May 6, 2021

Acting Assistant Secretary Ali Khawar
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave., N.W., Suite N-5677
Washington, D.C. 20210

Dear Acting Assistant Secretary Khawar:

We write as organizations and individuals that strongly opposed the Department of Labor's adoption last year of the "Improving Investment Advice for Worker & Retirees" exemption ("Exemption") because of our concern that it would leave retirement investors dangerously exposed to conflicted advice.[1] We understand the difficult choice the Department faced in deciding whether to delay the Exemption's implementation, and we appreciate that, in announcing the decision to allow it to take effect as scheduled in February, the Department made clear that its work on this issue is not done.[2] The Department's recent release of Guidance on what firms need to do to comply with the Exemption ("Guidance") is the first, critically important step toward fulfilling that commitment.[3]

By staking out a tough stance on the obligation to mitigate conflicts of interest, the Guidance sends a strong message that the Department is committed to doing all it can, within the limits of the Exemption, to ensure that workers and retirees receive appropriate protections when they turn to investment professionals for retirement investment advice. Guidance can only take us so far, however, so we also greatly appreciate the Department's reaffirmation that it expects to take further actions, through notice and comment rulemaking, including amending the regulatory definition of fiduciary investment advice under ERISA, amending the advice Exemption, and "amending or revoking some of the other existing class exemptions available to investment advice fiduciaries."[4] We believe such continued efforts are needed to close legal loopholes that would otherwise enable firms to evade appropriate application of the fiduciary duty, and to ensure that the duties set forth in the Exemption actually reflect and implement the strong fiduciary standard set forth in ERISA. We therefore view these additional actions as essential if the Department is to achieve its goal of ensuring that workers and retirees who turn to investment professionals for advice about their retirement investments get advice that is untainted by harmful conflicts and that truly serves their best interests, consistent with the core requirements of ERISA.

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[1] Prohibited Transaction Exemption 2020–02, Improving Investment Advice for Workers & Retirees, 85 Fed. Reg. 82,798 (Dec. 18, 2020) ("Preamble" or "Release").
[2] U.S. Department of Labor, News Release, U.S. Department of Labor Confirms Investment Advice Exemption (Feb. 12, 2021), https://www.dol.gov/newsroom/releases/ebsa/ebsa20210212.
[3] U.S. Department of Labor, Employee Benefits Security Administration, New Fiduciary Advice Exemption: PTE 2020-02, Improving Investment Advice for Workers & Retirees, Frequently Asked Questions (April 2021) ("Guidance"), https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/faqs/new-fiduciary-advice-exemption.pdf.
[4] *Id.* at 5.

THE GUIDANCE REPRESENTS AN IMPORTANT STEP FORWARD

1. Conflicts of interest continue to inflict harm on retirement investors.

In developing the 2016 conflict of interest rule, the Department amassed extensive evidence of the harmful impact conflicts of interest can have on the advice that retirement investors receive. Since that rule was abandoned, confirming research has continued to come out. Recently, for example, researchers from Harvard and New York University have issued a study of variable annuities sales before and after adoption of the 2016 conflict of interest rule. That research documents the influence that conflicts have on recommendations, the harm to investors that results, and the benefits of a strong rule that effectively limits the impact of those conflicts.[5] Specifically, after examining the drivers of variable annuity sales, the researchers found that brokers earn higher commissions for selling "inferior annuities, in terms of higher expenses and more ex-post complaints" and that "variable annuity sales are roughly five times more sensitive to brokers' financial interests than investors'." The study concludes that the 2016 conflict of interest rule had a positive impact, driving down the sales of high-expense variable annuities "as sales became more sensitive to expenses and insurers increased the relative availability of low-expense products."

In short, research continues to show that investors still need regulatory protections that more effectively rein in conflicts of interest. Unfortunately, regulators at the Securities and Exchange Commission ("SEC") and in state insurance departments have thus far been unwilling to take consequential steps to rein in harmful incentives. At least as previously interpreted, neither the SEC's Regulation Best Interest ("Reg. BI") for brokers nor its fiduciary standard for investment advisers has delivered meaningful restrictions on conflicts, and the revised suitability standard for annuities recommendations from the National Association of Insurance Commissioners ("NAIC") is even weaker. We were, therefore, greatly concerned when the Department previously indicated that its own advice rule was intended to harmonize with these anti-investor rules. Fortunately, the Department retained authority to interpret and enforce its standards under the Exemption and did not delegate that authority to others.

2. The Guidance articulates a clear duty to mitigate conflicts of interest.

The Guidance, which recognizes the need to rein in harmful incentives to protect investors, helps to lay these concerns to rest.[6] Instead of reflecting the weak approach adopted by other regulators, the Guidance supports the strong articulation of the obligation to mitigate conflicts in the Exemption text, which states that firms' policies and procedures to mitigate conflicts must be such that a reasonable person, "reviewing the policies and procedures and incentive practices as a whole," would conclude that they do not create an incentive for the financial institution or investment professional to place their interests ahead of the interests of the retirement investor. In this regard, we greatly appreciate the Department's clarification that there "is no safe harbor based solely on compliance with other regulators' standards." Our hope is that

[5] Mark Egan, Shan Ge, Johnny Tang, *Conflicting Interests and the Effect of a Fiduciary Duty – Evidence from Variable Annuities*, HARV BUS SCH, Working Paper 21-018 (2020), https://www.hbs.edu/ris/Publication%20Files/21-018_258d3c19-c099-4447-9589-304fcfddd885.pdf.
[6] Guidance, at 11 - 13.

the SEC will now follow the Department's lead and take forceful action to restrict harmful conflicts under its own rules, thus harmonizing the standards up, rather than down, as we had previously feared.

In contrast to other regulatory pledges to put investor interests first, the Guidance does not just give lip service to this principle; it endows it with helpful, concrete meaning. It identifies specific practices that could harm retirement investors and sends a clear message that firms must strive to avoid them. For example, it warns firms against creating incentives that would reasonably be expected to undermine compliance with the best interest standard, identifying firms' use of quotas, bonuses, prizes, or performance standards as potentially problematic. We ask that the Department consider identifying other problematic compensation structures, as well, such as forgivable loans and deferred compensation plans that are tied to expectations that the investment professional meet certain production thresholds. Moreover, regarding the Department's suggestion that firms may need to engage in increased monitoring for certain investments that it identified as particularly prone to conflicts (including proprietary products and principal-traded assets), we recommend that it add complex investments to its examples of products in need of enhanced monitoring.

Further, we strongly agree that financial institutions "should aim to eliminate such conflicts to the extent possible, not create them." Where conflicts are unavoidable, the Guidance lays out specific steps firms should take to mitigate them, such as leveling compensation within a specific investment category, reducing compensation differentials among categories, and, where compensation cannot be leveled among product categories, exercising heightened supervision. Importantly, however, the Guidance makes clear that, while effective supervision around conflicts is essential, "in many circumstances, supervisory oversight is not an effective substitute for meaningful mitigation or elimination of dangerous compensation incentives."

We appreciate the strong message the Guidance sends that financial institutions are accountable for designing their compensation and incentive systems responsibly and, in keeping with the fiduciary standard, should "avoid compensation that is likely to incentivize investment professionals to recommend one investment product over another comparable product based on the greater compensation to them or their financial institutions." In short, to the extent possible under the terms of the Exemption, the Guidance lays out the kind of rigorous approach to conflict mitigation that is essential if we truly want investment professionals to do what is best for retirement investors, instead of what is best for their own bottom line. We hope that other regulators will follow the Department's lead in this regard.

3. The Guidance appropriately restricts reliance on written disclaimers that exploit the "primary basis" prong of the five-part test, pending further rulemaking to close such loopholes.

We greatly appreciate the strong stand the Department takes in the Guidance limiting firms' ability to rely on written statements that disclaim a mutual understanding or reliance on the advice as a primary basis for investment decisions to avoid their fiduciary obligations.[7] For decades, such language has allowed investment professionals to avoid capture by the five-part

[7] *Id* at 6.

test of the 1975 regulation defining fiduciary investment advice, notwithstanding that their investment advice was, in fact, the primary basis for retirement investors' investment decisions. The Guidance makes clear that, "Boilerplate disclaimers are insufficient to defeat the test," and that, in determining whether the mutual understanding test has been met, "the Department intends to consider the *reasonable* understandings of the parties based on the totality of the circumstances," including how firms hold themselves out "in their oral communications, marketing materials, or interactions with retirement investors." This approach still poses challenges in its application and creates opportunities for evasion, as "facts and circumstances" tests invariably do, but the Guidance at least clearly dispels the notion that simple disclaimers will suffice to insulate advice from the strong fiduciary standard set forth in ERISA.

4. The Guidance also helps limit abuse of the "regular basis" prong of the five-part test, pending further rulemaking to close such loopholes.

The Guidance also helps limit abuse of the "regular basis" prong of the five-part test, at least in the context of rollover recommendations. As long as the regulatory definition remains in effect, the Department is forced to concede that a "discrete instance" of advice to roll assets over from a plan to an IRA would not meet the regular basis test. The Guidance correctly adds, however, that rollover advice would satisfy the regular basis prong of the five-part test if it is given either as part of an ongoing relationship or as the beginning of an intended future ongoing relationship. The Guidance explains that even where the rollover recommendation is the "first instance" of advice rendered to the client, it can nevertheless satisfy the regular basis element provided that the investment professional "expects to regularly make investment recommendations" as part of an "ongoing relationship."

As with the primary basis requirement, this interpretation is less than ideal, as it creates practical challenges in assessing the parties' expectations and creates opportunities for evasion. Nevertheless, it adds value, pending further rulemaking, by limiting the ability of an investment professional to avoid the regular basis prong of the five-part test. Additionally, the Department can and should further limit the harmful impact of the regular basis element by clarifying the meaning of regular basis more generally. In further guidance, it should explain that even occasional advice, delivered at irregular intervals, can constitute advice on a "regular basis."

As discussed below, we do not believe the "primary basis" or the "regular basis" prongs belong in any definition specifying what constitutes fiduciary investment advice under ERISA. However, pending further rulemaking to revise the definition and eliminate this and other loopholes, we strongly support the helpful interpretation in the Guidance on both aspects of the definition. Moreover, we appreciate that the Department also issued an FAQ for investors, which suggests that the retirement investor ask that the investment professional directly answer the question of whether they are acting as a fiduciary, and confirm their fiduciary status in writing.[8]

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[8] U.S. Department of Labor, Employee Benefits Security Administration, Choosing the Right Person to Give You Investment Advice: Information for Investors in Retirement Plans and Individual Retirement Accounts (April 2021), https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/choosing-the-right-person-to-give-you-investment-advice.

5. **The Guidance appropriately expands upon the considerations necessary to justify a rollover recommendation.**

The Guidance also offers helpful clarification regarding the factors investment professionals are required to consider in determining whether a rollover is in a retirement investor's best interests. When the Department issued its proposal last year, we strongly supported the requirement to document the basis on which the investment professional determined that a rollover recommendation is in the retirement investor's best interests. But we worried that the factors the Department identified as required to be considered were not sufficiently rigorous. The Guidance states, for example, that the analysis would have to include "the different levels of services and investments available under the plan and the IRA," but not how they should be weighed. We were concerned that, without further clarification, firms were likely to recommend rollovers that expose the retirement investor to increased costs, asserting that the recommendation was nonetheless justified based on the different levels of services and investments available under the Plan and the IRA. Furthermore, we worried that the investment professional would solely focus on the different services and investments, while ignoring important benefits the retirement investor might lose when rolling over their Title I plan.

The Guidance goes a long way toward addressing the first concern. In particular, we appreciate the clarification that, where relevant, "the analysis should include consideration of factors such as the long-term impact of any increased costs; why the rollover is appropriate notwithstanding any additional costs; and the impact of economically significant investment features such as surrender schedules and index annuity caps and participation rates." This directive should help to ensure that the analysis is meaningful.

However, the Department should further clarify its treatment of rollovers in at least two respects. First, it should explain that the mere fact that the retirement investor might have access to a broader range of investments or services in the IRA should not be sufficient to justify the rollover if the retirement investor has no need for those added services or the broader investment selection. Second, the Department should make clear that the investment professional must also consider what benefits the retirement investor may lose if they were to roll out of their Title I plan. The investment professional should have to document how it considered those factors and the basis on which it concluded that the rollover recommendation is the right course of action for this particular retirement investor.

6. **The Guidance should do more to clarify the meaning of "best interest," a core element of the Exemption.**

We also believe the Department can and should do more to clarify the meaning of "best interest" more generally. In contrast to its robust discussion regarding mitigation of conflicts, the Guidance includes only a limited discussion of how the Department plans to interpret the best interest standard.[9] It notes merely that, under this standard, "the advice must be based on the interests of the customer, rather than the competing financial interest of the investment professional or financial institution." The one concrete example provided – "that in choosing between two investments equally available to the investor, it is not permissible for the

[9] Guidance at 8.

investment professional to advise investing in the one that is worse for the retirement investor because it is better for the investment professional's or the financial institution's bottom line" – is helpful, but more is needed.

We encourage the Department to do more to clarify how it will interpret whether advice and recommendations are in the retirement investor's best interests. In particular, the Guidance remains unhelpfully vague regarding what should be considered in determining whether one investment is "worse" than another investment. In providing that clarification, we urge the Department to adopt an interpretation that is consistent with its interpretation of that term in the 2016 conflict of interest rule.[10] It must make clear, for example, that in contrast to the standard in the NAIC model rule, it is not enough to recommend a product that simply meets the customer's needs. Rather, the Department should make clear that, to satisfy the Impartial Conduct Standards, investment professionals, after following a prudent process, must recommend those investments, investment strategies, services and accounts they reasonably believe are the best option for the retirement investor from among those they have reasonably available to recommend. Furthermore, the Department should clarify that, where none of the products available to the agent or broker would meet the best interest standard, the agent or broker must refrain from making a recommendation.

7. Further guidance should provide additional explanation as to adequacy of disclosures provided pursuant to the Exemption.

We remain concerned about the effectiveness, substance, and timing of the disclosures required by the Exemption. Until those concerns can be addressed through additional rulemaking, the Department can and should do more to ensure that the required disclosures help investors understand, in concrete terms, the nature and magnitude of the conflicts of interest that may influence the investment recommendations they receive. Only then will investors be able to act on the disclosures and make appropriate decisions about their investments.

The Guidance correctly notes that, "The disclosure should be designed to allow a reasonable person to assess the scope and severity of the financial institution's and investment professional's conflicts of interest."[11] It further explains that the aim is to convey "meaningful information that retirement investors need to make decision about their investments." We fear that, without further guidance, disclosures to investors under the Exemption will not be sufficiently detailed to meet these objectives, and will do little more than acknowledge the existence and general nature of conflicts. The Department should make it clear that retirement investors must receive concrete information about the "scope and severity" of the applicable conflicts of interest, if the information is to be meaningful for the intended audience. The Department should provide further guidance as to the factors it will consider when determining whether the disclosure allows a reasonable person to assess the information they have been given. For example, the Department should provide guidance that the timing, length, clarity, and complexity of the disclosure will be considered in determining whether a reasonable person is

[10] If the Department believes, for whatever reason, that it cannot provide that additional clarification in the context of the current Exemption, it should do so through rulemaking, as discussed further below.
[11] Guidance at 9 (emphasis added).

able to assess the information they have been given in a way that is meaningful to the retirement investor's ability to make an informed decision about the disclosed conflicts.

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Even without these additions, the Guidance represents a major step forward. Its focus on conflict mitigation goes to the heart of the issue, by seeking to limit the reasons financial firms and investment professionals have to violate the fiduciary standard. Strong as the Guidance is, however, it must be just the beginning of a comprehensive effort to address deficiencies in the rules governing fiduciary investment advice. In particular, unless the Department takes steps to close loopholes in the regulatory definition and related exemptions, firms are likely to simply avoid relying on the Exemption rather than rein in the practices that deliver them healthy profits while costing retirement investors billions in lost savings each year. This letter outlines, in general terms, some of the additional steps we believe the Department needs to take to correct those deficiencies. We look forward to working with you to achieve that goal.

RECOMMENDATIONS FOR ADDITIONAL ACTION

1. Close Remaining Loopholes in the Definition of Fiduciary Investment Advice

We strongly opposed the Department's decision last summer to reinstate the 1975 regulatory definition of fiduciary investment advice.[12] In contrast to ERISA's broad statutory language, the regulatory definition's five-part test makes it all too easy for financial firms to avoid fiduciary responsibility even when they are functioning as, and clients are relying on them as, trusted advisers. In particular, financial firms and investment professionals have used the "regular basis" prong of the definition to avoid application of the fiduciary standard to their rollover recommendations, leaving retirement investors unprotected at a time when the conflicts, risks, and potential long-term costs are greatest. Similarly, investment professionals have widely used the regulatory requirement that advice be rendered pursuant to a "mutual agreement, arrangement, or understanding" that the advice will serve as a "primary basis" for the client's investment decisions to evade their fiduciary obligations.

We recognize as a positive step the Department's interpretation, included in the Preamble to the Exemption and reinforced in the Guidance, that at least some rollover recommendations could be considered fiduciary investment advice – specifically, those that are part of or intended to begin a relationship in which advice is provided on a regular basis. But more is needed. First, such guidance, lacking the force of regulation, is all too likely to be challenged by those most intent on avoiding any fiduciary responsibility. Second, even under the Guidance, some of the most problematic rollover recommendations – including one-time recommendations to purchase an insurance annuity or other non-securities, such as gold, bitcoin, or collectibles – would escape application of the fiduciary standard by virtue of the "regular basis" prong of the definition.[13]

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[12] Conflict of Interest Rule – Retirement Investment Advice: Notice of Court Vacatur, 85 Fed. Reg. 40,589 (Jul. 7, 2020), https://www.federalregister.gov/documents/2020/07/07/2020-14260/conflict-of-interest-rule-retirement-investment-advice-notice-of-court-vacatur.

[13] The Guidance states that, "A single, discrete instance of advice to roll over assets from an employee benefit plan to an IRA would not meet the regular basis prong of the 1975 test." Guidance at 6.

There is no rational basis to provide fiduciary protections under ERISA solely to advice given on a regular basis, while leaving advice that is equally impactful uncovered.

Third, it has traditionally been far too easy for investment professionals to avoid capture by the five-part test through the use of written agreements that proclaim they do not satisfy the test. As discussed above, the Guidance should help to curb this practice, by stating that the use of written statements that disclaim a mutual understanding or the reliance on the advice as a primary basis for investment decisions will not be determinative.[14] It further clarifies that, "Boilerplate disclaimers are insufficient to defeat the test," and that, in determining whether the mutual understanding test has been met, "the Department intends to consider the *reasonable* understandings of the parties based on the totality of the circumstances," including how firms hold themselves out "in their oral communications, marketing materials, or interactions with retirement investors." While we greatly appreciate and support this interpretation, we strongly encourage the Department not to rely on Guidance alone, but to act through rulemaking to formally and more securely close these and other loopholes.

Finally, the Department should clarify the difference between investment advice and education. As the Department has previously documented, financial firms have long sought to avoid application of the fiduciary standard by characterizing materials that retirement investors reasonably rely on as fiduciary advice as merely providing "investment education." The risk that retirement investors will be misled is most prevalent when firms combine educational materials with product-specific examples, which the retirement investor naturally perceives as a recommendation. The Department's interpretation in the Preamble to the Exemption preserves this practice, perpetuating firms' ability to avoid fiduciary obligations when providing what retirement investors reasonably perceive as advice. We therefore urge the Department, as it acts to close loopholes in the definition, to ensure that practices that are reasonably relied on by retirement investors as advice are not exempted from the fiduciary duty through the investment education exemption.

We appreciate that, in both the Department's statement announcing the decision to allow implementation of the Exemption to move forward and in the Guidance, the Department included among the issues it would continue to study, and on which further rulemaking is likely, "the rule defining who is an investment advice fiduciary." The goal of that effort should be to develop a definition more in line with the statutory language, one that makes clear that all the advice retirement investors reasonably rely on as fiduciary investment advice is held to ERISA's high fiduciary standard, including all rollover recommendations. At a minimum, that means removing both the "regular basis" and "primary basis" elements from the definition.

2. Address Shortcomings in the Exemption Through Rulemaking

There are a number of shortcomings in the Exemption that will need to be addressed through additional notice and comment rulemaking to fully protect retirement investors as intended by ERISA. The following are among the issues we view as priorities in this regard.

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[14] *Id.*

A. Strengthen the core duty of loyalty

The Department should amend the Exemption to ensure that those who invoke it remain unambiguously subject to the core fiduciary standard embodied in ERISA, which requires investment advice fiduciaries to act "solely in the interests" of their clients. In contrast, the Exemption currently frames an investment professional's basic obligation in comparatively weak terms: In the "Impartial Conduct Standards," it provides that advice is in the retirement investor's "best interest" as long as it does not place the investment professional's financial or other interests "ahead" of the interests of the retirement investor or "subordinate" the retirement investor's interests to the interests of the investment professional. This is problematic for at least two reasons.

First, it dilutes the ERISA fiduciary duty with a formulation of "best interest" that establishes a peculiar form of parity between the interests of the investment professional and those of the retirement investor – neither the investment professional's interest nor the client's interest is placed ahead of the other. The language does not equate with the strong duty set forth in ERISA, which provides that fiduciaries, including investment advice fiduciaries, must discharge their duties "solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries."[15] While the Guidance is helpful in addressing this concern, we believe formalizing through rulemaking the standard that the retirement investor's interests must come first would help to ensure that the obligation is effective and enforceable.

Second, the watered down articulation of the best interest standard in the Exemption creates confusion. Elsewhere, the Exemption indicates that the full-fledged ERISA fiduciary duty remains applicable to investment professionals invoking the Exemption. For example, in the Preamble the Department explains that, in general, exemptions do not dispense with the fiduciary obligations under Section 404 of ERISA, which as noted above require fiduciaries to act "solely in the interests of the participants and beneficiaries." In addition, the Exemption itself requires investment professionals to provide their clients with written acknowledgement that they "are fiduciaries under Title I" of ERISA, which includes Section 404. And, the Guidance further explains that this acknowledgement "reflects the Department's view that parties wishing to take advantage of the broad prohibited transaction relief in the new exemption should make a conscious up-front determination that they are acting as fiduciaries; tell their retirement investor customers that they are rendering advice as fiduciaries; and, based on their decision to act as fiduciaries, implement and follow the exemption's conditions."[16]

To address these concerns, the Department should strengthen the best interest standard and eliminate potential confusion by amending the Exemption to more closely track the language of ERISA. Toward that end, the Department should recast the best interest standard so that it requires investment professionals to place the interests of their clients ahead of their own

[15] 29 U.S.C. § 1104(a).
[16] Guidance at 8.

interests at all times.[17] That characterization of the best interest standard would be fully and unambiguously consistent with the Exemption language on mitigation of conflicts and the Guidance interpreting the conflict mitigation requirement. The latter, in particular, makes clear that conflicts of interest, while permitted, must not be allowed to influence recommendations.

B. Impose a duty to monitor

In the Preamble to the Exemption, the Department makes the blanket statement that "nothing in the final exemption requires Financial Institutions or Investment Professionals to provide ongoing monitoring services."[18] This statement, which appears to have been lifted from Reg. BI, is completely inappropriate given that, under the current regulatory definition of fiduciary investment advice under ERISA, the Exemption only applies to advice that is provided on a regular basis. Regardless of whether the Department removes the "regular basis" element of the definition, as we strongly urge, the Department should make clear that, wherever there is an ongoing relationship, there is a duty to provide ongoing monitoring services.[19]

C. Strengthen the disclosure requirements through testing and improved timing

The disclosure requirements, as set forth in the Exemption, are completely inadequate in terms of both their substance and their timing. Moreover, we are concerned that the discussion in the Preamble and in the Guidance as to what is needed to satisfy those requirements could lead to differing interpretations. In the Preamble, the Department suggests that the requirement to provide a "written description of the services to be provided and material conflicts of interest arising out of the services and any recommended investment transactions" can be met using disclosures developed to comply with Reg. BI, the Advisers Act fiduciary standard, or the NAIC model rule. But there is no evidence that these disclosures are effective in conveying key information to investors, and what little testing has been done (mostly by credible, independent parties) indicates that they are not.[20] This suggests that they would not satisfy the conflict disclosure standard, as described in the Guidance, which states that the disclosure "should be designed to allow a reasonable person to assess the scope and severity of the financial institution's and investment professional's conflicts of interest."[21]

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[17] *See* Certified Financial Planner Board of Standards, Inc., Code of Ethics and Standards of Conduct, at 3 (Oct. 1, 2019) ("Fiduciary Duty") (requiring CFP professionals to "place the interests of the Client above the interests of the CFP professional").
[18] 85 Fed. Reg. at 82824.
[19] While there would be no obligation to maintain an ongoing relationship under this approach, the obligation to monitor would apply wherever such a relationship exists. In the absence of an ongoing relationship and ongoing monitoring, the Department should maintain its interpretation that investment professionals would violate their fiduciary duty if they recommended a product that required monitoring they knew the retirement investor was incapable of conducting on his or her own.
[20]See, e.g., Letter from AARP, CFA, and the Financial Planning Coalition to SEC Chairman Jay Clayton regarding the results of independent testing of proposed Form CRS (Sep. 12, 2018), https://consumerfed.org/wp-content/uploads/2018/09/letter-to-sec-from-aarp-cfa-fpc-regarding-crs-testing.pdf; *see also,* Comments of the Center for Economic Justice to the NAIC Life Insurance and Annuities (A) Committee, regarding Recommendations for Disclosures/Templates for Proposed Revisions to Annuity Suitability Model Regulation, (Dec. 30, 2019); Letter from Consumer Federation of America to SEC regarding File No. S7-08-18, Form CRS Relationship Summary (Dec. 7, 2018), https://consumerfed.org/wp-content/uploads/2018/12/cfa-letter-to-sec-on-rand-crs-testing-study.pdf.
[21] Guidance at 9.

Accordingly, the Department should undertake a robust process of disclosure testing, on its own or in conjunction with other regulators, in order to develop an approach to disclosure that is best able to convey to retirement investors the key information they need to understand the services being provided, including any conflicts of interest that may bias the recommendations they receive.[22] Consistent with the approach the Guidance takes with regard to the use of disclaimers, disclosures should be evaluated in the context of the full range of firms' marketing materials and other communications.[23] Further, if the Department is able to determine through testing that a particular approach to disclosure is especially effective, it should make the appropriate changes to the Exemption through rulemaking to ensure firms utilize that approach.

Even if the disclosures themselves are improved, we are concerned that the Exemption does not do enough to ensure that the timing of the disclosures provides a meaningful opportunity for them to inform retirement investors' investment decisions. The Exemption requires that the acknowledgement of fiduciary status, the description of services and material conflicts of interest, and the documentation of specific reasons for a rollover recommendation be provided to retirement investors "prior to engaging in a transaction [or rollover]" pursuant to the exemption.[24] It does not specify how much time retirement investors should be given to review the disclosures, nor does it require that investment professionals discuss the disclosures with retirement investors to facilitate their understanding. All of these disclosures convey important, yet inherently complex information; they should not be made just before an investment transaction is executed and retirement investors part with their money.

The Exemption should therefore be amended to mandate that these disclosures be made a sufficient amount of time in advance of the relevant transaction or engagement to ensure retirement investors have time to review and discuss them. Further, the Exemption should affirmatively require investment professionals to discuss the disclosures with retirement investors and actively solicit any questions or concerns they may have regarding them.

D. Eliminate the self-correction provision

The Exemption includes a self-correction provision stipulating that a non-exempt prohibited transaction will not be deemed to occur as a result of a violation of the conditions in the Exemption provided a number of conditions are satisfied: 1) the violation caused no retirement investor losses or did cause losses but the investment professional made the retirement investor whole; 2) the investment professional corrects the violation within 90 days and notifies the Department within 30 days of correction; and 3) the violation and correction are set forth in the retrospective review required elsewhere under the Exemption.[25]

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[22] Some of us have recommended that the SEC undertake a similar disclosure testing initiative, so there could be opportunities for the two agencies to work together on this effort.
[23] With regard to the use of disclaimers, the Guidance makes clear that the Department will consider the full range of firm communications to assess the retirement investors' reasonable expectations.
[24] 85 Fed. Reg. at 82863 (emphasis added).
[25] *Id.* at 82,864.

In the Preamble, the Department expresses the view that the self-correction provision will increase incentives among investment professionals to identify and correct violations.[26] We believe, however, that on balance the opposite effect is more likely. In fact, some firms will be inclined to relax their approach to compliance based on the knowledge that, if violations occur and are detected, they can always invoke the self-correction process and avoid sanctions. Fueling this attitude will be the knowledge that the detection of many violations will hinge on investor complaints, yet retirement investors are often unaware that their investment professionals have made investment recommendations contrary to their best interest. Thus, the self-correction provision may encourage a lax approach to compliance by instilling the attitude that "violations may never surface in the first place, and even if they do, they can be neutralized under the self-correction provision."

Accordingly, this provision should be eliminated from the Exemption, as it will undermine accountability and compliance. Instead, the Department should retain discretion to grant relief only in those instances where the violation is minor, unintentional, and quickly corrected.

E. Strengthen the ineligibility provisions

The Exemption also includes an extensive section imposing a 10-year ban on reliance upon the Exemption by investment professionals or firms in the event of either: 1) certain criminal convictions; or 2) a determination that the investment professional or firm has engaged in a "systematic pattern or practice" of violating the conditions of the Exemption or engaged in other enumerated and serious misconduct.[27] This provision is laudable in principle, but it is so encumbered with provisos and procedural protections that we fear it will do little to incentivize compliance. It should therefore be amended.

For example, the Exemption provides that, before issuing a written ineligibility notice to an investment professional or firm, the Department must first issue a written warning identifying the specific misconduct supporting ineligibility and providing a six-month opportunity to cure. Further, if the Department determines at the end of six months that the misconduct persists, it must still provide the investment professional or firm with an opportunity to be heard in person, in writing, or both. Only after this process concludes may the Department actually effectuate the ineligibility by issuing a formal notice of the same.

This opportunity to cure should be eliminated from the Exemption. As with the self-correction provision, it will undermine compliance and accountability by reassuring investment professionals and firms that, even if they engage in a "systemic pattern or practice" of violating the conditions of the Exemption, or even provide materially misleading information to the Department related to their conduct under the Exemption, they will have the opportunity to cure and continue to rely on the Exemption. It is implausible that investment professionals and firms who have engaged in a "systematic pattern or practice" of violations will immediately and completely desist from such misconduct during the lengthy cure period. As a result, this

[26] *Id.* at 82,841.
[27] *Id.* at 82,864-65.

provision threatens to expose retirement investors to continued harm while the half-year opportunity to cure unfolds.

Finally, we urge the Department to eliminate the related provision allowing investment professionals who are found ineligible to rely on the Exemption (based upon their criminal convictions or serious misconduct) to nevertheless rely on other prohibited transaction exemptions or seek an individual transaction exemption from the Department. This, too, conflicts with a proper regulatory approach that seeks to protect the public and deter misconduct by foreclosing exemptive relief to those investment professionals and firms who are demonstrably unfit to enjoy it.

3. Actively Monitor Compliance with the Exemption

In announcing its decision to allow the Exemption to go into effect as scheduled, the Department noted that the temporary enforcement policy encompassed in Field Assistance Bulletin 2018-02 would remain in effect until December 20, 2021.[28] We are concerned by press reports suggesting that some firms were caught off guard by the Department's decision and have not taken adequate steps to implement the Exemption.[29] Moreover, months after Reg. BI took effect, staffers from both the SEC's Office of Compliance and Inspections ("OCIE") and FINRA identified a number of Reg. BI and Form CRS compliance concerns.[30] Until recently, the SEC had been operating under a so-called "good faith" compliance standard, much like the Department's proposed approach.

While we recognize the importance of giving firms time to adjust to new regulations, we are concerned that retirement investors will continue to be exposed to harmful advice during this period of "good faith" compliance. We therefore urge the Department to actively monitor industry compliance during this period, to act quickly to provide additional guidance as needed where it sees firms falling short, and to draw a clear distinction between firms that make a genuine good faith effort at compliance that nonetheless falls short and those firms that are guilty of flouting the rules. The Department should not accept vague statements pledging to act in retirement investors' best interests and mitigate conflicts of interest as sufficient to demonstrate good faith compliance with the Exemption.

4. Incorporate Strengthened Impartial Conduct Standards into Related Exemptions

Closing loopholes in the regulatory definition of fiduciary investment advice is a necessary step toward preventing investment professionals and firms from evading their fiduciary obligations when they are relied on by retirement investors as trusted advisers, but it is not sufficient. When the Department reinstated the regulatory definition of fiduciary investment advice, it also vacated amendments to incorporate the impartial conduct standards in other

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[28] Department of Labor, Employee Benefits Security Administration, Field Assistance Bulletin No. 2018-02 (May 7, 2018), https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2018-02.
[29] Patrick Donachie, RIAs Run Risk of Falling Short on DOL Rule Compliance (Apr. 12, 2021), https://bit.ly/3suZ4Fe.
[30] U.S. Securities and Exchange Commission, Roundtable on Regulation Best Interest and Form CRS (Oct. 26, 2020), https://www.sec.gov/news/upcoming-events/roundtable-reg-bi-form-crs.

related exemptions.[31] In doing so, it created an opportunity for regulatory arbitrage, enabling investment professionals and firms that are functioning as retirement investment advice providers to evade the fiduciary obligations appropriate to that advisory role by relying on one of several available exemptions that impose more modest regulatory obligations.[32]

It is essential that the Department engage in rulemaking to correct this problem. We appreciate that the recently released Guidance reconfirms the Department's intention to take additional regulatory action, including "amending or revoking some of the other existing class exemptions available to investment advice fiduciaries."[33] In determining how best to move forward, the Department should consider whether it makes more sense to reincorporate the impartial conduct standards in each of those separate related exemptions or to incorporate those exemptions into an all-inclusive exemption that applies to all advice relationships. The goal should be to remove opportunities for regulatory arbitrage, so that retirement investors are assured that the retirement investment advice they receive in any context and related to any product is designed to serve their best interests and subject to strict limitations on conflicts of interest that could otherwise taint the advice they receive.

5. Advice to IRA Investors Remains a Concern

While we appreciate the work done by the Department to ensure that investment professionals provide investment advice that is in the best interests of retirement investors, we remain concerned that IRA retirement investors do not enjoy the same level of protections as Title I retirement investors. Unfortunately, IRA retirement investors do not have the same remedies that Title I retirement investors have when their investment professionals engage in misconduct. While some investment recommendations may be subject to other regulation, that regulation falls short of the strong fiduciary standards embodied in ERISA. For example, recommendations of securities are overseen by the SEC, FINRA, and state securities regulators and are covered under Reg. BI or the Investment Advisers Act fiduciary standard. At least as currently interpreted and enforced by the SEC, however, that standard is far weaker than the ERISA fiduciary standard itself or the requirements under the Exemption as described in the Guidance. Annuities recommendations are overseen by state insurance regulators, but the standards that apply to annuities recommendations, including requirements embodied in the NAIC model law, are even weaker than the securities law standards. Some investments sold to IRA retirement investors, such as gold, bitcoin, art, or other collectibles, may fall entirely outside the regulatory framework.

With Americans holding more than $10 trillion in assets in IRAs in 2020, and IRAs playing an important role in their retirement planning,[34] the failure to provide robust regulatory oversight of IRA investment advice or a private right of action under the statute to enforce the

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[31] Department of Labor, Employee Benefits Security Administration, 29 CFR Parts 2509 and 2510 (RIN 1210-AB96), Conflict of Interest Rule – Retirement Investment Advice: Notice of Court Vacatur, Federal Register Vol. 85, No. 130 (Jul. 7, 2020) at 40590, https://www.govinfo.gov/content/pkg/FR-2020-07-07/pdf/2020-14260.pdf.
[32] *Id.* ("This document also reflects the Fifth Circuit's vacatur of … the amendments to the previously granted exemptions, PTEs 75–1, 77–4, 80–83, 83–1, 84–24 and 86–128.")
[33] DOL Guidance at 5.
[34] Investment Company Institute, The Role of IRAs in US Households' Saving for Retirement, 2020, ICI Research Perspective, Vol. 27, No. 1 (Jan. 2021), https://www.ici.org/system/files/attachments/per27-01.pdf.

standards that do apply represents a serious threat. The limited ability of the IRS to oversee these accounts or sanction firms for violations is not remotely adequate to address that concern. While we recognize that legislation is needed to fully address this concern, we urge the Department to use what authority it has to raise awareness of the risks to retirement investors that arise out of the current regulatory patchwork governing IRA accounts. In particular, we urge the Department to compile evidence regarding the extent to which IRAs are invested in products that are not covered by either the securities or insurance regulations, as well as the extent to which conflicts of interest are permitted to influence recommendations regarding IRA investments that are subject to securities and insurance laws. By studying the extent of the problem, the Department could help to provide the basis for an appropriate legislative response.

CONCLUSION

The recently released Guidance is an important first step toward providing the protections that workers and retirees expect and deserve when they turn to investment professionals for advice about their retirement assets. However, we believe that further guidance and additional rulemaking are also needed to ensure that all retirement investment advice is held to ERISA's high fiduciary standard. We look forward to working with you to achieve that goal, but we understand that rulemaking takes time. In the interim, it is essential that the Department actively monitor financial firms' and investment professionals' compliance efforts and take effective enforcement actions when they fail to follow the rules.

Respectfully submitted,

AFL-CIO

Alliance for Retired Americans

American Federation of Musicians of the United States and Canada (AFM)

American Federation of State, County and Municipal Employees (AFSCME)

American Federation of Teachers (AFT)

Americans for Financial Reform Education Fund

Bakery, Confectionary, Tobacco Workers and Grain Millers International Union (BCTGM)

Better Markets

Center for California Homeowner Association Law

Columbia Consumer Education Council

The Committee for the Fiduciary Standard

The Communications Workers of America (CWA)

Consumer Action

Consumer Assistance Council, Inc.

Consumer Federation of America

Consumer Federation of California

Delaware Community Reinvestment Action Council

Economic Policy Institute

International Federation of Professional and
Technical Engineers (IFPTE)

Northwestern Pritzker School of Law
Bluhm Legal Clinic/Complex Civil Litigation and
Investor Protection Center

The One Less Foundation

Pace Investor Rights Clinic
John Jay Legal Services, Inc.
Elisabeth Haub School of Law at Pace University

PIABA

Public Citizen

Securities Arbitration Clinic
St. Vincent De Paul Legal Program, Inc.
St. John's University School of Law

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The United Association of Journeymen and
Apprentices of the Plumbing and Pipe Fitting
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