March 15, 2022

Acting Assistant Secretary Ali Khawar
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Suite N-5677
Washington, DC 20210

Dear Acting Assistant Secretary Khawar:

We write as organizations and individuals who strongly support the Department of Labor ("the Department") moving forward with a modernization of the fiduciary rule and any supporting regulatory changes. We were very pleased that the Department's Spring 2021 regulatory agenda confirmed that a fiduciary rule update is in the works, but we are concerned that the rule has not yet reached the Office of Management and Budget ("OMB") for review, and we urge the Department to move expeditiously to complete it.

Research confirms that the Department's 2016 fiduciary rule, before it was vacated in 2018, improved retirement savers' investment returns by reducing conflicts of interest in retirement-related investment products. One study, by Harvard and New York University researchers, found that broker incentives are the most important factor in determining sales; that brokers earn higher commissions for selling inferior annuities with higher expenses; and that "in response to the [2016] rule "annuity sales flows became twice as sensitive to expenses as before the rule and the sale of annuities in the top quartile fell by 52%."[1] Furthermore, following the rule, the relative availability of high-expense products declined. That is, in complying with the rule, brokers began to "plac[e] a greater weight on investor interests."[2]

The current regulatory regime with its five-part definition of "fiduciary advice" makes it easy for retirement investment advice providers to avoid fiduciary responsibility even when retirement savers are relying on them as trusted advisers. It is most problematic that the "regular basis" prong of the regulatory definition may allow advice providers to avoid application of the fiduciary standard to their rollover recommendations, leaving retirement savers less protected when conflicts, risks, and potential long-term costs are greatest.[3] Examples of potentially

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[1] Egan, Mark, Shan Ge, and Johnny Tang, "Conflicting Interests and the Effect of Fiduciary Duty—Evidence from Variable Annuities, Harvard Business School Working Paper, No. 21-018, August 2020, *available at* https://www.hbs.edu/faculty/Pages/item.aspx?num=58605

[2] *Id.* at 3.

[3] The Department's interpretation, in the Preamble to Prohibited Transaction Exemption 2020-02 and subsequent April 2021 Guidance ("Guidance") that some rollover recommendations could be considered fiduciary investment advice is a positive step forward. But more is needed to cover all rollover recommendations, and Guidance, lacking

financially damaging, if not ruinous, one-time recommendations include recommendations to purchase inappropriate insurance annuities or other alternative non-securities, such as gold, bitcoin, or collectibles.

We see no justification for providing ERISA fiduciary protections solely to advice given on a regular basis, while leaving other equally and potentially more consequential advice uncovered. Similarly, retirement investment advice providers have widely used the current regulatory requirement that advice be rendered pursuant to a "mutual agreement, arrangement, or understanding" that the advice serves as a "primary basis" for the client's investment decisions, to avoid a fiduciary standard of care. In general, advice providers often try to avoid coverage by the five-part fiduciary test through written disclaimers in their agreements which state that they do not satisfy the test.[4] We urge the Department to update and eliminate all of these loopholes in the definition of "fiduciary investment advice" to align the new rule with the letter and spirit of ERISA and protect retirement savers who are predominantly covered by individual account plans.

To further protect retirement savers, rulemaking is necessary to clarify the difference between investment "advice" and investment "education." As the Department has documented, retirement investment providers have long sought to avoid application of the fiduciary standard by characterizing advisory materials that retirement investors reasonably believe is fiduciary advice, as "investment education." For example, retirement investors are often misled when educational materials are combined with highlights of particular investment products, because the retirement investor perceives them to be investment recommendations.[5]

We also are counting on, and awaiting, amendments to the Department's Prohibited Transaction Exemption 2020-02 ("the Exemption") to ensure that those who invoke the Exemption remain unambiguously subject to ERISA's core fiduciary standard. The Exemption currently frames the retirement advice provider's basic obligation in comparatively weak terms. It provides that

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regulatory force, is likely to be legally challenged by those most intent on avoiding fiduciary responsibility for their retirement investor clients.

[4] We appreciate that the Guidance will help curb this practice because it states 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.

[5] The Department's interpretation in the Exemption Preamble preserves this practice, thereby 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 reasonably relied on by retirement investors as advice are not exempted from the fiduciary duty through the investment education exemption.

advice is in the retirement investor's "best interest" as long as it does not place the retirement advice provider's financial or other interests "ahead" of the retirement investor's interests, or "subordinate" the retirement investor's interests to those of the advice provider. This formulation of "best interest," which establishes a kind of parity between the interests of the two parties, because neither interest is placed ahead of the other, is contrary to the statutory mandate that 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."[6] While the Department's April 2021 Guidance is helpful in addressing this concern, formalizing the standard through rulemaking will help ensure that the obligation is effective and enforceable.

The Exemption's monitoring "requirement"—that "nothing in the final exemption requires Financial Institutions or Investment Professionals to provide ongoing monitoring services"—requires revision. Retirement investment providers should always have a duty to monitor on-going investment relationships even if, as we urge, the Department removes the "regular basis" element of the definition.

The disclosure requirements under the Exemption are inadequate both in substance and timing. The Department suggests in the Exemption Preamble 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 for compliance with Reg. BI, the Advisers Act fiduciary standard, or the NAIC model rule. There is no evidence, however, that these disclosures are effective. Indeed, what little testing has been done indicates that they are not,[7] which suggests that they do not satisfy the conflict disclosure standard set out in the Guidance, i.e. that it "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." We urge the Department to use the time between proposing and finalizing the new fiduciary rule to test any proposed consumer disclosures (including those under Reg. BI or the NAIC model rule) to be sure they are understandable and effective before adoption of a final rule and allowing these other disclosures to be used for compliance with the Department's

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[6] 29 U.S.C.§1104(a).

[7] *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), *available at* 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), *available at* https://consumerfed.org/wp-content/uploads/2018/12/cfa-letter-to-sec-on-rand-crs-testing-study.pdf.

more stringent statutory fiduciary standard under any proposed, amended or existing Department exemption.

The exemption fails to ensure that the timing of the conflict disclosure—it must be provided merely "prior to engaging in a transaction [or rollover]—is adequate for the retirement investor to consider the impact of the conflict. It does not specify how much time retirement investors should have to review the disclosure; nor does it require that investment providers discuss the disclosure with retirement investors to facilitate their understanding. Such disclosures convey important, yet inherently complex, information, so they should be made well before an investment transaction is executed to minimize the risk of an uninformed decision.
The Exemption's self-correction provision should be eliminated. We respectfully disagree with the Department's view, expressed in the Preamble, that the provision is productive because it will increase investment professionals' incentives to identify and correct violations. In our view, the provision likely will create a lax approach to compliance, because when violators "self-correct" they can avoid sanctions. Investment advisors know that the detection of many violations will hinge on investor complaints and retirement investors are mostly unaware when investment recommendations are contrary to their best interest. The self-correction provision may give truth to a belief that violations may never surface, and even if they do, they are of no consequence. The Department should retain discretion to grant relief only in those instances where the violation is minor, demonstrably unintentional, and quickly corrected.

The 10-year ban on reliance upon the Exemption because of certain prior poor conduct requires reexamination and amending. While laudable in principle, the ban is so encumbered with procedural hoops that we fear it will do little to incentivize compliance. Specifically, before issuing a written ineligibility notice to an investment professional or firm, the Department must issue a written warning identifying the specific misconduct and provide a six-month opportunity to cure. If, after six months, the misconduct persists, the violator has an opportunity to be heard in person, in writing, or both. The Department can determine ineligibility only after this process concludes. The opportunity to cure should be eliminated because its existence undermines compliance and accountability. It reassures advice providers that, even if they engage in a "systemic pattern or practice" of violating the conditions of the Exemption—or provide materially misleading information to the Department—they will have the opportunity to cure and continue to rely on the Exemption. We find it implausible that those who have engaged in a "systematic pattern or practice" of violations will immediately and completely desist from such misconduct, even during a lengthy cure period. As a result, this provision threatens to expose retirement investors to continued harm while the half-year opportunity to cure unfolds. Further, the related provision allows advice providers, who are Exemption-ineligible because of criminal

convictions or other serious misconduct, to rely on other prohibited transaction exemptions or seek an individual transaction exemption. This loophole should be eliminated. This provision conflicts with a regulatory goal of protecting retirement savers and deterring misconduct. Exemptive relief should not be available to those who are demonstrably unfit to warrant it.

Last spring, in its regulatory agenda, the Department correctly acknowledged the need to update the fiduciary rule to protect retirement investors from investment advice tainted by conflicts of interest. We urge the Department to move forward with that agenda and the supporting regulatory changes we have identified in this letter.

Sincerely,

AARP
Airline Pilots Association International (ALPA)
Alliance for Retired Americans (ARA)
American Federation of Labor & Congress of Industrial Organizations (AFL-CIO)
American Federation of Musicians (AFM)
American Federation of State, County and Municipal Employees (AFSCME)
American Federation of Teachers (AFT)
Americans for Financial Reform Education Fund
Association of Flight Attendants (AFA-CWA)
Bakery, Confectionery, Tobacco Workers and Grain Millers International Union (BCTGM)
Better Markets
Center for American Progress (CAP)
Center for Responsible Lending (CRL)
Committee for the Fiduciary Standard
Consumer Action
Consumer Federation of America (CFA)
Economic Policy Center (EPI)
Institute for the Fiduciary Standard
International Association of Machinists and Aerospace Workers (IAM)
International Brotherhood of Teamsters (IBT)
International Union of Bricklayers and Allied Craftworkers (BAC)
Investor Rights Clinic, University of Miami School of Law
National Committee to Preserve Social Security and Medicare

National Coordinating Committee for Multiemployer Plans (NCCMP)
National Nurses United (NNU)
Pension Rights Center
Public Citizen
Public Investors Advocate Bar Association (PIABA)
RealFi Investor Rights Clinic, John Jay Legal Services, Inc.
Elisabeth Haub School of Law at Pace University
Securities Arbitration Clinic, Cardozo School of Law
Securities Arbitration Clinic, St. Vincent De Paul Legal Program, Inc.
St. John's University School of Law
Social Security Works
United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (UA)
UNITE HERE!
United Mine Workers of America (UMWA)
United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW)
U.S. PIRG
Woodstock Institute

Signing in their individual capacity
The Honorable Phyllis Borzi
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