, however, firms have been permitted to recommend the high-cost, low-quality investments that pay them more, but saddle the investor with excessive risks and substandard returns, instead of those that are best for the investor. For all these reasons, Reg. BI cannot serve as an appropriate basis for compliance with ERISA’s high fiduciary standard.

There are similar problems with the proposed exemption’s requirement that firms mitigate conflicts of interest, which is also modeled on Reg. BI. Here again, the SEC refused to say what types of conflicts of interest, if any, that are currently permitted under the FINRA suitability framework would be prohibited under Reg. BI or to provide any guidance on how permitted conflicts would have to be “mitigated” to satisfy the standard. Rather, the loud and clear signal that the SEC has sent is that firms can continue to structure their compensation and incentives in ways that are reasonably likely to encourage and reward harmful advice. For example, Reg. BI explicitly allows firms to continue to pay differential compensation to their registered representatives, which creates the incentive to recommend products that pay the highest compensation, even when alternatives are reasonably available that would be a better fit for the investor. In addition, Reg. BI explicitly allows firms to use a wide variety of sales contests, quotas, trips, and other special awards to encourage and reward production. These perverse incentives work to undermine rather than promote clients’ best interest. Production incentives, for example, encourage rollovers regardless of whether that is in the customer’s best interests. By echoing Reg. BI’s lax guidance on mitigating conflicts of interest, the DOL is sending the same message as the SEC – that the vast majority of conflicted practices can continue unabated under the proposed exemption.

Making matters worse, the exemption’s weak standard will be unenforceable for the millions of Americans who save for retirement through IRAs. That’s because there is no meaningful enforcement mechanism for IRA investors under the proposed exemption. The Department explicitly states in the rule proposal preamble that the standard does not create a private right of action, and DOL itself has no authority to enforce the standard as it applies to IRAs. As a result, IRA investors who are financially harmed by the conflicted advice unleashed by this proposal

would have no recourse and no ability to recover their losses. In consequence, there will be little incentive for firms to comply with the amendment's requirements when advising IRA investors.

Taken together, these fatal flaws in the proposal dramatically increase the risk that retirement savers will rely on investment advice that is tainted by conflicts of interest, and suffer serious financial harm as a result. For this reason, the Department cannot reasonably conclude that the exemption is sufficiently protective for retirement plans, plan participants, or IRA investors.

Conclusion

The Department cynically claims that this regulatory package is designed to improve investment advice for workers and retirees. It is clear, however, that the real goal is to protect the profitability of broker-dealers, insurance companies, and other financial institutions, even if it means sacrificing the retirement security of millions of Americans in the process. Because this proposal would expose retirement savers to increased risk and deprive them of essential protections under ERISA and the tax code, we urge you to withdraw the rule in its entirety.

Respectfully submitted,

Alliance for Retired Americans

American Federation of State, County and Municipal Employees (AFSCME)

Americans for Financial Reform Education Fund

Center for Economic Integrity

Center for Economic Justice

The Committee for the Fiduciary Standard

Consumer Action

Delaware Community Reinvestment Action Council, Inc.

Economic Policy Institute

Georgia Watch

International Federation of Professional and Technical Engineers

International Union of Bricklayers and Allied Craftworkers

Lynn Turner

Montrose Cones

National Committee to Preserve Social Security and Medicare

Pension Rights Center

Public Citizen

Take on Wall Street