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VIA On-Line Submission

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Fiduciary Rule Examination
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: RIN 1210-AB79; Definition of the Term "Fiduciary"; Updated Economic and Legal Analysis

To Whom It May Concern:

Thank you for the opportunity to comment on the delay and further examination of the Department of Labor Fiduciary Duty Rule. I am writing this comment on behalf of the Securities Arbitration Clinic at St. John's University School of Law (the "Clinic"). The Clinic is part of the St. Vincent De Paul Legal Program, Inc., a not-for-profit legal services organization. The Clinic represents aggrieved investors and is committed to investor education and protection. The Clinic has a strong interest in the rules governing financial advisers and ensuring that these advisers act in their client's interests over their own.

The Clinic strongly opposes any further delay of the Department of Labor's Fiduciary Duty Rule ("Rule") and its accompanying exemptions. Additionally, the directives of President Trump's Memorandum on Fiduciary Duty Rule ("Memo") directs the Department of Labor ("DOL") to examine whether the Rule may adversely affect

access of Americans to “retirement information and financial advice.” In such examination the DOL is asked to consider (1) whether “anticipated applicability of the [Rule] has harmed or is likely to harm investors due to a reduction of Americans’ access” to retirement and financial products and advice; (2) whether retirement services have been dislocated or disrupted due to anticipation of the Rule; and (3) whether the Rule will lead to an increase in litigation and in prices that “investors and retirees must pay to gain access to retirement services.” The Clinic believes each of these questions had been adequately addressed throughout the rulemaking process, and there is no new information at this time that should lead the DOL to revise or revoke the Rule.

The Rule will not reduce Americans’ access to retirement and financial products

The majority of investors believe their brokers and financial advisors to be their fiduciaries, as is evidenced by the thousands of investor filed cases against brokers and brokerage firms each year, where the most frequently asserted claim is Breach of Fiduciary Duty.¹ Unfortunately, as many of these investors find out once in the arbitration forum, their brokers never owed them more than an assurance that the investments recommended would be *suitable*. This suitability standard requires only that the broker have a “reasonable basis” for recommending the investment, and imposes no duty on the broker to disclose conflicts of interest influencing such a recommendation, nor does it require that better, cheaper investments be offered to the customer.² Because brokers, in general, currently owe their customers no fiduciary duty, investors, especially those saving for retirement, are in desperate need of protection. That protection must come in the form of a fiduciary standard imposed on all financial advisors.

It is asserted by many in the financial industry that the ultimate effect of the Rule will be to hinder Americans’ access to retirement products and financial advice. However, such assertions have no basis and run contrary to the actual effects in the marketplace. For example, firms such as Morgan Stanley and Merrill Lynch have already begun to comply with the Rule (despite its delay) and have re-worked their business to continue to serve the smaller 401(k) markets.³ Moreover, states which already require a heightened duty of brokers, such as California, have seen no such limitation on financial products or retirement advice available to its citizens. Further, a

¹ See, FINRA Dispute Resolution Statistics, available at <https://www.finra.org/arbitration-and-mediation/dispute-resolution-statistics>.

² FINRA Rule 2111, available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=9859.

³ Robert Bloinke and William H. Byrnes, *Despite DOL Fiduciary Suspension, Merrill, Morgan Stanley Roll Out Products*, Think Advisor, <http://www.thinkadvisor.com/2017/04/03/despite-dol-fiduciary-suspension-merrill-morgan-st> (last visited April 14, 2017).

2012 study confirmed that no statistical difference in service or product offerings could be found between states with heightened fiduciary standards and those without such heightened standards.⁴

As discussed, no evidence has been offered which shows that access to retirement products and financial advice has been, or will be, limited because of the Rule. However, as the DOL reported in its Regulatory Impact Analysis (“RIA”), investors do have a lot to lose if the Rule is not enacted. According to the DOL’s RIA, Individual Retirement Account (“IRA”) investors will see their investments underperform by 50-100 basis points, because of conflicted investment advice over the next 20 years, if the Rule is not enacted.⁵ This is a cost of between \$202 billion-\$404 billion over the same time period.⁶ Thus, the effect of the Rule will not be to limit investor access to retirement products and financial advice, but rather will be to save investors billions of dollars in lost investment funds while simultaneously providing them with investment advice that is actually in their best interests, rather than their broker’s.

The Rule has not disrupted or dislocated retirement services

The financial and retirement services industries have already invested millions into both challenging the Rule, as well as preparing to comply with the Rule, in anticipation of its enactment in early April 2017. In four courts around the country, the Rule has been challenged on numerous grounds, including that the DOL exceeded its authority in adopting the Rule (and its related exemptions), that the DOL’s RIA was insufficient, and that the Rule impermissibly creates a private right of action.⁷ As of the date of this comment, three of the four cases have decisions rendered, and all are in favor of the DOL.

As the Rule has been facing these legal challenges, firms across the country have been preparing to comply with the Rule. For example, a Deloitte study in late March 2016, which surveyed 27 financial services firms, many which do a substantial amount

⁴ See Michael Finke and Thomas P. Langdon, *The Impact of the Broker-Dealer Fiduciary Standard on Financial Advice*, Financial Planning Assoc., <https://www.onefpa.org/journal/Pages/The%20Impact%20of%20the%20Broker-Dealer%20Fiduciary%20Standard%20on%20Financial%20Advice.aspx> (last visited April 14, 2017).

⁵ See Department of Labor Regulatory Impact Analysis, *Regulating Advice Markets at 22*, available at <https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2>.

⁶ *Id.*

⁷ See *e.g.*, *National Association for Fixed Annuities v. Perez* (D.C. 2016)(No. 16-CV-01035); *Chamber of Commerce v. U.S. Dep’t of Labor* (N.D. Tex. 2017)(No. 16-CV-01476-M); *Market Synergy Group, Inc. v. U.S. Dep’t of Labor* (Kan. 2016)(16-CV-04083); and *Thrivent Financial for Lutherans v. Perez* (Minn. 2016)(16-CV-03289).

of business in the retirement investor marketplace, found that 55% of the firms already reported their preparation for compliance with the Rule as significant.⁸

Many in the financial industry have complained that compliance with the Rule, or utilization of one of the available exemptions, would force them out of business due to high compliance costs and restructuring of fee arrangements. However, this assertion is also unfounded, as the cost of compliance with the Rule is not much different than costs already associated with meeting the suitability standard.⁹ Further, a 2011 study by the Securities Exchange Commission (“SEC”), found that a uniform fiduciary duty standard would not affect the use of various fee structures and types of advice currently available to retail investors.¹⁰

The Rule was set to be phased in beginning in early April 2017, and thus most of the industry has already spent the time, money, and manpower to implement the Rule. This industry preparedness is a clear indicator that neither disruption nor displacement has occurred because of the Rule. Rather, as a recent report by the Consumer Federation of America shows, efforts by the industry to begin compliance have already resulted in eliminating the most harmful conflicts for consumers, as well as a significant reduction of costs for investors.¹¹ For these benefits to be maintained, there cannot be any further delay. Additionally, any revisions to the Rule may reverse the momentum generated in anticipation of its application.

The Rule will not increase litigation or costs

The Rule preserves for firms the option to require pre-dispute binding arbitration in contracts with retirement advisers, while also prohibiting these contracts from preventing the investor from bringing, or participating in, a class action lawsuit. In its RIA, the DOL assessed and addressed the potential for an increase in litigation costs as a result of the Rule and its related exemptions. Acknowledging the potential cost-savings of arbitration, the RIA goes on to point out that a major issue in arbitrations, whether

⁸ See Industry Preparedness for the Department of Labor’s Fiduciary Rule, available at <https://www2.deloitte.com/us/en/pages/regulatory/articles/dol-fiduciary-rule-industry-preparedness.html>. Note that this survey was completed before the DOL announces the phasing in the Rule and exemptions over a one year time period. Thus, concerns about immediate compliance with the Rule were alleviated by the DOL’s extended roll-out.

⁹ *Supra* note 4 (showing no statistical difference in compliance costs in states with heightened fiduciary standards versus those without).

¹⁰ See “Staff Study Recommending a Uniform Fiduciary Standard for Conduct for Broker-Dealers and Investment Advisers” (2011), available at <https://www.sec.gov/news/press/2011/2011-20.htm>.

¹¹ See Consumer Federation of America, “The Department of Labor Conflict of Interest Rule is Already Delivering Benefits to Workers and Retirees: Delay Puts Those Benefits at Risk” (Jan. 31, 2017), available at http://consumerfed.org/wp-content/uploads/2017/01/1-31-17-DOL-Rule-Delivering-Benefits_Fact-Sheet.pdf.

the broker was subject to a fiduciary duty, would no longer need to be an issue addressed in such proceedings.¹² Further, in allowing class actions, the DOL's RIA found this ensures compliance with the Rule by encouraging supervisors and managers to ensure their brokers are indeed acting in their client's best interests on a consistent basis.¹³

Additionally, brokerage firms are already prohibited from including a class action waiver in any contract with a customer.¹⁴ Accordingly, the inclusion of a prohibition of use of such a waiver will have no impact on the brokerage industry. Regardless of what is in the Rule, brokerage firms would be prevented from including such a clause. However, without including such a ban in the Rule, investment advisers and insurance brokers would be permitted to include such language in their agreements. By prohibiting the use of such a waiver by others offering retirement advice simply levels the playing field. Moreover, there is no indication that the brokerage industry has been unduly burdened by class actions because of its inability to include class action waivers in its contracts with customers.

As discussed earlier, the Rule has been challenged in court on several grounds, another of which is that the Rule, and specifically its the Best Interest Contracts Exemption ("BICE"), creates a private right of action against the firm for the consumer. However, District of Columbia Judge Moss, in *NAFA*, held that no such private cause of action was created.¹⁵ Rather, the Court held that the BICE "merely dictates terms that otherwise-conflicted financial institutions must include in written contracts with IRA and other non-title I owners in order to qualify for the exemption."¹⁶ With no created private right of action, and an arguably more efficient arbitration process, the argument that the Rule will lead to an increase in litigation is also unsupportable.

As has been discussed, no evidence which shows higher costs for compliance with a fiduciary standard versus the current suitability standard is present either. Rather, the effect of the Rule will be to save billions of dollars for consumers, while cutting down on the time and costs associated with arbitration for all involved. Moreover, because most in the industry has prepared to be in compliance with the Rule by April 2017, the costs associated with conforming to the new Rule have already been assumed and paid by most. Delaying and potentially revoking the Rule at this point would mean that firms

¹² See Department of Labor Regulatory Impact Analysis, *Regulating Advice Markets* at 293, available at <https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2>.

¹³ *Id.*

¹⁴ See FINRA Rule 2268.

¹⁵ See *National Association for Fixed Annuities v. Perez*, No. 16-01035(RDM), 2016 WL 6573480, at *25 (D.C. Cir. Nov. 4, 2016), *appeal filed Nov. 28, 2016*.

¹⁶ *Id.*

which are prepared to act as their customer's fiduciaries, will only not do so because they are not required to, and not because they are unable.

Conclusion

The DOL has spent years developing this comprehensive Rule designed specifically to protect investors whose only fault is putting their trust in those who on a daily basis hold themselves out to be *trusted* advisors. If the DOL fails to implement this Rule, the effect will be to continue the draining of billions of dollars of hard-earned funds from retirees and future-retirees, into the pockets of those very same advisors. President Trump's Memo calls for the ability of consumers to have freedom of choice when making investment decisions with their retirement funds. But, what this Memo fails to acknowledge is that the freedom of choice which exists now will still be available to consumers once the Rule is implemented.

Few of the purported negative impacts of the Rule are realistic, and the impact it may have on the industries' bottom-line is negligible in comparison to the impact that just a suitability standard is currently having on retirement investors across the United States. As a legal intern of the Clinic, I see on a weekly basis retirees whose savings have either diminished or disappeared. These people, more often than not seniors, trusted their advisors to invest their hard-earned retirement savings in investments which would serve their financial needs and make them comfortable into the extended years of their life. And unfortunately, for many of the Clinic's clients, they now must worry whether they will have enough money to pay their medical bills and keep their homes, forgetting about the comfortable retirement which they worked their entire lives to secure. Their money is often invested in some of the most complex financial products in the market, from Real Estate Investment Trusts ("REITs") to Business Development Corporations ("BDCs") to Leveraged Exchange Traded Funds ("ETFs"), and before they know it, some if not all of their savings have disappeared. When they were sold these products, in every single case, they were told by their brokers to trust them, that they would do what was best. However, that was not the case.

Unfortunately, the investors the Clinic sees are the small investors – those with the least ability to lose any of their retirement savings. Clinics, such as the Securities Arbitration Clinic at St. John's School of Law, attempt to help as many of these wronged investors as possible. But with limited resources, many investors with cases must go to arbitration without counsel, further decreasing their chance of success. However, if implemented, the Rule would help many of these investors twofold, by preventing their advisors from giving them conflicted investment advice and by not requiring they prove that their broker owed them a fiduciary duty, should they have to go to arbitration. The obligations owed to an investor by a broker will be clear, and no longer will a firm be able to disclaim the representations made by its brokers when they were trying to instill trust and confidence in their clients.

Accordingly, is it critical that this Rule be implemented without further unnecessary delay to ensure that investors are protected and prevented from losing billions of more dollars in savings.

Sincerely,

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