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17 April 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 Avenue, NW
Washington, DC 20210

Re: Definition of the Term "Fiduciary"; Conflict of Interest Rule-Retirement Investment Advice; Best Interest Contract Exemption (Prohibited Transaction Exemption 2016-01); Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Prohibited Transaction Exemption 2016-02); Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, 84-24 and 86-128 (RIN 1210-AB79)

Dear Sir or Madam:

CFA Institute[1] is writing to provide comments to the Department of Labor (DOL) on its proposal (the Proposal) to reexamine the rule DOL adopted in April 2016, titled "Definition of the Term 'Fiduciary:' Conflict of Interest Rule—Retirement Investment Advice" (the Rule). CFA Institute represents the views of those investment professionals who are its members before standard setters, regulatory authorities, and legislative bodies worldwide on issues that affect the practice of financial analysis and investment management, education and licensing requirements for investment professionals, and on issues that affect the efficiency, integrity and accountability of global financial markets.

Executive Summary

Rule's importance. We continue to support the Rule to require advice providers to act in their clients' best interests. This principle should be a fundamental, regulatory obligation for any advice provider.

Points of review. The Administration's directives to the DOL do not raise issues that justify repeal or dilution of the Rule. Instead, in anticipation of the Rule's implementation, market

[1] CFA Institute is a global, not-for-profit professional association of more than 148,000 investment analysts, advisers, portfolio managers, and other investment professionals in 163 countries, of more than 141,000 hold the Chartered Financial Analyst® (CFA®) designation. The CFA Institute membership also includes 148 member societies in 73 countries and territories.

innovations have been, or are in the process of being, implemented that offer smaller investors a range of choices to ensure continued accessibility to retirement advice, programs, and services.

Title differentiation. We continue to believe that the Securities and Exchange Commission should mandate clear differentiation in the titles of advice providers and that this would substantially reduce investor confusion about applicable standards of care. Those referring to themselves as "advisers" should be subject to the Investment Advisers Act, held to a fiduciary standard of care, and register with the SEC. Those not wishing to meet these requirements would have to refer to themselves as "salespersons."

Discussion

CFA Institute supports[2] the Rule's aim to ensure that retirement advisers act in the best interests of retirement investors and ensure that the advice they provide is impartial, transparent, and allows clients to make reasoned decisions about investments and service providers. We believe the DOL's Rule is needed to protect investors' retirement savings and, if not this rule, then a replacement that applies this bedrock standard.

Investors should be able to trust those they pay to provide them investment advice. Until the SEC makes clear which investment professionals are bound by a fiduciary duty rule for dealings with retail investors, the DOL's Rule provides protection that is otherwise unavailable to many U.S. retirees. The Rule applies a much-needed standard for retirement investors and IRA account holders who are not receiving advice from registered advisers, but from others, including broker-dealers and insurance agents, who are not held to a fiduciary standard.

We recognize investors are confused as to the standard of care they should receive when paying for investment advice. CFA Institute believes a clear delineation in titles of those providing services would remedy much of this confusion. Under this approach, providers of financial advice who refer to themselves as "advisers" would have to be registered with the SEC under the Investment Advisers Act of 1940 and held to a fiduciary standard of care. Other financial services providers, including those who may provide non-incidental advice and adhere to a non-fiduciary standard of care (e.g., suitability standard) would refer to themselves as "salespersons." We believe this approach would be relatively easy to implement with minimal cost for market participants.

Administration Priorities

In directing the DOL to reexamine the Rule, the Administration states its priorities as

> 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.

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[2] See, e.g., 20 July 2015 letter to the Office of Regulations and Interpretations, Employee Benefits Security Administration on "Definition of 'Fiduciary;' Conflict of Interest Rule—Retirement Investment Advice (RIN 1210-AB32) by Kurt N. Schacht, CFA and Linda L. Rittenhouse.

The Administration has directed the DOL to undertake actions to rescind or revise the Rule if it is inconsistent either with these priorities, or with three specific directives the DOL is to consider.

CFA Institute believes the Rule is entirely consistent with the Administration's stated priorities. This Rule accomplishes this by seeking to address the detrimental effect on investors from receiving "conflicted advice" that may include the sale of inappropriate investment products, higher-than-normal fees, and lower performance returns.

The February 2015 Council of Economic Advisers' report (CEA Report) estimates the cost to clients who are saving for retirement to

- be approximately *$17 billion each year* from being invested in products that generate revenues for the people and entities providing the advice;
- produce lower returns, net of fees, to investors of approximately *one percentage point*; and
- reduce ultimate savings by approximately *12 percent* over 30 years as a result of higher fees and less appropriate investment instruments used due to conflicted advice to those rolling 401(k) monies into IRAs.

If investors are to save for retirement and build the wealth they need to, among other things, withstand unexpected financial emergencies, they need advice that focuses on their interests. Ultimately, this Rule will help produce the circumstances the Administration cites in its priorities.

Sufficient Initial Review

We believe the DOL did engage in a thorough initial review for its Rule, including substantive and economic analyses over a number of years. It invited comments from the public during two distinct comment periods; held four days of testimony from individuals and groups; conducted outreach sessions with industry groups and market participants holding various views on the Rule; and confirmed that it reviewed and considered the issues raised in the more than 3,000 comment letters it received on that rulemaking. Moreover, the DOL not only read and considered the views of a wide range of commenters, but it also amended its final Rule to accommodate many of the points raised in these comments. Consequently, we believe the process was thorough, reasonable and appropriate.

The sufficiency of this process has been affirmed by the courts that have ruled on challenges brought by opponents to the Rule and dismissed their claims. In an opinion rendered in February 2017 for the U.S. District Court for the Northern District of Texas, Judge Barbara Lynn found the DOL's review was neither arbitrary nor capricious:

> 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….

Specific Directives in Memorandum

The memorandum issued by the Administration on 3 February (Memorandum) directs the DOL to examine the Rule to determine "whether it may adversely affect the ability of Americans to gain access to retirement information and financial advice." In making this determination, the Memorandum directed the DOL to prepare an updated economic and legal analysis that considers each of the three following issues:

1. *Whether the anticipated applicability of the final rule has harmed or is likely to harm investors due to a reduction of American's access to certain retirement savings offerings, and retirement product structures, retirement savings information, or related financial advice;*

In anticipation of the Rule's implementation, investment firms advising retirement clients have introduced new structures to ensure retirement savers will continue to have access to this range of offerings, information and advice. For example, recent reports note that Morgan Stanley and Edward Jones are moving to lower commission structures. Other firms have likewise stepped forward with innovative responses (e.g., robo-advisers) to accommodate the advice needs of smaller retirement investors. Moreover, a number of firms (e.g., Mass Mutual, Morgan Stanley, Ameriprise) have indicated they are intending to use the best interest contract exemption, regardless of whether it is finally adopted by DOL, and thus work within the requirements of the Rule.

While commission-based providers may still argue that investors will be harmed through the loss of options should the Rule go forward, this argument is not supported by the number of industry responses that explore new technology and other options to serve this sizeable population.

2. *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;*

We believe that while the Rule has resulted in dislocations or disruptions within the retirement services industry, we have not seen this adversely affecting investors. For example, in a survey CFA Institute conducted in February 2016, our members uniformly saw the advent of automated advisers being an advantage to retirement investors with small balances because the technology would reduce costs for these investors, as well as increase access. Moreover, we believe the innovations and changes described above have been responsive to investors' needs for options and will provide a wider array of options than currently exist. As one example, firms are already developing lower cost options, like T-shares and clean shares in response to the Rule.

3. *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.*

While new regulations generally may require adjustments to existing procedures and processes, DOL officials have repeatedly emphasized their focus is not in bringing enforcement actions, but instead in helping affected parties to understand the Rule's requirements and to bring themselves into compliance. In addition, in response to comments received during the Rule's proposal stage, the final version eliminated a private right of action, which we saw as attempting to assuage initial concerns about increased litigation.

In performing its cost/benefits exercise on the effects of delaying implementation of the Rule beyond its original April date, the DOL calculates that a 180-day delay would reduce potential gains to investors by "$441 million in the first year and 2.7 billion over 10 years, while relieving industry of 180 days of day-to-day compliance burdens would be worth an estimated $126 million." This calculation makes clear that the costs of reduced returns and higher fees to investors and retirees due to conflicted advice is far greater than the costs to the industry.

Conclusion

We encourage the DOL to let its Rule remain in force. Not only does the Rule effect a much-needed change in the retirement advice marketplace—putting investor interests first—but it also has sparked innovation by market participants as they act to address the issues raised by the Rule. Requiring all advice providers to put investors' best interest before their own should be a fundamental requirement in the investment advice business. We believe diluting this protection will ultimately harm the U.S. retirement community.

Should you have any questions about our positions, please do not hesitate to contact Kurt N. Schacht, CFA at kurt.schacht@cfainstitute.org or 212.756.7728; or Linda Rittenhouse at linda.rittenhouse@cfainstitute.org or 434.951.5333.

Sincerely,

/s/ Kurt N. Schacht

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Managing Director,
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