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AMERICA'S UNIONS

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Submitted by email to EBSA.FiduciaryRuleExamination@dol.gov

March 17, 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

Attention: Fiduciary Rule Examination

Re: RIN 1210-AB79

Ladies and Gentlemen:

The American Federation of Labor-Congress of Industrial Organizations ("AFL-CIO") is pleased to submit these comments to the Department of Labor ("DoL" or "Department") on the Notice of Proposed Rulemaking[1] to extend for 60 days the applicability date of the Final Rule[2] defining who is a "fiduciary" under the Employee Retirement Income Security Act of 1974, as amended ("ERISA") and the Internal Revenue Code of 1986, as amended ("Code"), and the applicability date of related prohibited transaction exemptions (collectively "PTEs"), including the Best Interest Contract Exemption ("BICE"), to address questions of law and policy.

The AFL-CIO strongly supports the final fiduciary rule and new and amended PTEs at issue here in their current form and for the reasons detailed below

[1] The notice was published in the Federal Register on March 2, 2017 (82 Fed. Reg. 12319).

[2] The final Rule entitled Definition of the Term "Fiduciary;" Conflicts of Interest Rule – Retirement Investment Advice was published in the Federal Register on April 8, 2016 (81 Fed.Reg.20, 9469, *available at* http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=28806), became effective on June 7, 2016, and has an applicability date of April 10, 2017, as do the PTEs.

opposes any delay whatsoever in their applicability date, which is currently scheduled for April 10, 2017.

DoL also has invited comments on three questions raised about the Final Rule in a February 3, 2017, Presidential Memorandum.[3] While the AFL-CIO believes these questions already have been answered in clear favor of the Final Rule moving forward on schedule, we intend to respond to them via a separate comment letter.

The AFL-CIO is a voluntary, democratic federation of 55 national and international labor unions that collectively represent 12.5 million working people. We work every day to improve the lives of people who work for a living. We help people who want to join together in unions so they can bargain collectively with their employers for fair pay and working conditions and the best way to get a good job done. Our core mission is to ensure that working people are treated fairly and with respect, that their hard work is rewarded, and that their workplaces are safe. Further, to help our nation build a workforce with the skills and job readiness for 21st century work, we operate the largest training network outside the U.S. military. We also provide an independent voice in politics and legislation for working women and men and make their voices heard in corporate boardrooms and the financial system.

Union members have much at stake in the private-sector pension and retirement savings system. Over 80% of union workers employed in private industry participate in workplace retirement plans, compared to just over 45% of non-union workers.[4] While the vast majority of private-sector union workers are covered by defined benefit pension plans (65% compared to 10% of non-union workers), an equal percentage (44%) of union and non-union workers participate in defined contribution plans.[5] More than one-in-four dollars in ERISA-covered retirement plans (27%)—totaling $1.9 trillion in assets—are in collectively bargained defined benefit and defined contribution plans.[6] Thousands of union members serve as fiduciary trustees jointly responsible with management-appointed representatives for administering and overseeing the assets of

[3] This Memorandum was published in the Federal Register on February 7, 2017 (82 Fed. Reg. 9675, *available at* https://www.federalregister.gov/documents/2017/02/07/2017-02656/fiduciary-duty-rule).

[4] U.S. Dept. of Labor, U.S. Bureau of Labor Statistics, *National Compensation Survey: Employee Benefits in the United States, March 2016*, *Bulletin 2785* (July 2016) t. 2 (private industry workers), *available at* https://www.bls.gov/ncs/ebs/benefits/2016/ownership/private/table02a.pdf.

[5] U.S. Dept. of Labor, U.S. Bureau of Labor Statistics, *National Compensation Survey: Employee Benefits in the United States*, *March 2016*, *Bulletin 2785* (July 2016) t. 2 (private industry workers), *available at* https://www.bls.gov/ncs/ebs/benefits/2016/ownership/private/table02a.pdf.

[6] *Calculated from* U.S. Dept. of Labor, Employee Benefits Security Administration, *Private Pension Plan Bulletin: Abstract of 2012 Form 5500 Annual Reports* (Jan. 2015 v. 1.2) t. A6, *available at* http://www.dol.gov/ebsa/pdf/2012pensionplanbulletin.pdf.

multiemployer retirement plans. Union workers and retirees from both the private and public sectors have retirement money invested through Individual Retirement Accounts (IRAs). Like their non-union counterparts, many union members transfer money from workplace retirement plans into IRAs when they leave a job.

With so much at stake for working people, the AFL-CIO and our affiliate unions have advocated for legislative and regulatory improvements to strengthen protections for workers and retirees since ERISA's enactment. We filed comments with, and testified before, DoL in anticipation of the Final Rule now proposed for delay and under consideration for revision or rescission.

Background.

ERISA includes a broad definition of "fiduciary" by reason of having given investment advice. The statute provides in part, "[A] person is a fiduciary with respect to a plan to the extent…(ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so…."[7]

Unfortunately, in 1975, DoL regulations considerably narrowed this broad definition by defining a "fiduciary," in relevant part, as someone who renders advice on a regular basis to a plan, pursuant to a mutual agreement, arrangement or understanding between the adviser and the plan or a plan fiduciary that the advice would serve as the primary basis for investment decisions with respect to plan assets.[8] The result of these new requirements was that many investment professionals who advised on retirement assets had no legal obligation to act as fiduciaries—i.e., to put their clients' best interests ahead of their own financial interests or to address their conflicts of interest.

Subsequent DoL guidance constricted the regulatory definition of fiduciary investment advice even further. A 1976 Advisory Opinion concluded that "a valuation of closely-held employer securities that an employee stock ownership plan (ESOP) would rely on in purchasing the securities would not constitute investment advice under the regulation."[9] A 1996 Interpretive Bulletin set out broad circumstances in which investment-related educational information provided to participants and beneficiaries in self-directed individual account pension plans would be considered education and not advice, even when that "education" identified a specific investment option.[10] In 2005, another Advisory Opinion concluded that advice that a participant

[7] 29 USC § 1002(21)(A).

[8] 29 CFR § 2510.3-21 (2015).

[9] 75 Fed. Reg. 65264-65265 (Oct.22, 2010) (citing Advisory Opinion 76-65A (June 7, 1976)).

[10] 29 CFR § 2509.96.1 (2015).

take a permissible pension plan distribution would not constitute investment advice—even when that advice is combined with a recommendation about investing that distribution—so long as the recommendation came from an individual who is not otherwise a fiduciary.[11]

Taken together, the 1975 DoL rule and subsequent guidance created a regulatory regime riddled with loopholes favoring the financial interests of a professional investment adviser at the literal expense of the client—an approach clearly at odds with any sound public policy that seeks to improve the retirement income security of our nation's working families.

The Final Rule.

On April 8, 2016, after a prolonged and exhaustive rulemaking process and extensive findings about the pernicious impact of conflicted advice on Americans' retirement security,[12] the Department issued a new rule providing for a functional definition of investment advice, consistent with both the broad statutory language the rule implements and the approach taken by other regulators.[13] According to the new rule, a person renders investment advice when she receives compensation, directly or indirectly, for providing a recommendation that is individualized or specifically directed to an employee retirement plan, such as a traditional pension or 401(k); a plan participant, such as an employee saving for retirement in her company's 401(k); an Individual Retirement Account (IRA); or an IRA owner.[14] The new rule, thus, removes the previous rule's technical hurdles and anti-investor loopholes that defeat the

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[11] Advisory Opinion 2005-23A (Dec.7, 2005)(AO205-23A), *available at* http://www.dol.gov.ebsa/regs/aos/ao2005-23ahtml.

[12] The Department first issued a proposed revised definition of fiduciary in October 2010 followed by a 104-day public comment period. A two-day public hearing and another comment period followed in 2011. On April 20, 2015, a notice for another proposed rule was published, and DoL extended the initial 75-day comment period to 90 days; several hundred comment letters were submitted in response, along with more than 70,000 petition signatures. In August 2015, DoL also held a four-day hearing on its proposal and related PTEs which was followed by yet another public comment period. Interspersed throughout this nearly five-year period were a great many meetings at which all stakeholders including financial services industry lobbyists and worker, retiree, and consumer representatives, shared information and perspectives with not only officials and staff from DoL, but also from the Executive Office of the President. DoL also consulted and coordinated with the SEC to ensure appropriate alignment with any investment advice rule it may issue in the future

[13] The Rule's facts-and-circumstances approach to determining whether an investment recommendation has been made mirrors the Financial Industry Regulatory Authority's ("FINRA") facts and circumstances approach to determining whether the current-law duty of care imposed on brokers, the so-called suitability standard, is triggered. *See* FINRA Regulatory Notice 11-02 (effective Oct. 7, 2011) at 2.

[14] 29 CFR § 2519.3-21.

common sense expectations of retirement investors, which the industry has done little, if anything, to address.

As set forth in Section 2510.3-21(a)(1)(i)-(ii), recommendations falling within the scope of investment advice include the following when provided for a fee or other compensation:

- Relating to acquiring, holding, disposing of, or exchanging, securities or other investment property, including a recommendation to take a benefit distribution or a recommendation about the investment of securities or other property to be rolled over or otherwise distributed from a plan or an IRA.

- Regarding the management of securities or other investment property, including recommendations in investment policies or strategies, portfolio composition, selection of other persons to provide investment advice or investment management services, selection of investment account arrangements (e.g. brokerage versus advisory); or recommendations with respect to rollovers, distributions transfers from a plan or IRA, including whether, in what amount, in what form, and to what destination such a rollover, transfer or distribution should occur.

The Rule clarifies the types of communications that fall short of "recommendations," and are, thus, non-fiduciary in nature, including broad categories of educational information and materials.

Cognizant of the value of preserving business model flexibility, the Department promulgated a new exemption, the BICE, from ERISA's prohibited transaction rules to permit investment advisers' compensation to take a variety of forms, including commissions, and to offer proprietary products. This is permitted so long as steps are taken to ensure the advice provided is in a client's best interests and to mitigate an adviser's financial conflicts of interests that would otherwise interfere with meeting that standard.[15]

Specifically, as a condition of receiving advice that otherwise would be prohibited under ERISA and the Code, the BICE requires retirement advice providers to enter into a written contract with clients confirming that the advice services will be provided under a fiduciary standard of care, and that the adviser has adopted policies and procedures designed to mitigate conflicts of interest. In addition, advice providers must clearly and prominently disclose any existing conflicts of interest and provide information about compensation arrangements. Advisers cannot receive more than reasonable compensation.

[15] 81 Fed. Reg. 21002 (April 8, 2016).

DoL has provided for a phased implementation of the BICE. During a transition period from April 10, 2017, through December 31, 2017, financial institutions and advisers need only comply with a limited set of conditions in order to take advantage of this exemption. These limited conditions include: complying with the best interest standard; not receiving more than reasonable compensation; not making misleading statements to the retirement investor; providing a single written disclosure that includes, among other things, an acknowledgement of fiduciary status, a commitment to comply with the best interest standard, and a description of certain financial conflicts; designating a specific person or persons for addressing financial conflicts of interest and monitoring advisers' adherence to the best interest standards; and complying with certain recordkeeping requirements.

After the transition period expires, beginning January, 1, 2018, financial institutions and advisers must satisfy conditions that are more protective of the interests of retirement investors in order to take advantage of the BICE. For example, institutions and advisers must then enter into a written client contract and institutions must make more extensive web-based disclosures related to their material conflicts of interest and related matters. As discussed below, the AFL-CIO supports this exemption as written along with the current schedule for a phased-in implementation.

Since the issuance of the Final Rule and PTEs, based on input from the financial services industry and other stakeholders, the Department has issued two sets of frequently asked questions with answers to provide guidance to both workers and firms and to assist with implementation.

On February 3, 2017, the President issued a Memorandum directing the Department to examine the Rule for the likely impact of certain specified harms and to prepare an "updated" economic and legal analysis concerning the likely impact of the Rule. Conspicuously absent from this Memorandum is any requested inquiry as to the likely retirement investor gains.

On March 7, 2017, the Department published its proposed rule to delay the compliance deadline by 60-days, from April 10, 2017, to June 9, 2017. In the event a final rule regarding a delay is not published before April 10, the Department has announced that it will not initiate any enforcement action because an adviser or financial institution failed to satisfy the conditions of the rule or the PTEs during the "gap" period between April 10 and the publication of a new final rule.[16]

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[16] U.S. Department of Labor, Field Assistance Bulletin NO. 2017-01 (March 10, 2017, available at https://www.dol.gov/sites/default/files/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2017-01.pdf.

A Delay Will Inflict Serious Financial Harm on Retirement Savers.

Delaying implementation of the rule means delaying the important consumer protections against conflicted advice. This will perpetuate the investment losses the rule seeks to address, imposing enormous costs on retirement investors.

The Department itself estimates, based on its own partial estimate of the costs of conflicted advice borne by retirement investors, that just a 60-day delay will cost working people and retirees $147 million over 12 months, with losses from this one-time delay snowballing to an estimated $890 million over 10 years (using a three-percent discount rate).[17] A full accounting of the harms of conflicted advice, however, would show a much greater cost imposed on retirement investors by delaying the rule and related exemptions.

The Economic Policy Institute has estimated that a 60-day delay of the rule and exemptions would cost retirement investors $3.7 billion over the next 30 years.[18] While this estimate still does not account for losses that would accrue to 401(k) account holders or other retirement plans, it does expand the scope of losses counted beyond just those accruing to IRA owners invested in front-load mutual funds, to which DoL's estimate is limited, to include those losses imposed on IRA owners invested in other load mutual funds and variable annuities.

Americans cannot afford the high cost of delaying these protections. Far too many people are facing a personal retirement security crisis, lacking adequate pensions or retirement savings to support them in retirement. According to the Center for Retirement Research at Boston College, half of working-age households are at risk of not being able to maintain their standard of living in retirement, up from fewer than three-in-10 in the early 1980s.[19]

This dramatic deterioration in retirement security has occurred at the same time we have seen a drastic change in how Americans build and receive retirement income, with the responsibility for saving and investing increasingly falling on the individual rather than employers and professional investment managers. IRAs and 401(k)-type defined contribution plans have supplanted defined benefit pension plans as Americans' primary private retirement vehicle. IRAs are the single largest and fastest growing form of retirement savings—outstripping both private-sector defined benefit and defined contribution plans—with rollovers from employer-sponsored

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[17] 82 Fed. Reg. 12319, 12320.

[18] Letter from Heidi Shierholz, Director of Policy, Economic Policy Institute, to U.S. Department of Labor, p. 2 (March 17, 2017), available at http://www.epi.org/files/pdf/124190.pdf.

[19] Alicia H. Munnell, et. al, Center for Retirement Research at Boston College, *NRRI Update Shows Half Still Falling Short Issue Brief*, No. 14-20 (Dec. 2014) fig. 2 *available at* http://crr.bc.edu/wp-content/uploads/2014/12/IB_14-20-508.pdf.

plans accounting for most IRA funding and expected to surge in coming years. This shift has left working people and retirees, and their financial security in retirement, particularly reliant on financial institutions and professionals and vulnerable to those who do not act in the best interests of their clients.

Complete Implementation of BICE Is Already Delayed Until 2018.

DoL already has addressed financial institutions' and advisers' need for time to prepare for complying with the Rule and PTEs by delaying the applicability date for one year until April 10, 2017. With respect to the BICE, financial institutions and advisers need only comply with a limited set of conditions until January 1, 2018. During this additional transition period, they simply must act in their clients' best interests, not make misleading statements to their clients or take unreasonable compensation, provide basic disclosure about their duties and their conflicts of interest, assign someone to oversee compliance, and keep adequate records. They then have more than eight months to prepare for the remaining requirements for entering into a contract with retirement investors and providing detailed web-based disclosures.

A Delay Rewards Those Who Have Not Made a Good Faith Effort Towards Implementation.

There is no indication that companies that have taken complying with the Rule seriously will be unable to meet the current deadline. As they have made clear through their public statements and actions, many companies, representing a large share of the financial services industry, have taken the steps that will enable them to come into compliance by the April 10, 2017, applicability date.[20] Not only have companies prepared to change their compensation and compliance practices, they also have developed new product offerings to ease compliance.

If the Department elects to delay the applicability date, any delay should be limited to those firms that can demonstrate good faith efforts to comply with the April 10, 2017, applicability date.

If the Applicability Date is Delayed, Retirement Investors Are Unlikely to Benefit from Advisors' Groundwork to Implement the Rule and the PTEs.

While many financial firms have invested the resources and taken the necessary steps to comply with the Rule and PTEs by the April 10, 2017, applicability date, it is evident that many do not

[20] See, e.g., Letter from U.S. Sen. Elizabeth Warren to Edward Hugler, Acting Secretary of Labor, U.S. Dept. of Labor (Feb. 7, 2017) pp. 4-5 (quoting statements from representatives of major financial institution statements describing preparations to comply with the law by the applicability date) *available at* https://www.warren.senate.gov/files/documents/2017-2-7_Warren_Ltr_to_DOL.pdf ; Letter from Barbara Roper, Director of Investor Protection and Micah Hauptman, Financial Services Council, Consumer Federation of Labor to U.S. Dept. of Labor (March 17, 2017) (describing the development of specific new financial products to ease compliance with the Rule and BICE).

intend to follow through if the Rule is delayed or rescinded, as they are members of the industry lobbying associations that are co-plaintiffs in lawsuits seeking to block the Rule and PTEs. For example, the U.S. Chamber of Commerce, Financial Services Institute, Financial Services Roundtable, Insured Retirement Institute, and Securities Industry and Financial Markets Association recently issued a statement responding to a grant of summary judgement against their claims seeking to overturn the Rule, vowing to "pursue all of our available options to see that this rule is rescinded."[21] Therefore, in evaluating the impact of a delay, it would be inappropriate to attribute gains to retirement investors from any preparations made to comply with the rule.

Delaying the Rule Is Likely to Dissuade Individual Retirement Investors from Seeking Professional Investment Advice.

Although professional investment advice can play an important role in improving retirement security for many Americans (especially as the abandonment of professionally managed pension and other retirement plans by private-sector employers has shifted the risks and responsibilities for managing retirement savings onto working people and retirees), many people are justifiably skeptical of the financial services industry and individuals who bill themselves as financial advisors while acting like salespeople. Research bears out this distrust and the potential impact on whether individuals seek out financial advice:

- Only 9 percent of people trust their financial advisers, according to a 2016, 5,000-person survey sponsored by the National Association of Retirement Plan Participants.[22]
- Among major industries, financial services is the least trusted, according to an annual tracking survey by Edelman.[23]
- Non-affluent consumers "avoid financial advisers because of lack of trust" and because such consumers "often perceive financial advisers (and the institutions for which they work) to be attempting to sell financial products at the expense of providing unbiased financial advice," according to a report on barriers to financial advice.[24]

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[21] "Co-plaintiff Statement on Court Ruling to Uphold Labor Department's Fiduciary Rule" (Feb. 8, 2017) *available at* http://www.sifma.org/newsroom/2017/co-plaintiff_statement_on_court_ruling_to_uphold_labor_department's_fiduciary_rule/.

[22] Kerry Close, "Almost Nobody Trusts Financial Institutions," *Money* (Apr. 14, 2016) http://time.com/money/4293845/trust-financial-institutions-study/.

[23] Edelman, *Edelman Trust Barometer 2016* (2016) p. 11, *available at* https://www.scribd.com/doc/295815519/2016-Edelman-Trust-Barometer-Executive-Summary#.

[24] Dan Iannicola, Jr. and Jonas Parker, The Financial Literacy Group, *Barriers to Financial Advice for Non-Affluent Consumers* (Sept. 2010) p. 18, *available at* https://www.soa.org/researchbarriers/.

By establishing universal standards and protections for the provision of investment advice to individual retirement investors, the Final Rule and PTEs are likely to improve individual retirement investors' confidence in their ability to select advisers whom they can trust and thereby lower this significant barrier to getting professional advice. Delaying the applicability date, however, may have the opposite effects—increasing retirement investors' distrust of financial advisers and dissuading them from seeking professional advice.

In sum, after a prolonged and thorough rulemaking process and with so much at stake for retirement investors, we see absolutely no reason to delay the Rule. The American workers, retirees, and employee benefit plan trustees who rely on professional investment advice deserve no less than the Rule's long-overdue and important protections.

We appreciate the opportunity to submit these comments. Please do not hesitate to contact me with any questions you may have about them.

Very truly yours,

/s/ Shaun C. O'Brien

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