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National Association of Federally-Insured Credit Unions

March 17, 2017

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5665
U.S. Department of Labor
200 Constitution Avenue NW
Washington, D.C. 20210

Re: Definition of Term Fiduciary; Conflict of Interest Rule-Retirement Investment
RIN: 1210-AB79

Dear Sir/Madam,

On behalf of the National Association of Federally-Insured Credit Unions (NAFCU), the only national trade association focusing exclusively on federal issues affecting the nation's federally-insured credit unions, I would like to share with you NAFCU's thoughts on the proposed extension of the Department of Labor's (DOL) "Fiduciary Duty Rule." NAFCU fully supports the 60 day extension of the date of applicability and also believes that the Department of Labor should revoke its final rule defining who is a fiduciary of an employee benefit plan under the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code—or in the alternative, exempt credit unions from the rule.

Credit unions are different than most other types of financial institutions. Since the Great Depression, the credit union industry has defined itself as "not for profit, not for charity, but for service," and that shared philosophy has endured to this day. As financial cooperatives directed by volunteer boards, credit unions exist for the primary purpose of serving their membership—not for earning fees on investment brokerage.

The National Credit Union Administration (NCUA) has traditionally stated that federal credit unions may not act as broker-dealers in securities or provide investment advice of the type that would render them "investment advisers" under state or federal securities laws.[1] While the Fiduciary Duty Rule covers these types of activities, it also covers transactions and relationships that are significantly broader in scope, including a significant number of transactions and relationships relating to individual retirement accounts (IRAs).

[1] *See,* NCUA Letter to Federal Credit Unions 10-FCU-03 (Dec. 2010) (broker-dealers); NCUA Legal Opinion Letter 09-0511 (June 3, 2009) (investment advisers).

NAFCU and our members are concerned that the Fiduciary Duty Rule casts a wide net that unfairly burdens credit union activity with complex requirements and potential litigation risk. For example, the requirements of the rule are triggered when an individual provides a “recommendation,” which is defined as a “a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action.”[2]

Given the rule's extraordinarily broad scope, credit unions may decide that it is no longer worthwhile to recommend an investment advisory credit union service organization (CUSO) to a member to either set up an IRA or create an employee welfare benefit plan (if the member is a business). This is because the Fiduciary Duty Rule defines “investment advice” to include “a recommendation as to the…selection of other persons to provide investment advice or investment management services.”[3]

Along similar lines, a credit union may decide to withhold certain investment recommendations relating to rollovers or transfers that would otherwise constitute sound investment advice. This is because an individual is also considered to be providing “investment advice” under the Fiduciary Duty Rule if he or she makes recommendations with respect to rollovers, transfers, or distributions from a plan or IRA, “including whether, in what amount, in what form, and to what destination such a rollover, transfer, or distribution should be made.”[4]

Although the Fiduciary Duty Rule provides a Best Interest Contract Exemption, it imposes costly burdens by requiring credit unions to adopt anti-conflict policies before offering certain retirement planning recommendations. Credit unions frequently rely on third parties or CUSOs to act as broker-dealers; however, the rule would require extensive analysis of existing business relationships to determine whether there are conflicts of interest. Performing this type of analysis on a semi-regular basis will impact the prices consumers must pay to access retirement planning services and disrupt existing third party arrangements, resulting in less choice and fewer options among investment products. Traditionally, credit unions have served their members' best interests by building trusted relationships, and the success of the credit union model has never depended upon the imposition of sweeping fiduciary standards.

NAFCU believes that there is little merit in requiring credit unions to comply with a complex fiduciary duty requirement when there is minimal, if any, data indicating that potential conflicts of interest have negatively impacted credit union member service. Conversely, there is no shortage of evidence describing the costs and accompanying reduction in consumer choice that would follow enforcement of the rule. Accordingly, DOL should revoke its Fiduciary Duty Rule in order to promptly comply with the February 3, 2017 Presidential Memorandum directing DOL to rescind the rule should if it frustrates the Administration's goal of advancing financial choice and independence. Alternatively, DOL should seek to exempt all credit unions from the scope of the final rule.

[2] 29 C.F.R. § 2510.3-21(b)(1).
[3] 29 U.S.C. § 2510.3-21(a)(1)(ii).
[4] 29 C.F.R. § 2510.3-21(a)(1)(ii).

NAFCU appreciates the chance to submit comments regarding DOL's proposed extension. Should you have any questions or concerns, please do not hesitate to contact me at amorris@nafcu.org or (703) 842-2266.

Sincerely,

Andrew Morris
Regulatory Affairs Counsel