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AMERICA'S UNIONS

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Submitted by e-mail to EBSA.FiduciaryRuleExamination@dol.gov

April 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 Ave., 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 in response to a request by the Depart of Labor ("DoL" or "Department") [1] for comments on questions of law and policy concerning the Final Fiduciary Rule[2], including three questions posed to the Secretary of Labor by the President in a February 3, 2017, memorandum.[3] The AFL-CIO submitted separate comments in response to DoL's proposal to delay for 60 days the applicability date for defining who is a "fiduciary" under the Employee Retirement Income Security Act of 1974, as amended ("ERISA") and the Internal Revenue Code of 1986 ("Code"), and the applicability date of related prohibited transaction exemptions ("PTEs"). [4]

[1] *See* 82 Fed. Reg. 12319 (Mar. 2, 2017).

[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. 20945, available at http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?Docld=28806), became effective on June 7, 2016, and has an applicability date of April 10, 2017, as do the PTEs.

[3] *See* 82 Fed. Reg. 9675.

[4] Letter from Shaun C. O'Brien, Asst. Policy Dir. for Health and Retirement, AFL-CIO, to Office of Regulations and Interpretations, Employee Benefits Security Administration (Mar. 17, 2017).

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. More than eight-in-ten union workers employed in private industry participate in workplace retirement plans, compared to fewer than half (45%) of non-union workers.[5] 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.[6] Overall, more than one-in-four dollars in ERISA-covered retirement plans (27%)—totaling some $1.9 trillion in assets—are in collectively bargained defined benefit and defined contribution plans.[7] Thousands of union members serve as fiduciary trustees jointly responsible with management-appointed representatives for administering and overseeing the assets of retirement plans. Furthermore, 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, retirees, and their benefit plans since ERISA's enactment. We filed comments with, and testified before, DoL in anticipation of the final Rule and related prohibited transaction exemptions.

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[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] *Id.*

[7] *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

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…."[8]

To the detriment of retirement investors, 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.[9] The result of these new requirements was that many investment professionals who advised on retirement assets had no legal obligation to act as fiduciaries.

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."[10] 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.[11] In 2005, another Advisory Opinion concluded that advice that a participant 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.[12]

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.

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[8] 29 USC § 1002(21) (A).

[9] 29 CFR § 2510.321 (2015).

[10] 75 Fed. Reg. 65263-65265 (Oct.22, 2010) (citing Advisory Opinion 76-65A (June 7, 1976)).

[11] 29 CFR § 2509.961 (2015).

[12] Advisory Opinion 2005-23A (Dec.7, 2005) (AO205-23A), *available at* *http://www.dol.gov.ebsa/regs/aos/ao200523ahtml*.

The Final Rule

On April 8, 2016, after a prolonged and exhaustive rulemaking process,[13] including extensive findings about the pernicious impact of conflicted advice on Americans' retirement security, the Department issued a new Rule, accompanied by a comprehensive Regulatory Impact Analysis ("RIA").[14] The new Rule provided a functional definition of investment advice, consistent with both the broad statutory language the rule implements and the approach taken by other regulators.[15] That is, 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.[16] The new Rule, thus, removes the previous rule's technical hurdles and anti-consumer loopholes that defeat retirement investors' common-sense expectations that their advisors are acting in their best interest.

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:

[13] 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, 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.

[14] That more than 300 page analysis is available here: https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/conflict-of-interest-ria.pdf.

[15] 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.

[16] 29 CFR §2519.3-21.

- 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, such as broad categories of educational information and materials.

Cognizant of the value of preserving business model flexibility, the Department promulgated a new exemption, the Best Interest Contract Exemption ("BICE"), from ERISA's prohibited transaction rules to permit investment advisers' compensation to continue to take a variety of forms, including commissions, and to offer proprietary products. Such practice 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.[17]

Specifically, as a condition of providing advice that otherwise would be prohibited under ERISA and the Code because of the financial conflicts of interest involved, the BICE requires retirement advice providers to enter into a written client contract confirming that 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. Further, their compensation must be reasonable.

DoL provided for a phased implementation of the BICE. From the initial implementation date of April 10, 2017, through December 31, 2017, financial institutions and advisers needed to comply only with a limited set of conditions in order to take advantage of this exemption.[18] At the

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

[18] These limited conditions included: 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

expiration of the transition period, beginning January 1, 2018, financial institutions and advisers had to satisfy conditions that are more protective of the interests of retirement investors in order to utilize the BICE. By then, for example, advisers and firms were required to enter into a written client contract with firms making more extensive web-based disclosures about their material conflicts of interest. As discussed below, the AFL-CIO supports this exemption as written, along with its phased-in implementation schedule.

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 assist with implementation.

On February 3, 2017, President Trump issued a Memorandum directing the Department to re-examine the Rule for the likely impact of certain specified harms and "update" the just 10-month old economic and legal analysis concerning its overall likely impact. The President also directed the Secretary to publish a proposed Rule rescinding or revising the final Rule if he determines:

(1) The Rule has harmed or is likely to harm retirement investors due to a reduction of Americans' access to certain retirement savings offerings, retirement product structures, retirement savings information, or related financial advice;
(2) The anticipated applicability date of the rule has resulted in dislocations or disruptions within the retirement services industry that may adversely affect investors or retirees; or
(3) The Rule is likely to cause an increase in litigation and an increase in the prices that investors and retirees must pay to gain access to retirement services.

Conspicuously absent from this Memorandum is any requested inquiry about the likely *gains* for retirement investors because of the Rule.

The President also directed the Secretary to publish a proposed Rule rescinding or revising the final Rule if he concludes for any other reason that it is inconsistent with his Administration's priority "to empower Americans to make their own financial decisions, to facilitate their ability to save for retirement and build the individual wealth necessary to afford typical lifetime expenses, such as buying a home and paying for college, and to withstand unexpected financial emergencies."

On March 7, 2017, the Department published a proposed Rule to delay the final Rule's applicability date, and that of related PTEs, by 60-days, from April 10, 2017, to June 9, 2017. On

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 recordkeeping requirements.

April 7, 2017, a second final Rule providing for this 60-day delay was published in the Federal Register.[19]

Further, DoL revised the conditions that must be satisfied to qualify for the BICE and a related PTE during the phase-in period before January 1, 2018. In particular, beginning on June 9, 2017, the impartial conduct standard within the BICE and a related PTE will become applicable, while compliance with certain other conditions will not be required during this phase-in period. This means that advisers relying on these exemptions will be required simply to provide advice that is in the client's best interest, avoid misleading statements, and charge no more than reasonable compensation.

DoL concluded that its second final Rule delaying the applicability date "can best protect the interests of retirement investors in receiving sound advice, provide greater certainty to the public and regulated parties, and minimize the risk of unnecessary disruption by taking a more balanced approach than simply granting a flat delay of fiduciary status and all associated obligations for a protracted period of time."[20] The Department recognized that its notice of proposed rulemaking to delay the Rule had created reasonable expectations on the part of retirement investment advisers that there would, in fact, be a delay and that, accordingly, they justifiably slowed (or perhaps even halted) their efforts to comply with the Rule and PTEs by the original applicability date.

Overarching Issues of Law and Policy

The Department issued the final Rule and related PTEs after finding clear and substantial harm to retirement investors from the pervasive conflicts of interest within the advice marketplace and concluding that the changes it was adopting would result in a large net gain to working people and retirees. We are aware of no new credible evidence that has arisen in the approximately 12 months since then that contradicts DoL's findings or central conclusion.

Further, we note that three independent, conflict-free arbiters—the Federal District Courts for the District of Columbia, Kansas, and the Northern District of Texas—have reviewed the final Rule and related PTEs. All three have determined them to be an appropriate exercise of the Department's authority granted by Congress under ERISA and the Code.

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[19] *See* 82 Fed. Reg. 16902 (Apr. 7, 2017). Furthermore, in the event a final Rule had not been published before April 10, the Department announced that it would not initiate any enforcement action because an adviser 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. *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.

[20] *See* 82 Fed. Reg. 16905.

To justify a reconsideration of the final Rule adopted during the last Administration, the President questions whether the final Rule conflicts with his Administration's newly created policy priority "to empower Americans to make their own financial decisions, to facilitate their ability to save for retirement and build the individual wealth necessary to afford typical lifetime expenses, such as buying a home and paying for college, and to withstand unexpected financial emergencies." First, contrary to what this statement purports to suggest, "empowering Americans **to make their own financial decisions** [emphasis added]" is in no way inconsistent with the final Rule. Nothing in this Rule diminishes investors' agency over their retirement money. Furthermore, while this Administration may consider an unregulated advice marketplace to be a virtue, it can neither override the applicable statutory language and mandate nor supersede the overall regulatory scheme and its purposes. As the Texas federal court noted, "The new rules are compatible with the substance of Congress' regulatory scheme, ***as* the broad remedial purpose of ERISA is to protect retirement investors and benefit plans** [*emphasis added*]."[21]

<u>DoL Already Has Answered All of the Questions in the President's Memorandum</u>

The Department has asked for feedback on the three questions raised in the President's memorandum to the Secretary. The substance of each of these questions was addressed by DoL in its analysis that accompanied the final Rule and related PTEs, with the Department concluding that the new regulatory structure would yield a large net gain for retirement investors. Further, the Department's analysis, overall and of some of the specific points raised in the memorandum, has been reviewed by the federal courts cited above and been found to meet the requisite legal standards. For example, the Texas federal court stated:

> The Court finds the DOL adequately weighed the monetary and non-monetary costs on the industry of complying with the rules, against the benefits to consumers. In doing so, the DOL conducted a reasonable cost-benefit analysis.[22]

The questions posed appear to ignore both this extensive prior analysis and the judicial review of it—and to disregard any benefits that would offset costs.

Commenters are asked to address whether the anticipated applicability date of the final Rule has harmed, or is likely to harm, investors due to a reduction of Americans' access to certain retirement savings offerings, retirement product structures, retirement savings information, or related financial advice. Implicit in this is the notion that all advice and all products create net positive value for retirement investors. On the contrary, if the rule works as intended, shoddy products and services that are not in a retirement saver's best interest will no longer be on the market. In fact, research cited by DoL has shown that as a result of adviser conflicts of interest

[21] *Chamber of Commerce of the U.S., et al. v. Hugler*, No. 3:16cv1476-M (N.D. Tex. Feb. 8, 2017) at 32.

[22] *Id.* at 60.

some investors "are worse off than they would have been if the investment adviser did not exist at all."[23]

As the rulemaking record clearly shows, there are already thousands of financial service professionals who operate as fiduciaries under a best interest standard to provide retirement advice services to every day Americans, either under commission based business models or for fees with no or low minimum asset requirements.[24] Further, by their own account, numerous firms and advisors appear to be having no problem with compliance, as they are poised to offer fiduciary investment advice.[25]

Firms and advisers not yet operating under a fiduciary standard are much more likely to adjust their policies and practices to keep their business, rather than abandon their middle-class clients. An owner of a fee-only firm provided this candid assessment of what is truly at stake for these non-fiduciary advisors: "[T]he reason brokers don't want to register as fiduciaries is because they have been making so much money off the old system."[26]

The Department asks further whether the anticipated applicability of the final Rule has resulted in dislocations or disruptions within the retirement services industry that may adversely affect investors or retirees. Disruption in the retirement services industry is the point of the Rule—because any disruption will be to the benefit of investors and retirees. Contrary to the assumption underlying this question and this Administration's recently promulgated final Rule, not implementing the rule on schedule will cause significant negative disruption for retirement investors by causing them to leave existing relationships to find others that are rooted in a best interest standard—where there are either no material financial conflicts or those conflicts have been mitigated such that they do not influence and comprise the advice given.

The Department also asks whether the final Rule is likely to cause an increase in litigation, and an increase in the prices that investors and retirees must pay to gain access to retirement services.

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[23] U.S. Dept. of Labor, *Regulating Investment Advice Markets: Definition of the Term "Fiduciary" Conflicts of Interest – Retirement Investment Advice: Regulatory Impact Analysis for Final Rule and Exemptions* (Apr. 2016) p. 133.

[24] *See* Comments submitted by the Financial Planning Coalition (Coalition), comprised of the Certified Financial Planner Board of Standards (CFP Board), Financial Planning Association® (FPA®) and National Association of Personal Financial Advisors (NAPFA).

[25] These firms include Merrill Lynch, Ameriprise, LPL, Cambridge, Cetera, Morgan Stanley, Raymond James, Mass Mutual, Lincoln Financial Distributors and Lincoln Financial Network and Wells Fargo.

[26] Mike Ivey, *Many Worried by Rollback of Financial Regulation*, Isthmus, quoting Kathy Hankard, *available at* http://isthmus.com/news/news/many-worried-by-rollback-of-financial-reforms/.

Only a subset of advice providers—those choosing to continue structuring adviser compensation in ways that otherwise would be prohibited under ERISA and the Code because of financial conflicts of interest—will need to rely on the BICE and enter into a best interest contract with their clients.

Second, contrary to the claims of rule opponents, the United States District Court for the District of Columbia observed, "[T]he BIC exemption does not create a [new] private right of action; it 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."[27] Further, if a retirement investor had enforceable contract rights against an adviser or financial institution before the rule's implementation, the BICE does nothing to expand those rights.[28]

Third, the BICE permits advice providers to limit their legal exposure and potential financial liability. In particular, they can request that advice recipients waive their right to bring an individual court action in favor of mandatory arbitration, as well as waive their right to punitive damages or rescission based on violation of the contract. A reasonable assumption is that the vast majority of, if not all, retirement advisers that choose to take advantage of the BICE will incorporate these waivers as boilerplate in their client contracts. Since individual retirement investors have very little market power on their own, they likely will be forced to accept these waivers in order to receive advice— resulting in no litigation for virtually all individual claims.

Fourth, although a retirement investor cannot waive her right in a best interest contact to bring a class action claim, the significant statutory hurdles associated with certifying a class action will necessarily limit their use. Further, in *Chamber of Commerce of the United States of America, et al., v. Hugler,* the District Court for the Northern District of Texas determined that the BICE requirement prohibiting contractual waivers of, or limitations on, a retirement investor's ability to participate in a class action is a reasonable one:

> As for the BICE condition requiring that the written contract with the retirement investor may not waive or qualify the investor's ability to participate in a class action, the court does not find it to be unreasonable, especially when variable annuities have been subject to similar conditions under FINRA's Customer Code since 1992. The DOL weighed the pros and cons of the class action provision, and reasonably found it was in the best interest of retirement investors, helped prevent systemic fiduciary misconduct, and provided an incentive for the industry to comply with BICE. For these reasons, the Court

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[27] *The National Association for Fixed Annuities v. Thomas E. Perez, et al.,* No. 16, 1035 (D. D.C. Nov. 4, 2016) *at 55.*

[28] *Id.*

> finds that the conditions to quality for BICE and the consequences Plaintiffs cite are reasonable.[29]

In sum, DoL carefully crafted the BICE to ensure that any increase in litigation will be due to systemic abuses by retirement advice providers that rely on the BICE and, therefore, that it is necessary and justified to ensure the integrity of the marketplace.

<u>The Final Rule and Related PTEs Create Certainty for Retirement Investors</u>

It is imperative that DoL provide certainty to retirement investors that specific professional investment recommendations regarding retirement money held in IRAs and private-sector retirement plans is required to be provided in their best interests and that financial conflicts of interest must be rooted out or substantially mitigated.

Employers, financial institutions, and federal policymakers have all increasingly pushed the job of managing retirement money on to individuals. Working people and retirees who look for expert help in doing that job, however, have had to confront a challenging and deeply troubling question: How do I know whether I can trust an adviser to do right by me? There has been no easy answer to this question, however, because the 1975 regulations implementing the definition of fiduciary investment advice have made it nearly impossible to know. Those rules have allowed investment professionals to hold themselves out as trusted financial advisors while acting and getting paid like salespeople. That is, investment professionals have been permitted to call themselves advisers and make specific investment recommendations to their clients while taking advantage of the regulatory loopholes to avoid fiduciary status.

The Department has laid out in detail the specific costs of the 1975 regulatory structure to just one segment of individual retirement investors, and described the broader impact on other segments of retirement investors receiving conflicted advice. DoL has not investigated the extent to which the 1975 rules—by creating a regulatory environment in which conflicted advice thrives and individual retirement investors cannot be confident that the advice provided to them is in their best interests—have created a barrier to middle-income and working class individuals getting investment advice. According to one study, however, 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."[30]

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[29] *Chamber of Commerce* at 36.

[30] 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/.

In promulgating a delay in the applicability date for the final Rule and related PTEs, DoL concluded that the delay it was adopting was justified, in part, by the need to "provide greater certainty to the public" about the rules and standards that would apply to the provision of retirement investment advice. Yet, the defaulted-to 1975 rules create, in effect, a permanent state of uncertainty for retirement investors, making it next to impossible for them to know whether a financial professional providing specific investment recommendations is a retirement fiduciary—an uncertainty, as noted above, which acts as a significant barrier to retirement investors getting the advice they need.

The final Rule, in contrast, creates a clear, commonsense definition of fiduciary investment advice. Fiduciary status will be triggered whenever a financial professional provides, for direct or indirect pay, a specific investment recommendation that is individualized or specifically directed to an IRA or ERISA-covered retirement plan, an IRA owner or a plan participant. There will be no tricks or traps, such as the 1975 rules' exclusion of one-time advice or requirement that both parties expressly agree that the advice will provide the primary basis for investment decisions. The final Rule and related PTEs will address retirement investors' legitimate concerns about the fidelity and trustworthiness of financial advisers and create regulatory certainty for them. Further, by establishing universal standards and protections for the provision of investment advice to individual retirement investors, the final Rule and PTEs will improve individual retirement investors' confidence in their ability to select advisers they can trust, and thereby lower this significant barrier to seeking professional advice.

Rescinding or substantially revising the final Rule and PTEs, however, will have the opposite effects—increasing retirement investors' distrust of financial advisers and further dissuading them from seeking professional advice. Such a reversal of course could exacerbate the level of distrust that existed before the final Rule and PTEs existed. The rulemaking generated an enormous amount of national and local media coverage, creating a new awareness among retirement investors of the risks and harms that result from conflicted retirement advice. Undoubtedly, any action that rescinds or cuts back on the final Rule and PTEs will lead to another intensive round of negative attention about the harms of conflicted advice and the risks of using conflicted financial advisers.

Retirement Plans and the Rule

Although absent from the President's inquiry, the benefits of the fiduciary Rule for ERISA-covered retirement plans, which as of 2015 held $8 trillion in plan assets, cannot be disregarded; both plan officials and participants rely heavily on professional advisers for advice on investing plan assets.

The detailed description contained in the Regulatory Impact Analysis of plans' heavy reliance on professional investment advisers comports with our own experience. Plan sponsors—including employers and the trustees of jointly-trusteed retirement plans providing retirement plan coverage to union members—hire service providers to give advice regarding the investment of plan assets, whether it is on asset allocation, the selection of specific investment managers or investment options made available to participants in self-directed plans, or for specific transactions. Some plan sponsors, including many multiemployer plan trustees, hire only those advisers who are willing to accept fiduciary status under ERISA, telling potential bidders not to bother applying unless they are. We also are aware of pension investment consultants who readily accept ERISA fiduciary status and act accordingly.

Nevertheless, while many service providers hold themselves out as fiduciaries acting in the best interest of their clients, they often act outside the scope of the 1975 regulations' definition of investment advice, taking advantage of the large loopholes present in the current regulatory structure. Both the SEC and GAO have confirmed this, finding that providers intentionally structure their relationships with ERISA-covered plans to fit within one or more of these loopholes.[31] Many plan sponsors, particularly those that are smaller, do not have the experience, market power, or access to outside legal advice that enables them to ensure advice providers are acting in a fiduciary capacity and not biased by financial conflicts.

Even when a plan sponsor makes an effort to build fiduciary status into a contractual agreement, plan participants and beneficiaries could still be vulnerable under the 1975 rules. We are aware of one instance in which a pension plan entered into a contractual agreement providing that an investment advisor would be a fiduciary, yet, when a claim arose out of the adviser's investment recommendations that resulted in huge losses to the plan, the adviser countered that he could not be held liable since he did not meet the 1975 regulatory definition of a fiduciary.

The final Rule's functional definition of investment advice will provide a clear, common-sense approach to determining fiduciary status. This will benefit plan sponsors directly, as well the workers and retirees who are counting on these pensions and 401(k)s to provide them with a measure of retirement security, because whether they benefit from ERISA's fiduciary protections will no longer depend on their market power or the sophistication of their counsel or themselves.

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[31] Employee Benefit Security Administration, U.S. Dept. of Labor, *Regulating Advice Markets: Definition of the Term "Fiduciary"; Conflicts of Interest – Retirement Investment Advice: Regulatory Impact Analysis for Final Rule and Exemptions* (Apr. 2016) p. 190 (citations omitted).

Leveling the playing field in this way is likely to have the biggest benefits for participants in smaller and medium-sized plans.[32]

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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[32] According to a recent *Pensions & Investments* report, one expert (Kathleen M. McBride, a founder of the Committee for the Fiduciary Standard) "thinks small and midsized plans stand to gain the most with the new rule. 'It's a very, very good step for sponsors because it tightens up a lot of the deception that has plagued them. It's a big market, and people who do this the right way know it can be done.'" Hazel Bradford, "Delay Seen as Making DOL Fiduciary Rule More Likely," *Pensions & Investments* (Apr. 17, 2017) *available at* http://www.pionline.com/article/20170417/PRINT/304179991/delay-seen-as-making-dol-fiduciary-rule-more-likely?newsletter=issue-alert&issue=20170417.