

March 17, 2017

Office of Exemption Determinations
Employee Benefits Security Administration
Room N-5655
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

To Whom It May Concern:

This comment is submitted by the Center for American Progress, or CAP, a progressive, nonpartisan think tank dedicated to improving the lives of Americans through ideas and action. As part of its efforts to reduce poverty and ensure a stable middle class, CAP promotes policies to improve the financial well-being of low- and moderate-income households and promote a financial system that works for everyone.

We are writing to express our strong support for the Department of Labor’s conflict of interest rule and to oppose any delay in the rule’s applicability date. Given the extensive rulemaking process that has already taken place, there is no justification for continued analysis at this time. After withdrawing an initial proposal in 2011, the Department re-proposed the rule in 2015, holding two public comment periods and four days of hearings culminating in over 300,000 public comments. It is unreasonable to claim affected entities have not had a chance to weigh in at this point, whether through rulemaking, legislation, or in the courts.

The conflict of interest rule, as finalized, closes a loophole that has existed for over four decades allowing financial sales pitches to be construed as impartial, personalized investment advice. It ensures that the over \$181 billion¹ per year in tax expenditures for pensions and retirement savings ultimately serve their function of ensuring a secure and dignified retirement for savers, rather than allowing savings to be eroded through high fees and conflicted advice. And by protecting investors from self-dealing, expensive sales pitches that deplete their nest eggs, it also reduces the burden on taxpayers when retirement savings fall short. These costs, among others, have not been factored into the Department’s analysis.

Even so, the Department’s most recent economic analysis does effectively illustrate part of the harm that a delay would cause. Even by focusing on one segment of the market—Individual Retirement Accounts, or IRAs—it clearly demonstrates costs to investors that greatly outweigh the unrealized compliance costs of firms. Over ten years, investors could lose as much as \$890 million from just a 60-day delay as higher fees compound over time, while the delay would only save companies \$42 million in reduced compliance costs in the interim. When considering other forms of conflicted advice, such as various annuity products, the difference between the rule’s cost to investors and benefit to firms only grows wider.

¹ “Table 14–1. Estimates of Total Income Tax Expenditures for Fiscal Years 2015–2025,” *Analytical Perspectives, Budget of the United States Government, Fiscal Year 2017*, available at https://obamawhitehouse.archives.gov/sites/default/files/omb/budget/fy2017/assets/ap_14_expenditures.pdf.

Higher costs to investors under a conflicted advice regime can be highly damaging to investor returns in the long run. Even a 75 basis point difference in fees for a young worker could result in \$100,000 of additional fees across a lifetime—equivalent to working three additional years to achieve the same level of retirement adequacy.² Given substantial evidence of the harms posed by conflicted advice to date, including the Department’s previous analyses, any new cost-benefit analysis arguing in favor of a delay and against the rule would clearly be rooted in alternative facts. Indeed, should the Department move forward on an extended delay in order to scrutinize the rule, the costs to investors will only accelerate.

Product marketing to former federal employees demonstrates the expensive and unnecessary nature of conflicted investment advice. Despite having access to what has been described as “the best retirement plan ever” and “a model for others to follow”³, nearly half of all federal employees take money out of the TSP when they leave the government and face fees that are at least 20 times higher—an extremely costly decision.⁴ Allowing this regime to continue ultimately weakens the valuable retirement benefits provided to federal employees, including veterans, that are designed to help them meet their future financial needs.

There is no legitimate business justification for a delay. Markets are already responding to the rule—in effect, delaying and modifying the rule would be more disruptive to business than moving forward as planned. Twenty-one large financial services companies recently responded to an information request by Senator Elizabeth Warren stating that they have invested in adapting their practices for this rule and are prepared to comply with it.⁵ And a number of newer firms have welcomed the rule for increasing transparency, accountability, and competition in the market for financial advice.

Meanwhile, because the rule is limited to tax-advantaged retirement accounts under which individuals and plans seek professional advice, it does not meaningfully reduce consumer choice. It merely provides a mechanism to ensure that marketing by firms matches the true role fulfilled by the professionals at these firms. A recent analysis of 25 firms affected by the rule and whose trade associations have advocated against it finds that they all refer to their employees as “financial advisors” rather than salespeople and create the expectation that they provide investment “advice” and retirement “planning” rather than product sales.⁶ Meanwhile, in court filings, they have considered their representatives to be “salespeople” who should not be subject to a fiduciary standard. It is up to the Department to reconcile these two

² Jennifer Erickson and David Madland, “Fixing the Drain on Retirement Savings: How Retirement Fees Are Straining the Middle Class and What We Can Do about Them” (Washington: Center for American Progress, 2014), available at <https://www.americanprogress.org/issues/economy/report/2014/04/11/87503/fixing-the-drain-on-retirement-savings/>.

³ The Motley Fool, “What Is the Thrift Savings Plan?” available at <https://www.fool.com/knowledge-center/what-is-the-thrift-savings-plan.aspx> (last accessed March 2017).

⁴ John Hechinger, “Brokers Lure Soldiers Out of Low-Fee Federal Retirement Plan,” *Bloomberg News*, August 12, 2014, available at <http://www.bloomberg.com/news/articles/2014-08-12/brokers-lure-soldiers-out-of-low-fee-federal-retirement-plan>.

⁵ Letter from Senator Elizabeth Warren to Edward Hugler, Acting Secretary of Labor, February 7, 2017, available at https://www.warren.senate.gov/files/documents/2017-2-7_Warren_Ltr_to_DOL.pdf.

⁶ Micah Hauptman and Barbara Roper, “Financial Advisor or Investment Salesperson? Brokers and Insurers Want to Have It Both Ways” (Washington: Consumer Federation of America, 2017), available at http://consumerfed.org/wp-content/uploads/2017/01/1-18-17-Advisor-or-Salesperson_Report.pdf.

statements, and we would urge that it fulfill the expectations of consumers who overwhelmingly expect that financial professionals act in their clients' best interest⁷ and support keeping the rule.⁸

Holding financial professionals to a true best interest standard, as the Department's final rule does, is a position shared by investment industry experts. As former Securities and Exchange Commission Chairman Arthur Levitt stated, "I think people of modest means are the ones who need this rule more than any other type of investor."⁹ Jack Bogle, founder of Vanguard, stated that with the growth of low-cost funds, "all of this makes it seem like it will be hard to walk back this fiduciary rule into oblivion... Who are you making money for—your firm or your client?"¹⁰ Any proposed delay in implementing the rule would only continue to harm retirement investors and enlarge the gap between their expectations of financial professionals and the services they ultimately receive.

The Department of Labor's rule already reflects a balanced approach to the decades-old problem of conflicted retirement advice, and any effort to delay the rule will only increase costs to consumers and uncertainty for financial markets. Thank you again for the opportunity to comment. If you would like to discuss anything in this letter in more detail, please contact Joe Valenti, Director of Consumer Finance, at jvalenti@americanprogress.org.

Sincerely,
Joe Valenti
Director of Consumer Finance
Center for American Progress

⁷ In a 2015 survey of retirement investors, 87 percent considered it "very important" or "somewhat important" that advisors be legally required to act in investors' best interests. Financial Engines, "The human touch: The role of financial advisors in a changing advice landscape," October 2015, available at <http://corp.financialengines.com/research/FE-The-Role-of-Financial-Advisors-1015.pdf>.

⁸ For example, in a December 2016 Glover Park Group poll of self-described Trump voters, 65 percent support keeping the Department's rule in place: "GPG Survey of Trump Voters, December 2016," available at <http://gpg.com/gpg-survey-trump-voters-december-2016/>.

⁹ U.S. Department of Labor, "Arthur Levitt: Move Forward on the Fiduciary Standard," available at <https://www.youtube.com/watch?v=7zycY3rn6pc>.

¹⁰ Mitch Tuchman, "Jack Bogle: Despite Trump, 'clients first' fiduciary rule is here to stay," *MarketWatch*, January 28, 2017, available at <http://www.marketwatch.com/story/jack-bogle-despite-trump-clients-first-fiduciary-rule-is-here-to-stay-2017-01-26>.