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March 17, 2017

Office of Regulations and Interpretations
Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: Definition of the Term "Fiduciary" - Delay of Applicability Date
RIN 1210-AB79

Dear Sir or Madam:

The American Federation of State, County and Municipal Employees ("AFSCME") is the largest union in the AFL-CIO representing 1.6 million state and local government, health care and child care workers. AFSCME members participate in over 150 public pension systems whose assets total over \$1.7 trillion. In addition, the AFSCME Employees Pension Plan is a long-term shareholder governed by the Employee Retirement Income Security Act ("ERISA") that manages \$1 billion in assets for its participants, who are staff members of AFSCME and its affiliates.

We are writing to express our strong support for the Department of Labor's ("DOL's") conflict of interest rule and our strong opposition to the proposal to delay the rule's applicability date. AFSCME also previously submitted comments in support of the rule.¹ This rule strengthens protections for retirement savers by requiring financial advisers and their firms to provide retirement investment advice that is in their clients' best interests. These protections remain urgently needed and long overdue, and the DOL's proposal to delay the rule roughly a month before the rule takes effect is unacceptable. Delaying implementation would allow financial advisers and their firms to continue to engage in harmful practices that threaten the retirement security of their clients and hurt working people. Even according to the DOL's own analysis, this proposed delay is unjustified. It is past time to put the millions of Americans with workplace retirement plans first.

Current System Robs Retirees

For far too long, the current system has allowed the financial industry to quietly rob investors and retirees of their hard earned savings. Under current law, many financial advisers that workers and retirees turn to for retirement investment advice are legally allowed to make recommendations that serve their own self-interest, at their client's

¹ AFSCME Comment Letter (July 21, 2015), available at: <http://www.regulations.gov>.

expense. In its Regulatory Impact Analysis (“RIA”), the DOL extensively detailed a wide body of evidence showing that conflicted advice is widespread and causes serious harm to plan and IRA investors. The RIA found that advisers’ conflicts take a variety of forms and bias their advice in a variety of ways. Furthermore, it found adviser compensation arrangements are often calibrated to align their interests with those of their affiliates and product suppliers, rather than retirement investors. And advisers often are paid substantially more if they recommend investments and transactions that are highly profitable to the financial industry, even if they are not in investors’ best interests.

The losses that stem from conflicted advice are significant, as American workers are losing billions of dollars from excessive fees and poor performance in their retirement accounts. According to a 2015 White House Council of Economic Advisers report, the aggregate annual cost of conflicted advice to retirees is \$17 billion each year.² Retirement investors are losing \$1.4 billion every month from conflicted advice. The DOL’s RIA estimated that IRA holders receiving conflicted investment advice can expect their investments to underperform by an average of 50 to 100 basis points per year over the next 20 years. Based on “a careful review of the evidence, which consistently points to a substantial failure of the market for retirement advice,” the DOL concluded that the underperformance associated with conflicts of interest – in the mutual funds segment alone – could cost IRA investors between \$95 billion and \$189 billion over the next 10 years and between \$202 billion and \$404 billion over the next 20 years. And the DOL’s analysis found that these losses represent only a portion of what retirement investors stand to lose from adviser conflicts. These losses to retirement savers grow much larger when you consider the full range of products and accompanying conflicts that influence adviser recommendations.

The harm from conflicted advice is not limited to IRA investors, as plan participants experience substantial losses as a result of conflicts of interest as well. Here it should be noted that defined contribution plans and IRAs are intricately linked, as the overwhelming majority of money flowing into IRAs comes from rollovers from an employer-based retirement plan, and not direct IRA contributions. The DOL’s RIA found that an ERISA plan investor who rolls her retirement savings into an IRA could lose 6 to 12 and possibly as much as 23 percent of the value of her savings over 30 years of retirement by accepting advice from a conflicted financial adviser. The RIA also cites a GAO study, which found that defined benefit pension plans using consultants with undisclosed conflicts of interest earned 1.3 percentage points per year less than other plans. Another GAO report found that adviser conflicts may cause plan participants to roll plan assets into IRAs that charge high fees or 401(k) plan officials to include expensive or underperforming funds in investment menus. Other studies also support the RIA and GAO findings. For example, a study by the Center for Retirement Research at Boston College found that mutual fund companies involved in plan management often act in ways that appear to advance their interests at the expense of plan participants. The study found that this bias is especially pronounced in favor of affiliated funds that delivered sub-par returns over the preceding three years, and participants do not shift

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

their savings to undo this favoritism.³ Finally, a Yale study found that a significant portion of 401(k) plans establish poorly designed investment menus that lead investors to hold high-cost portfolios. The study showed that fees and menu restrictions cost investors seventy-eight basis points in excess of index funds.⁴

Rule Ends Conflicts, Benefits Investors

The DOL rule would directly address the problem of conflicted retirement investment advice in the plan and IRA contexts by requiring all financial advisers who provide retirement investment advice to serve their clients' best interest, not their own self-interest. Recent developments demonstrate how the DOL rule is transforming the way commission-based advice is offered, with enormous potential benefits for all investors, not just those saving for retirement. The rule is achieving these beneficial results in three areas without sacrificing retirement savers' access to advice or choice in how to pay for that advice. First, the rule is eliminating the most harmful conflicts associated with commission-based advice without eliminating access to commission-based advice. The Securities and Exchange Commission recently approved a request from the Capital Group to create a new class of "clean" mutual fund shares for its American Funds that conform to the DOL rule while preserving investors' ability to get commission-based advice.⁵ Secondly, most firms are continuing to offer commission-based retirement investment advice. A variety of firms, including Ameriprise, Morgan Stanley and Wells Fargo among others, have announced plans to rely on the best interest contract exemption in order to continue to offer commission-based retirement investment advice.⁶ Finally, the rule is already responsible for significant cost reductions. Here we note a number of major firms, including Schwab, Blackrock, Fidelity and Prudential, have announced plans to reduce costs on certain investment products, such as ETFs and mutual funds, at least in part to be more competitive under the DOL rule.⁷

Uncertainty from Delay Is Bad for Retirement Investors and Financial Advisers

Uncertainty from the proposed delay is bad not only for retirement savers, but also for the firms and financial advisers who have already made fundamental business changes in

³ Veronika K. Pool, Clemens Sialm, and Irina Stefanescu, "Are 401(k) Investment Menus Set Solely for Plan Participants?" Center for Retirement Research Boston College, August 2015, http://crr.bc.edu/wp-content/uploads/2015/08/IB_15-13.pdf

⁴ Ian Ayres & Quinn Curtis, "Beyond Diversification: The Pervasive Problem of Excessive Fees and "Dominated Funds" in 401(k) Plans," Yale Law Journal, March 2015, <http://www.yalelawjournal.org/article/excessive-fees-and-dominated-funds-in-401k-plans>

⁵ John Waggoner, "American Funds gets SEC approval for clean shares," InvestmentNews, January 13, 2017, <http://www.investmentnews.com/article/20170113/FREE/170119955/american-funds-gets-sec-approval-for-clean-shares>.

⁶ "Ameriprise will stick with IRA commissions under DOL fiduciary rule," InvestmentNews, October 26, 2016; "Morgan Stanley to keep commission-based IRA business despite DOL rule in contrast to Merrill Lynch," InvestmentNews, October 26, 2016; "Wells Fargo to keep commission retirement accounts under DOL fiduciary rule," InvestmentNews, December 2, 2016.

⁷ Consumer Federation of America, "The Department of Labor Conflict of Interest Rule is Already Delivering Benefits to Workers and Retirees: Delay Puts Those Benefits at Risk," January 31, 2017, http://consumerfed.org/wp-content/uploads/2017/01/1-31-17-DOL-Rule-Delivering-Benefits_Fact-Sheet.pdf.

anticipation of the rule being in effect on April 10th. Firms have spent more than a year and millions of dollars preparing for the rule. Many firms have made significant changes to their business models in order to comply. In response to a letter sent by United States Senator Elizabeth Warren, a number of firms including Capital One, Charles Schwab, Fidelity, John Hancock, Principal Financial Group, RBC, TIAA-CREF, Transamerica, U.S. Bancorp and Wells Fargo, responded they had devoted time and resources to meeting the April 10, 2017 implementation date and all expressed confidence that they would indeed be ready to comply on that date.⁸ Capriciously delaying a rule that firms were prepared to implement and abide by is unnecessarily disruptive to the marketplace and all participants.

Delaying implementation of the rule will undermine the progress that has already been achieved from early adoption efforts. Worse, it could result in firms rescinding pro-investor changes and backsliding to pre-fiduciary, conflicted standards that cost retirees billions each year. As a result, retirement savers will lose billions if a delay is allowed. Here it should be noted that those who oppose the rule have a financial interest in maintaining the status quo. Many large financial firms are against the rule because it will force them to stop overcharging retirees billions and billions of dollars per year. Any delay in implementation of the DOL rule will result in continued financial harm to retirement savers.

Latest Economic Analysis Is Inadequate, Understates Harm from Delay

Moreover, the DOL's latest economic analysis in support of the delay is deficient in looking at the scope of market affected by conflicted advice. It looks at only one segment of the market -- mutual funds in IRAs. This leaves out the costs to retirement savers from other products, including various annuities and non-traded REITs, for example, or the costs to plan investors, as discussed above. Not considering these additional costs, as well as other sources of conflicts of interest that ultimately harm retirement savers, is a fundamental flaw that undercounts the costs to investors. Yet even using the DOL's incomplete analysis, the proposed delay cannot be justified on a cost-benefit basis. The DOL projects that a 60-day delay could reduce annualized investor gains by \$104 million using a three percent discount rate, and \$87 million using a seven percent discount rate. In contrast, the DOL projects annualized compliance savings for the industry would only be \$8 million using a three percent discount rate, and \$9 million using a seven percent discount rate. The DOL's own flawed analysis of the projected financial harm to retirement savers far outweighs the projected industry savings from a delay.

Conclusion

The proposed delay and extended comment period is a harmful stall and delay tactic in search of alternative facts for a rule that has already been thoroughly vetted. The DOL should seriously rethink its apparent position to allow the investment industry to continue putting its interests first over retirement savers with this delay. Any delay in implementation of the rule will be expensive and harmful to retirement investors, and the longer the rule is delayed, the greater this financial harm will be. Americans who work hard, play by the rules and struggle to save for

⁸ Letter from United State Senator Elizabeth Warren to Acting Department of Labor Secretary Edward Hugler, February 7, 2017, http://www.warren.senate.gov/files/documents/2017-2-7_Warren_Ltr_to_DOL.pdf.

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retirement should get a fair deal and not be victimized by a system that incentivizes financial advisers to act against the best financial interest of their clients. Accordingly, the DOL should conclude that the proposed delay is unjustified and that the rule should be implemented beginning on April 10th.

We appreciate the opportunity to share our views on this proposed delay. If you have any questions, or need additional information, please do not hesitate to contact John Keenan at (202) 429-1232.

Sincerely,



Steven Kreisberg
Director
Department of Research
& Collective Bargaining

SK/dd