The Commonwealth of Massachusetts

Secretary of the Commonwealth
State House, Boston, Massachusetts 02133

William Francis Galvin
Secretary of the Commonwealth

March 13, 2017

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

RE: Comments Opposing the Proposed 60-Day Delay in the Applicability of the Fiduciary Rule
RIN 1210-AB79

To Whom It May Concern:

As chief securities regulator for the Commonwealth of Massachusetts, I am writing to strongly oppose the U.S. Department of Labor's (the "Department") proposal to delay by at least sixty days, from April 10, 2017 to June 9, 2017, the applicability of the Department's rule titled "Definition of the Term 'Fiduciary;' Conflict of Interest Rule – Retirement Advice" (the "Fiduciary Rule" or the "Rule"), published in the Federal Register on April 8, 2016.

The Fiduciary Rule will protect retirement investors from the hazards created by conflicted retirement investment advice. In too many cases, the advice provided to workers saving for retirement is merely a sales pitch for an expensive financial product. The Fiduciary Rule will protect investors from the impact of excessive fees, abusive practices, and fraud. Moreover, it will address the retirement savings crisis by helping more working people successfully prepare for their retirement. The Rule should be adopted without delay.

Most of the comment letters (many are identical form letters) filed with the Department of Labor, which support the proposed delay, clearly represent the interests of those who financially benefit from current financial industry standards. Those standards allow, and even foster, conflicted retirement investment advice. I urge the Department to disregard the poorly supported arguments, driven by self-interest, that some segments of the investment industry have raised in support of the delay. Their real agenda is to protect their conflicted business models by watering down the Rule or by preventing its adoption altogether.

Examples of Harm Caused by Conflicted Investment Advice

Some financial services firms are asserting that investors will suffer a loss of choice if it becomes impracticable to sell them high-cost investment products under the Fiduciary Rule. This argument is ludicrous. It has been demonstrated repeatedly that investors' interests are protected, they pay less in fees, and have greater retirement savings if they invest using lower-cost investment products.

In contrast to the hypothetical harms described by the opponents of the Fiduciary Rule, the Office of the Secretary of the Commonwealth (the "Office") has seen repeated instances of the grievous harm that investors suffer due to conflicted investment advice. In my July 2015 comment letter to the Department, I included several examples of investors who were harmed by advice that was not in their best interest.[1] Those problems and practices have not gone away: I offer the following additional examples of investor harm, which have occurred since my last letter, in support of these comments.

a) **<u>Enforcement Action: Abuse in IRA Roll-Overs and Annuity Sales</u>**

Last year, my Office filed an enforcement action against a large independent broker-dealer relating to misconduct by one of its agents. My Office alleged that the agent engaged in fraudulent conduct in handling retirement funds of former hospital employees, including several nurses and hospital administrators.

Specifically, my Office alleged that the agent sold identical, illiquid and high-commission variable annuities to many of his clients. The enforcement allegations included that the agent switched many of his clients from one variable annuity to another causing his clients to incur surrender charges but earning the agent and the firm healthy commissions on the sales.

The firm missed numerous red flags and failed to take action against the agent until my Office filed its complaint. The firm settled the matter and paid a fine, disgorged commissions received from the variable annuity sales, and agreed to pay surrender fees and losses incurred by the clients on the variable annuities.

b) **<u>Enforcement Action: Abuse through Churning of an IRA Account</u>**

My Office carried out an investigation and filed an administrative complaint in 2016 against a brokerage firm and one of its agents for engaging in abusive sales practices in the accounts of one retired Massachusetts resident.

The complaint alleged that one of the firm's agents churned the client's IRA, generating over $100,000 in commissions to himself and the firm. The complaint described that the assets that the retired investor entrusted to the firm constituted substantially all of his liquid assets that he had saved and invested for retirement. The commissions and fees caused by the agent's

[1] Comments from Secretary of the Commonwealth of Massachusetts, William F. Galvin, July 21, 2015, https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA25/00231.pdf .

excessive trading activity ultimately negated any gains in the investor's account and the client's IRA suffered a significant loss in value, the complaint alleged.

The complaint further detailed that another agent in the firm later over-concentrated the retired investor's IRA in an oil and gas investment, which at one point made up over 70% of the retired investor's account. The oil and gas company ultimately went bankrupt and caused significant losses to the client.

c) Enforcement Action: Abuse in Sales of Illiquid Alternative Investments

In 2016, my Office filed a case that alleged that a brokerage firm and one of its agents engaged in dishonest and unethical conduct in one of his client's IRAs. The complaint described that the broker convinced his client, a widow in her 60s, to purchase $150,000 worth of non-traded real estate investment trusts ("Non-Traded REITs").

The complaint asserted that the broker earned commissions on the sales of the Non-Traded REITs but failed to explain the nature of these alternative investments to the client. The client was later unable to sell one of the Non-Traded REITs for which she had paid $50,000, as it was illiquid, the complaint alleged.

The alleged violations included that the same broker also traded excessively in the client's IRA to generate substantial commissions on the trades for both himself and the firm. The case asserted that the client incurred significant transaction costs due to the excessive trading, and ultimately incurred large investment losses.

Delaying the Fiduciary Rule Will Create Uncertainty and Disruption

As the Department is well aware, the Fiduciary Rule has been a years-long project. It was adopted after an exhaustive public comment process, which resulted in significant revisions to the Rule as originally proposed. Industry participants have been given a long lead-time to prepare, and my Office has seen the steps that product sponsors, brokers-dealers, and investment advisers have taken to meet the requirements of the Rule by April 10th.

To help promote an orderly transition to the Fiduciary Rule, my Office held a training program for Massachusetts investment advisers that featured expert speakers. Over 350 investment advisers attended the program and they showed a strong interest in meeting the requirements of the Rule.

Delaying the applicability of the Rule will create massive uncertainty for firms that are working to establish a framework for providing retirement advice going forward. This uncertainty will be bad for business, bad for regulators, and bad for compliance efforts. Moreover, it is certain that such a delay will confuse customers who greatly need sound retirement financial advice.

We Must Establish and Preserve Strong Rules to Protect Retirement Savings

The drafters of ERISA wisely included one of the strongest fiduciary standards in any body of law. This strong standard is appropriate because the process of accumulating retirement funds is slow, and retirement funds typically cannot be replaced once they are lost.

We note that the form comment letter submitted by many financial firms and salespeople promotes the approach of addressing adviser conflicts of interest by merely disclosing those conflicts to the customer. Such an approach is fundamentally wrong because it represents, at best, a watered down fiduciary duty. Moreover, allowing advisers to "cure" conflicts through disclosure would heighten the confusion that many investors now have regarding whether their broker is merely a salesperson or an adviser who must act in their best interest.

The Fiduciary Rule represents a victory for retirement savers and for this country as a way to address the retirement savings crisis. I urge you to reject the proposed delay of the Rule and defend it from revisions that will make retirement savers vulnerable to conflicted advice.

Please contact me or Bryan Lantagne, Director of the Massachusetts Securities Division, at (617) 727-3548, if you have questions or if we can assist in any way.

Sincerely,

William F. Galvin
Secretary of the Commonwealth
Commonwealth of Massachusetts