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National Association of Federally-Insured Credit Unions

July 21, 2017

Office of Exemption Determinations, EBSA
U.S. Department of Labor
200 Constitution Avenue NW., Suite 400
Washington, D.C. 20220

RE: Fiduciary Rule and Prohibited Transaction Exemptions
RIN 1210-AB82:

On behalf of the National Association of Federally-Insured Credit Unions (NAFCU), the only national trade association focusing exclusively on federal issues affecting the nation's federally-insured credit unions, I am writing in response to the Department of Labor's ("the Department") request for information regarding the Fiduciary Rule and Prohibited Transaction Exemptions. In May 2017, NAFCU submitted comments asking that the Department reconsider the Fiduciary Rule in its entirety. We are pleased to see that the Department has since acted to promptly suspend enforcement of the rule as it reviews options for delaying or amending the provisions in the best interest contract (BIC) exemption, principal transactions exemption, and amendments to prohibited transaction exemption (PTE) 84-24.[1]

NAFCU has consistently urged the Department to exempt credit unions from the broad scope of the Fiduciary Rule; however, NAFCU has also supported delaying the rule to effectuate reconsideration of its burdensome requirements.[2] Today we are writing in support of a one year delay of the January 1, 2018 applicability date for provisions relating to the Fiduciary Rule's contract and transaction exemptions. NAFCU intends to share its thoughts regarding questions 2-18 in a separate letter, as well as reiterate our longstanding position that the Fiduciary Rule is entirely inappropriate for credit unions.

General Comments

Credit unions are different than most other types of financial institutions. Since the Great Depression, the credit union industry has defined itself as "not for profit, not for charity, but for service," and that shared philosophy has endured to this day. As financial cooperatives directed by volunteer boards, credit unions exist for the primary purpose of serving their membership—not for earning fees on investment brokerage.

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[1] *See* Department of Labor, Temporary Enforcement Policy on Fiduciary Duty Rule, Field Assistance Bulletin No. 2017-02 (May 22, 2017).
[2] *See* Executive Office of the President, Memorandum for the Secretary of Labor, 82 Fed. Reg. 9675 (February 3, 2017).

The National Credit Union Administration (NCUA) has traditionally stated that federal credit unions may not act as broker-dealers in securities or provide investment advice of the type that would render them "investment advisers" under state or federal securities laws.[3] While the Fiduciary Rule covers these types of activities, it also covers transactions and relationships that are significantly broader in scope, including a significant number of transactions and relationships relating to individual retirement accounts (IRAs).

NAFCU and our members are concerned that the Fiduciary Rule casts a wide net that unfairly burdens credit union activity with complex requirements and potential litigation risk. For example, the requirements of the rule are triggered when an individual provides a "recommendation," which is defined as "a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action."[4] NAFCU also disagrees with the Fiduciary Rule's uncompromising view of educational communications regarding investment property such as CDs and other similar depository investment products.[5] NAFCU believes that the rule's failure to provide an exemption for educational statements beyond just marketing material information poses an unfair risk to credit unions that do not typically offer complex retirement investment vehicles but still wish to help members understand their options. Part of what distinguishes credit unions as unique financial institutions is a commitment to personalized service—a feature that the Fiduciary Rule severely compromises by restricting the extent to which credit union employees may offer responsive investment information.

Given the rule's extraordinarily broad scope, credit unions may decide that it is no longer worthwhile to recommend an investment advisory credit union service organization (CUSO) to a member to either set up an IRA or create an employee welfare benefit plan (if the member is a business). This is because the Fiduciary Rule defines "investment advice" to include "a recommendation as to the…selection of other persons to provide investment advice or investment management services."[6]

Along similar lines, a credit union may decide to withhold certain investment recommendations relating to rollovers or transfers that would otherwise constitute sound investment advice. This is because an individual is also considered to be providing "investment advice" under the Fiduciary Rule if he or she makes recommendations with respect to rollovers, transfers, or distributions from a plan or IRA, "including whether, in what amount, in what form, and to what destination such a rollover, transfer, or distribution should be made."[7]

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[3] *See,* NCUA Letter to Federal Credit Unions 10-FCU-03 (Dec. 2010) (broker-dealers); NCUA Legal Opinion Letter 09-0511 (June 3, 2009) (investment advisers).
[4] 29 C.F.R. § 2510.3-21(b)(1).
[5] *See* Department of Labor, Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice, 80 Fed. Reg. 20946, 20962 (Apr. 8, 2016).
[6] 29 U.S.C. § 2510.3-21(a)(1)(ii).
[7] 29 C.F.R. § 2510.3-21(a)(1)(ii).

Although the Fiduciary Rule provides a Best Interest Contract Exemption, it imposes costly burdens by requiring credit unions to adopt anti-conflict policies before offering certain retirement planning recommendations. Credit unions frequently rely on third parties or CUSOs to act as broker-dealers; however, the rule could require extensive analysis of existing business relationships to determine whether there are conflicts of interest. Performing this type of analysis on a semi-regular basis may impact the prices consumers must pay to access retirement planning services and disrupt existing third party arrangements, resulting in less choice and fewer options among investment products. Traditionally, credit unions have served their members' best interests by building trusted relationships, and the success of the credit union model has never depended upon the imposition of sweeping fiduciary standards.

NAFCU believes that there is little merit in requiring credit unions to comply with a complex fiduciary duty requirement when available data does not suggest that the "conflicts" envisioned by the final rule have ever detracted from credit unions' high standards of member service. Conversely, the potential for litigation risk is measurable and will ultimately lead to a reduction in consumer access to trustworthy investment advice. Accordingly, the Department should revoke its Fiduciary Rule in order to advance financial choice and independence. Alternatively, the Department should seek to exempt credit unions from the Fiduciary Rule consistent with the goals of tailored regulation outlined in the U.S. Treasury's recent report on "*A Financial System that Creates Economic Opportunities*."

NAFCU appreciates the chance to submit comments regarding the Department's proposed extension. Should you have any questions or concerns, please do not hesitate to contact me at amorris@nafcu.org or (703) 842-2266.

Sincerely,

Andrew Morris
Regulatory Affairs Counsel