WASHINGTON, D.C.

601 Pennsylvania Avenue NW
South Building, Suite 600
Washington, D.C. 20004-2601

Phone: 202-638-5777
Fax: 202-638-7734

MADISON, WISCONSIN

P.O. Box 431
Madison, WI 53701-0431

5710 Mineral Point Road
Madison, WI 53705-4454

Phone: 608-231-4000
Toll-Free: 800-356-9655

Submitted via: Regulations.gov

March 16, 2017

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

RE: Proposed Extension of Applicability Date "Fiduciary" rule
Document Number: 2017-04096 and RIN: 1210-AB79

Dear Sir or Madam:

The Credit Union National Association (CUNA) appreciates the opportunity to comment on the U.S. Department of Labor's (DOL) proposed extension of applicability date of the "Fiduciary" rule. CUNA represents America's credit unions and their more than 100 million members.

CUNA supports the goal of this rule to protect investors and encourage all advisors to act in the investor's best interest. Nevertheless, we believe because of the complexity of this rule and the uncertainty about compliance deadlines and applicability, a delay and additional analysis of the Fiduciary rule would benefit credit union members.

Credit unions exist to serve their members, and inherent in the credit union movement and member-ownership structure is the motivation to act in a member's best interest. Credit unions offering investment services to their members aim to help American families of all means receive information about saving for retirement and planning for their future. While many large investment firms seek high net-worth clients, credit unions seek to provide services to their members in all financial situations and to make it easier for these individuals to map out financial plans. Working with their local credit union to achieve long-term financial goals, or to save for education or unplanned health emergencies is an important option for members.

We agree with the DOL's intent that credit union members, and all consumers, deserve the best possible service when seeking information about financial or retirement plans, or Individual Retirement Accounts (IRA). However, it is important to have rules that encourage and promote retirement savings rather than potentially chill the ability of credit unions, or other financial institutions, to provide these products and services. CUNA appreciates that the DOL included some of our requested clarifications from the proposed rule stage in the final rule, including some explanations about what is financial education versus advice. We believe these

WASHINGTON, D.C.
601 Pennsylvania Avenue NW
South Building, Suite 600
Washington, D.C. 20004-2601
Phone: 202-638-5777
Fax: 202-638-7734

MADISON, WISCONSIN
P.O. Box 431
Madison, WI 53701-0431
5710 Mineral Point Road
Madison, WI 53705-4454
Phone: 608-231-4000
Toll-Free: 800-356-9655

clarifications show that credit unions can continue to have broad conversations with their members about financial education, and also provide general information about opportunities to invest and save. However, more narrowly tailored conversations to a members' specific situation, in which the credit union or credit union employee receives any compensation including recommendations for rolling over a 401k or retirement plan, may not be excluded from coverage of the rule. Further analysis about whether these new requirements could curtail credit unions and credit union service organizations (CUSOs) from serving members with investment products and services could be beneficial.

As an overarching matter, we urge the DOL to consider whether the compliance burdens and current confusion in the market associated with implementing the rule could harm credit union members if the rule goes into effect on April 10.

Credit Unions Provide Retirement and Investment Products and Services to Their Members in all Financial Situations

Credit unions provide various products and services to allow for investment opportunities for members in all financial situations. Under the final rule, any person who renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do, so is considered a fiduciary.[1] Accordingly, credit unions providing these services may have to examine each individual product they offer and the specific compensation structure, marketing materials, and types of communications associated with it at the credit union. Notably, working with outside counsel or providers to understand whether this rule could apply is a compliance burden alone, and coming into compliance with the rule or an exemption to it can be an especially significant compliance burden. Uncertainty about whether this rule would go into effect on April 10, and whether changes would be made to it, over the past several months has contributed to the complexity of determining when and how to comply with the rule.

There are three situations in which credit unions are providing products and services where they could be impacted by the rule, or may take on the compliance burden of determining whether they are implicated by the rule.

1. *Credit Unions Offering Investment Products and Services through a Third Party*

For the majority of credit unions offering brokerage and investment advisory services, compliance with the Fiduciary rule will not be determined at the credit union level because many credit unions offering these services have arrangements with a third party that clearly outline the duties and responsibilities of each party in the arrangement. The third party offering retirement or IRA services in most situations will be responsible for their own compliance with applicable laws and standards, and is usually selling their products directly to members. Notably, most commission-based retirement products from CUSOs or other third parties will fall

[1] Department of Labor Fiduciary Rule, 81 Fed. Reg. 20,946 (2016).

WASHINGTON, D.C.

601 Pennsylvania Avenue NW
South Building, Suite 600
Washington, D.C. 20004-2601

Phone: 202-638-5777
Fax: 202-638-7734

MADISON, WISCONSIN

P.O. Box 431
Madison, WI 53701-0431

5710 Mineral Point Road
Madison, WI 53705-4454

Phone: 608-231-4000
Toll-Free: 800-356-9655

under the rule. Credit union employees who interface between credit union members and the third party are only involved in a minor way.[2] However, credit unions are required to conduct due diligence to ensure any third party arrangement and practice has proper controls in place and there is a reasonable belief that practices are compliant.

Depending on the structure of this arrangement, there are questions about whether a credit union could be liable for the actions of the third party, which is particularly important since the DOL's final rule creates a private right of action. Class action litigation could sweep in credit unions as sponsors of these brokers-dealers and investment advisers, if trial lawyers bring an action against multiple parties. Unfortunately, any class action defense would generate additional costs that are borne by the members of the credit union. This could have the effect of causing credit unions to engage in additional risk evaluation of collaborating with a third party to provide investment products and services for members.

2. *Credit Unions Sharing Employees with a Third Party such as a CUSO.*

Under other less common circumstances, credit unions could be directly swept into this rule if they share employees with a third party such as a broker-dealer or investment adviser. A letter issued by the National Credit Union Administration (NCUA) in 2010 provides some guidance about this type of arrangement stating:

> "No employee of a federal credit union may provide investment advice that would subject the employee or credit union to federal or state securities laws. A federal credit union, however, may offer investment advice services to its members by establishing a shared employee arrangement with a third party registered investment adviser. The dual employee may provide investment advice on behalf of the third party, but not the credit union. A federal credit union may also act as a finder to introduce or otherwise bring together an outside vendor of investment adviser services to its members or wholly or partly own a CUSO that provides investment adviser services."[3]

In the case of dual employees, depending on compensation structure and types of interactions the employee is having with members, it becomes less clear that the credit union employee and credit union is exempt from consideration as a fiduciary. Restructuring these employees, complying with the Fiduciary rule, or qualifying for an exemption could be a significant burden to a credit union.

3. *Credit Unions that Provide Information about Rolling Over a Retirement Plan into an IRA or Other Information that Previously was not Considered Investment Advice.*

[2] 12 C.F.R. § 721.3(g).
[3] National Credit Union Administration Letter to Federal Credit Unions, "Sales of Nondeposit Investments" Letter No.:10-FCU-03, available at http://www.ncua.gov/Resources/Pages/LFCU2010-03.aspx (December 2010).

While the NCUA has clarified that no employee of a federal credit union may provide investment advice that would subject the employee or credit union to federal or state securities laws, the Fiduciary rule sweeps in activities that typically in the past have fallen outside the scope of investment advice.[4] As noted, a credit union that gives "advice" in the accordance with the final rule when marketing its retirement investment products and services, including IRA rollovers, may now be deemed a fiduciary under the rule. If a credit union or a credit union employee is receiving compensation in connection with a discussion with a member concerning IRA investments or rollovers, or in connection with marketing or sales, the credit union depending on the circumstances could trigger fiduciary status unless it qualifies for an exemption. The mere task of determining applicability, determining what exemptions could apply, and potentially making changes to policies and procedures could add unnecessary regulatory burdens to credit unions seeking to provide members with investment services.

The DOL Should Delay the Applicability Date of the Rule for at least 180 Days

As noted, there has been uncertainty surrounding this rule and whether it would go into effect on April 10. A February 3, Presidential Memorandum indicated there could be changes to the rule.[5] It was also widely reported that the DOL sent a request to the Office of Management and Budget for a 180-day delay to the rule.[6] Accordingly, many stakeholders in the financial services industry were relying on at least a 180-day delay for compliance. In order to not unfairly disadvantage those relying on this public information, we urge the DOL to institute at least a 180-day delay to allow time for the credit union industry to understand any changes that are made to the rule, and allow additional time to understand any compliance complexities associated with the rule. This delay would also allow time for additional transparency for consumers seeking to understand whether any changes are being made to the rule.

Additional Analysis about Unintended Consequences of the Rule Could Benefit Consumers

In a Presidential Memorandum, the Administration directed the DOL to examine the Fiduciary rule to determine whether it may adversely affect the ability of Americans to gain access to retirement information and financial advice.[7] As part of this examination, it requested the DOL prepare an updated economic and legal analysis concerning the likely impact of the Fiduciary rule, which should consider, among other things, the following:

---

[4] *Id.*

[5] Presidential Memorandum on Fiduciary Duty Rule, available at https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-memorandum-fiduciary-duty-rule (Feb. 3, 2017).

[6] InvestmentNews, *Labor Department seeks 180-day delay of fiduciary rule: Reports*, available at http://www.investmentnews.com/article/20170210/FREE/170219998/labor-department-seeks-180-day-delay-of-fiduciary-rule-reports (Feb. 10, 2017).

[7] Presidential Memorandum on Fiduciary Duty Rule *supra* note 5.

WASHINGTON, D.C.

601 Pennsylvania Avenue NW
South Building, Suite 600
Washington, D.C. 20004-2601

Phone: 202-638-5777
Fax: 202-638-7734

MADISON, WISCONSIN

P.O. Box 431
Madison, WI 53701-0431

5710 Mineral Point Road
Madison, WI 53705-4454

Phone: 608-231-4000
Toll-Free: 800-356-9655

(i) Whether the anticipated applicability of the Fiduciary Duty Rule has harmed or is likely to harm investors due to a reduction of Americans' access to certain retirement savings offerings, retirement product structures, retirement savings information, or related financial advice;

(ii) Whether the anticipated applicability of the Fiduciary Duty Rule has resulted in dislocations or disruptions within the retirement services industry that may adversely affect investors or retirees; and

(iii) Whether the Fiduciary Duty Rule is likely to cause an increase in litigation and an increase in the prices that investors and retirees must pay to gain access to retirement services.

More informed policymaking that narrowly examines the impact of a rule on consumers is beneficial to credit union members. Moreover, additional efforts and research to ensure that credit union members are not harmed by unintended consequences of overly broad rules, and additional analysis about whether choices may be limited for consumers, is beneficial for all consumers. It is particularly important to ensure the consumers of modest means will continue to have opportunities to learn about how they can plan for their financial future.

Conclusion

Consumers benefits when credit unions can offer a full range of products and services to their members, including products to help families save for retirement and other purposes. Any unnecessary compliance burdens or uncertainty in this area for credit unions is not helpful to members. Accordingly, we support a delay of at least 180 days to the Fiduciary rule. Furthermore, we support efforts for additional research and legal and economic analysis about how the rule will affect consumers, particularly credit union members.

Thank you for the opportunity to comment on this proposal. If you have questions concerning our letter, please feel free to contact me.

Sincerely,

Leah Dempsey
Senior Director of Advocacy & Counsel
Ldempsey@cuna.coop
202-508-3636