July 21, 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

Re: Fiduciary Rule and Prohibited Transaction Exemptions; Request for Information, EBSA-2017-0004-0001

Dear Secretary Acosta:

The American Association for Justice (AAJ), formerly the Association of Trial Lawyers of America (ATLA), hereby submits the organization's response to the Department of Labor's (DOL) request for information (RFI) regarding a potential delay of the provisions of the Best Interest Contract Exemption (BIC Exemption), Principal Transactions Exemption and amendments to PTE 84-24 (together the "Exemptions").[1]

AAJ, with members in the United States, Canada, and abroad, is the world's largest trial bar. It was established in 1946 to safeguard victims' rights and strengthen the civil justice system. AAJ members represent victims of fraud. It is in this capacity, as representatives of those who have been on the receiving end of the abuses that have permeated the financial services market, that we voice our concerns with any further delay of the Exemptions' January 1, 2018 implementation date.

The Department's July 6, 2017 request for information directed stakeholders to explain to the DOL whether a further delay of the Exemptions would "reduce burdens on financial services providers and benefit retirement investors by allowing for more efficient implementation responsive to recent market developments."[2] While a further delay may benefit the banks and brokerage firms that have chosen not to begin compliance with the rule, it would only do so by

[1] 82 Fed. Reg. 31278.
[2] Id., at 31279.

allowing these late- and bad-actors to continue to defraud everyday retirement savers by steering "Mr. and Mrs. 401(k)"[3] into products and services that are not in their best interest.

As we previously stressed,[4] the earlier delays have harmed investors, and any further delay would augment this problem rather than alleviating it. In fact, DOL's own analysis indicates that even a 60-day delay could lead to a reduction in estimated investment gains—direct losses for American retirees—of $147 million in the first year and $890 million over 10 years using a three percent discount rate.[5] Cost savings to firms during those 60 days is projected to be a comparably insignificant $42 million.[6] The harm to retirement savers during those 60 days still dwarfs the industry savings from the delay. Any effort to further delay these provisions only augments the problem faced by Mr. and Mrs. 401(k).

Furthermore, any additional delay would continue to leave harmed retirement savers without recourse to the courts. By enforcing a ban on class action waivers (a fundamental part of the BIC Exemption), the Department achieves the President's stated goal of "American empowerment" by preventing financial advisors from taking advantage of retirees while enabling the latter to save more money.

The Exemptions close loopholes created when investment advisors use forced arbitration clauses to shield themselves from class action claims. Although forced arbitration clauses are still permitted under the rule, investment advisors seeking to benefit from the BIC Exemption's safe harbor provisions are prohibited from blocking their clients from participating in class actions against them. The Exemptions act as a deterrent while ensuring that financial advisors that do not act in their client's best interest are responsible for their own behavior, rather than passing that burden on to retirement savers. These transgressions cost working and middle class Americans an estimated 17 billion dollars a year.[7]

Allowing the Exemptions to take effect on schedule would not lead to a huge spike in costs for financial institutions due to class action litigation. In fact, the current procedural barriers to class action litigation ensure that very few classes are certified. Class action plaintiffs must already satisfy stringent requirements to be certified as a class under Federal Rule of Civil Procedure 23, including demonstrating commonality and typicality of facts and law across the entire class, a large enough size, and adequate representation. Similarly, Rule 23 requires that the injury incurred by all members of the class is comparable in size and scope, and that the application of the relevant law to each plaintiff be substantially the same. The class must also be large enough to warrant a court certifying it as a class action—rather than simply deciding to join multiple, individual cases.

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[3] SEC Chairman Jay Clayton, Remarks at the Economic Club of New York (Jul. 12, 2017) *available at* https://www.sec.gov/news/speech/remarks-economic-club-new-york.
[4] American Association for Justice, Comment on the President's Memorandum on the Fiduciary Duty Rule RIN 1210-AB79 (Apr. 17, 2017).
[5] 82 Fed. Reg. 12320.
[6] *Id*.
[7] Counsel of Economic Advisors, The Effects of Conflicted Investment Advice on Retirement Savings (Feb. 2015) *available at* https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_coi_report_final.pdf

Finally, the prospective class must include adequate representatives that accurately reflect the interests of all putative class members.

These requirements are exceptionally difficult to meet for small businesses with limited consumer bases. Thus, large corporations tend to be more affected by class actions than small businesses because the smaller entities simply don't have enough clients impacted by the same illegal activity to warrant class relief. Clients of a local investment advisor offering individual advice to retirees on a case-by-case basis, for example, likely could not form a class, because the numerosity requirement of Rule 23 designed to encourage judicial economy would never be met. This system ensures that the class action cases that would go forward—when the Exemptions are permitted to go into effect—would only be cases where the harm in question is systemic, widespread, and a clear violation of the Exemptions under the Fiduciary Duty Rule.

For cases that do not meet the onerous requirements proscribed in Rule 23, they simply would not be joined as a class, and the individuals would be permitted to pursue their claims individually. If the individual signed a forced arbitration agreement with their investment advisor, then any legal disputes would be adjudicated by arbitration.

Investment advisors are not the first to be banned from including class action waivers in forced arbitration agreements—and the markets that have banned class action waivers have not experienced an explosion of litigation. For example, the Financial Industry Regulatory Authority (FINRA)[8] has prohibited the inclusion of class action waivers in forced arbitration agreements since 1992, and has not seen abuses of the system or drastic changes in price. Similarly, overall workplace class action activity has decreased since the National Labor Relations Board (NLRB) found class action bans unenforceable in 2012.[9] Furthermore, the Exemptions are based on common law developed in state courts, where there are also no skyrocketing costs for investment advisors or state-wide surges in class action litigation—which is in part due to the onerous complexity of bringing class action claims under the current rules.

In conclusion, there is no purpose to the imposition of any further delay in the implementation of the Exemptions. The issue raised in the RFI is one that has been addressed multiple times throughout the notice and comment and stakeholder processes. Delaying the implementation of these important Exemptions after the lengthy review process is unfair to the American consumer and to rule-abiding financial services institutions. At no point does the RFI raise an issue warranting additional scrutiny, nor does it make a reasoned case that these Exemptions are superfluous.

AAJ encourages the DOL to implement the rule as it was originally written without any further delay. If you have any questions or comments, please contact Sarah Rooney, Director of Regulatory Affairs at (202) 944-2805.

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[8] FINRA Rule 13204 (2012).

[9] Seyfarth & Shaw LLP, Workplace Class Action Report (2017) *available at* http://www.workplaceclassaction.com/2017/02/the-story-behind-workplace-class-action-filings-in-2016-trend-4/. *See also* In Re D. R. Horton, Inc., 357 NLRB 2277 (2012).

Sincerely,

Julie Braman Kane

President

American Association for Justice