March 16, 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

Via Email to EBSA.FiduciaryRuleExamination@dol.gov
Re: RIN 1210-AB79 DOL Conflict of Interest - Fiduciary Rule

To the Department of Labor:

I strongly support the implementation of the current DOL Conflict of Interest - Fiduciary Rule and strongly oppose any delay of the rule.

There is no reasonable or justifiable basis for any delay. In fact, the DOL has already conducted a full review and justification including a legal and economic analysis, concluding that the Rule is necessary in order for Americans to save and invest for retirement. Courts have supported the Rule. The Rule, effective last year, should be made applicable as scheduled on April 10th.

Any delay of the Fiduciary Rule would be arbitrary and capricious. In addition, any delay would be unlikely to withstand legal scrutiny.

This comment letter was written by me as an individual and expresses my own views. It was not written on behalf of any entity I may be associated with. I have worked under, studied, written about and guided colleagues with regard to prudent investment fiduciary practices for many years. I have a consulting practice, FiduciaryPath. In my role as an Accredited Investment Fiduciary Analyst® with the Centre for Fiduciary Excellence (CEFEX), I am invited in as an independent third-party to analyze the fiduciary process of Registered Investment Adviser firms that wish to have their prudent practices assessed, verified, peer-reviewed and certified by CEFEX. And I am Editor of the fi360 Fiduciary Standard Survey.

I am also a founder and immediate past Chair of The Committee for the Fiduciary Standard, an all-volunteer group of fiduciaries and fiduciary experts. The Committee advocates for the fiduciary standard because we know fiduciary advice and/or investment management leads to optimal investor outcomes.

Better retirement investor outcomes are strongly in the public interest.

In the retirement context, the goal is ultimately a bigger nest egg, via a diversified portfolio to mitigate risk and improve risk-adjusted performance, so that retirement investors can retire with dignity and financial security. We advocate on behalf of investors, not ourselves. Can those who oppose the Fiduciary Rule say that? None that I can identify. In fact all who oppose this rule have a financial axe to grind.

To be clear, Registered Investment Advisers – already fiduciaries – stand to lose an important competitive distinction when all firms working with retirement investors must act as fiduciaries. But it is so important that every American who sacrifices to save for their own retirement should have advice that is in their best interest, it supersedes that competitive differentiator. Retirement investors need – and believe they are already getting – advice that is in their best interest. Nothing less will help them to achieve their goal of a secure retirement.

I refer you to The Committee's letter of strong support for the Fiduciary Rule and strong opposition of any delay. The Committee's letter notes: "Since the [Fiduciary] Rule was made effective, there have been five lawsuits (consolidated from nine) from non-fiduciary entities protesting that they would now have to place retirement investors' best interests before their own and seeking to stay the Rule. Courts, ruling in four[1] of the five cases so far, have found in favor of the DOL Fiduciary Rule and retirement investors, noting that delay would not be in the public interest."

"Kansas U.S. District Court Judge Daniel Crabtree said, "*An injunction will lead to confusion about the law and likely produce unwarranted delay. This is not in the public's interest. Any injunction thus will produce a public harm that outweighs any harm that plaintiff may sustain from the rule change*." "

This confusion is already happening because of this new DOL's proposal to delay the Fiduciary Rule.

"Judge Crabtree added: DOL "*has concluded that significant public interests favor the proposed regulatory changes. As already explained, evidence in the administrative record supports the DOL's determination, and the court finds no basis for contradicting those findings*." "

The new Administration instructed DOL to propose a delay of the DOL Conflict of Interest - Fiduciary Rule that protects retirement savers from conflicts of interest in retirement advice. *That is a mistake, one with serious and immediate, as well as long term, irrevocable consequences for retirement investors.*

With any delay, according to DOL's own analysis during rulemaking, non-fiduciaries will continue extracting more than $17 billion each year in excess commissions and fees from retirement savers. That's $45 Million each day of delay; $1.5 Billion a month; $17 Billion a year – money that the rule would have redirected from Wall Street to retirement investors.

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[1] Washington DC Court Case 1:16-cv-01035-RDM Document 55 Filed 11/23/16
https://assets.documentcloud.org/documents/3224894/NAFA-20161123.pdf
Kansas Court Case 5:16-cv-04083-DDC-KGS Document 59 Filed 11/28/16
https://assets.documentcloud.org/documents/3226360/Market-Synergy-DOL-20161128.pdf
Texas Court Case 3:16-cv-01476-M Document 137 Filed 02/08/17
http://courthousenews.com/wp-content/uploads/2017/02/Adviser-Rule.pdf
Minnesota Court CASE 0:16-cv-03289-SRN-HB Document 44 Filed 02/21/17
https://assets.documentcloud.org/documents/3472998/Thrivent-Order-Minnesota.pdf

The DOL Fiduciary Rule has triggered a race to the top, rather than to the bottom in a way that benefits investors and also the firms that embrace genuinely placing investor's best interests before their own.

I don't know of any investor advocate who says that fiduciary advice should be provided for free. In fact, the model for firms whose investment fiduciary process is certified by independent fiduciary analysts, like me – and reviewed every year – is typically compensation via a reasonable, transparent, fee-only model. The fee-only model is typically based on a percentage of assets under management (AUM), hourly fee or flat fee. Fee-only fiduciary advisors receive no other compensation and therefore are free to choose the investments that best diversify client's assets, without regard to their own compensation.

This eliminates many of the most serious financial conflicts of interest inherent in the insurance and broker-dealer world. In addition, in a recent survey of financial intermediaries in the field, who work with investors every day, Nearly 91% say no, it does not cost more to work with a fiduciary advisor than a broker. Many respondents [2]commented that it costs less – and for more services.

Hidden Costs Investors Pay

While some 401(k)-type retirement plans may choose to use mutual funds that provide revenue sharing in order to defray the plan's costs for recordkeeping or administration, that revenue share does not go to salesperson. Instead, it is credited to the plan, strictly for those expenses. Any revenue share in excess of plan's costs is credited to plan participants annually. In other words, that kind of revenue sharing is not paid to the fee-only fiduciary advisor – it's used strictly for the plan's benefit. However, many fiduciaries encourage plan sponsors to move to lower expense share classes that do not have revenue sharing at all. The plan sponsor would simply pay the recordkeeping and administrative expenses directly. This separates the participant's investment performance from the plan's expenses and is considered a better practice. It is also a cost that can be less expensive if paid directly rather than through revenue sharing.

In contrast, when variable commissions and revenue sharing payments go to a non-fiduciary broker, insurance agent or other non-fiduciary as happens now, plan participants suffer, from expense drag and high costs that ultimately result in worse performance, less to reinvest and compound and smaller nest eggs. This can take away half of a retirement investor's nest egg over a career of saving for retirement.

The loopholes that opponents to the rule wish to preserve, permit the systematic overcharging of American retirees' nest eggs, allowing companies to siphon off half of a retirement nest egg over the years. According to Yale University's endowment manager, David Swenson notes[3] that just 2% in excess commissions or fees, <u>reduces retirees' nest eggs by at least half</u>. As investors save

[2] p 32, "Seeking Trustworthy Advice for Individual Investors – Findings of the 2015 fi360 Fiduciary Standard Survey." http://www.fi360.com/uploads/media/2015fiduciarysurvey.pdf
[3] "Three Investment Gurus Share Their Model Portfolios, NPR. http://www.npr.org/2015/10/17/436993646/three-investment-gurus-share-their-model-portfolios

during their working years, DOL's own research pointed out that just 1% in excess fees strips out 28% of their nest egg, leaving retirees with less to put to work in the American economy during the retirement years, and more reliant on Social Security.

Over the long term, the fiduciary model helps plan participants in several important ways that contribute to better participant outcomes – a larger nest egg.

1. Mutual funds selected for a retirement plan are based on an Investment Policy Statement and sound investment theory, not how much they pay a non-fiduciary intermediary.

2. The fund choices reflect the plan's demographic make-up. This enhances the ability of the plan's participants to properly diversify their portfolio and modify that as their age requires.

3. Plan participants are often offered models to help with asset allocation often at no additional charge.

4. Plan expenses are kept reasonable or low and as a best practice, regularly benchmarked.

5. When participant outcomes are optimal, participants are encouraged and save more.

In the non-fiduciary model, a non-fiduciary intermediary is paid a commission and often revenue sharing fees as well as 12b-1 fees – without rendering additional services. This makes the plan more expensive for the participants and is a serious drag on performance and participant outcomes over the long term.

In the IRA marketplace the fiduciary model makes an even bigger difference. From The Committee's comment letter: "After a careful review of the evidence, which consistently points to a substantial failure of the market for retirement advice, the DOL 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 this careful review of the evidence, 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. An ERISA plan investor who rolls her retirement savings into an IRA could lose 6% to 12% and possibly as much as 23% of the value of her savings over 30 years of retirement by accepting advice from a conflicted financial adviser. These DOL estimates are conservative. The harm to retirement savers is far greater when you consider the full range of products and the full range of conflicts that influence advisers' investment recommendations."

This, in turn, means that plan participants and IRA investors retire with smaller nest eggs and often are more dependent on Social Security and other programs.

Vanguard , Schwab, Betterment, WealthFront and others offer inexpensive investment management for very low cost with very low account minimums: $5,000 minimum at some, no

minimum at others. Some of the automated investment firms offer their services for $0 until an account grows to a certain level.

Some fiduciaries, such as Financial Engines, one of the largest RIAs in the US, have tackled both the "accumulation" phase as well as the "decumulation" phase, assisting plan participants with withdrawal plans at the same cost as their reasonable cost for the accumulation phase. Instead of rolling over from a plan into an IRA (with potentially higher costs), or a variable, fixed or fixed indexed annuity (with typically much, much higher costs and considerable, irreparable harm to the investor), a participant can stay in the plan and receive regular monthly or quarterly distributions from the plan. So if a participant pays, for example, .50 basis points annually for professional investment management in the plan, they pay the same amount for the investment management and distributions during the decumulation phase.

I am not advocating any one firm here, but it's important to note that this kind of continuous care model for accumulation and decumulation at very reasonable cost is a good thing for many investors and it's something that ought to be encouraged.

Conclusion

The Fiduciary 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.

Delaying implementation of these new protections would allow non-fiduciary financial advisers and their firms to continue to engage in harmful practices that threaten the retirement security of their clients. According to the prior Administration's DOL's own analysis, this proposed delay is unjustified.

As a fiduciary, I can see no reason to delay this important Fiduciary Rule. *When a firm wishes to serve the retirement market, advice they provide should be in the investor's best interest – from a fiduciary.* No firm should be allowed to pretend they act in investors' best interests while actually serving themselves.

Millions of Americans are counting on their 401(k)s and IRAs, and many employers depend on investment professionals for advice about managing these complex retirement plans. The advice investors get makes a difference in the success of their retirement savings outcome, and whether they will have a financially secure retirement. If they are steered into investments that are not in their best interest, but pay unreasonably high commissions or fees to non-fiduciaries, they may not be able to retire securely – or even at all.

The DOL rule:

- Closes unintended loopholes in the law, which allowed non-fiduciaries to evade their duty to serve investors' best interest.
- Strengthens protections for retirement savers, requiring firms and their representatives to provide retirement investment advice that is in investors' best interests.
- Means there will be <u>more fiduciary advice available</u>, in the best interest of investors, at a reasonable cost.

As a result, retirement savers will be confident that when they engage an advisor, they will receive competent, objective advice, instead of a sales pitch disguised as advice. Americans who've worked hard to save for retirement need and deserve these basic, common sense protections.

Delaying implementation of these new protections would allow non-fiduciaries and their firms to continue to engage in harmful conflicts of interest that threaten the retirement security of American retirement investors.

If the current Administration's DOL decides to delay the rule, it would be taking the position that those who oppose the Fiduciary Rule – whose model is instead to act in their own interests – should prevail, rather than American retirement savers' interests in receiving the critical protections from the rule.

Retirement savers need and deserve to receive the protections that the current DOL Conflict of Interest - Fiduciary Rule provides, without delay. The DOL should conclude that the proposed delay is unjustified and that the rule should be implemented beginning on April 10th.

Sincerely,

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