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SPECIAL COMMITTEE ON AGING

United States Senate

August 5, 2020

Jeanne Klinefelter Wilson
Acting Assistant Secretary
Employee Benefits Security Administration
United States Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Improving Investment Advice for Workers and Retirees (ZRIN 1210-ZA29)

Dear Acting Assistant Secretary Wilson:

I write today to request a public hearing on the Department of Labor's (the Department) recently proposed prohibited transaction class exemption (PTE) entitled, "Improving Investment Advice for Workers and Retirees" and to request an extension of the comment period by an additional 60 days.¹

Financial advisers' conflicts of interest cost families an estimated \$17 billion every year.² My office has led a series of investigations on conflicts of interest in the annuity industry that showed how providers offer agents lavish kickbacks that can compromise retirees' savings.³ The Department's "Definition of the Term 'Fiduciary'; Conflict of Interest Rule-Retirement Investment Advice" Rule (Fiduciary Rule), finalized in 2016, would have protected investors from costly conflicts of interest and leveled the playing field for financial advisers who are already putting their clients' interests first.⁴ However, following a legal challenge led by now-Secretary of Labor Eugene Scalia on behalf of the Chamber of Commerce, the rule was vacated in March 2018.⁵

¹ Department of Labor, "Improving Investment Advice for Workers and Retirees," 85 FR 40834 (July 6, 2020), *available at* <https://www.federalregister.gov/documents/2020/07/07/2020-14261/improving-investment-advice-for-workers-and-retirees>.

² Council of Economic Advisers, "The Effects of Conflicted Investment Advice on Retirement Savings," February 2015, pp. 2, https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_coi_report_final.pdf.

³ Office of Senator Elizabeth Warren, "Villas, Castles, and Vacations: How Perks and Giveaways Create Conflicts of Interest in the Annuity Industry," October 2015, https://www.warren.senate.gov/files/documents/2015-10-27_Senator_Warren_Report_on_Annuity_Industry.pdf; Office of Senator Elizabeth Warren, "Villas, Castles, and Vacations: Americans' New Protections from Financial Adviser Kickbacks, High Fees, and Commissions are at Risk," February 2017, https://www.warren.senate.gov/files/documents/2017-2-3_Warren_DOL_Rule_Report.pdf.

⁴ Employee Benefits Security Administration, Federal Register Final Rule, "Definition of the Term 'Fiduciary'; Conflict of Interest Rule-Retirement Investment Advice," April 8, 2016, <https://www.federalregister.gov/documents/2016/04/08/2016-07924/definition-of-the-term-fiduciary-conflict-of-interest-rule-retirement-investment-advice>.


⁵ U.S. Chamber of Commerce v. U.S. Department of Labor, 885 F.3d 360, 388 (5th Circuit, 2018).

This PTE is the Department’s long-anticipated proposal to replace the vacated Fiduciary Rule and address standards of conduct for advisers providing advice regarding retirement investments. As such, the public engagement and review process for this PTE should be no less comprehensive than the standard established for the 2016 Fiduciary Rule. For that rule, the Department provided an initial 75-day comment period on the proposal, which it later extended by an additional 15 days.⁶ Following the comment period, the Department held a public hearing featuring the testimony of more than 75 speakers.⁷ Following the hearing, the Department made the transcript of the hearing publicly available, and accepted additional comments for another 16 days.⁸ In total the Department reviewed more than 300,000 submissions, including more than 3,000 comment letters.⁹

The 30-day comment period you have provided¹⁰ is not only substantially shorter than the comment period afforded to the public for the 2016 rule; it also only half the length of time for public comment that Executive Order 12866 recommends in order for agencies to “afford the public a meaningful opportunity to comment on any proposed regulation.”¹¹ In order to provide the public appropriate time to thoroughly review and provide comment on the PTE, the comment period should be extended by an additional 60 days. In addition, the Department should hold a public hearing on the proposal following the conclusion of this comment period, soliciting testimony from at least as many stakeholders as the hearing for the 2016 Fiduciary Rule. The hearing should include witnesses who have lost retirement savings as the result of conflicted advice from financial advisers and consumer advocates who have worked on behalf of such individuals.

Americans’ hard-earned savings should never be compromised by conflicts of interest. It is imperative that the Department treat this proposal with the seriousness it requires, and provide for an appropriate, substantive public review by extending the comment period and holding a hearing on the PTE. Thank you for your attention. I look forward to your response.

Sincerely,



Elizabeth Warren
United States Senator

⁶ Employee Benefits Security Administration, Federal Register Final Rule, “Definition of the Term ‘Fiduciary’; Conflict of Interest Rule-Retirement Investment Advice,” April 8, 2016, <https://www.federalregister.gov/documents/2016/04/08/2016-07924/definition-of-the-term-fiduciary-conflict-of-interest-rule-retirement-investment-advice>.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Department of Labor, “Improving Investment Advice for Workers and Retirees,” 85 FR 40834 (July 6, 2020), available at <https://www.federalregister.gov/documents/2020/07/07/2020-14261/improving-investment-advice-for-workers-and-retirees>.

¹¹ Exec. Order No. 12,866 §6(a)(1), 3 C.F.R. 638, 644 (1993) reprinted as amended in 5 U.S.C. § 601 note. <https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf>.