January 2, 2024

Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave. NW
Washington, DC 20210

Re: Definition of Fiduciary—RIN 1210–AC02;
Application No. D–12057; Application No. D–12060

Assistant Secretary Gomez:

The undersigned are writing to express strong support for the Department of Labor's Retirement Security Proposal, which would strengthen protections for retirement investors who seek professional investment advice. The Department's proposed rule would ensure that all investment professionals provide advice that is in retirement investors' best interest and that any conflicts of interest do not taint their advice. We urge the Department to finalize this proposal without undue delay.

The Current Department of Labor Investment Advice Rule Requires Modernization to Adequately Protect Retirement Investors From Conflicted Investment Advice.

In recent decades, there has been a dramatic shift in our private retirement system away from defined benefit pension plans and into 401(k)s and Individual Retirement Accounts (IRAs). Millions of Americans are counting on their retirement savings for a secure financial future. These plans often involve complex investment decisions, so many investors turn to investment professionals for advice. When retirement investors do so, they reasonably expect that they will receive advice that is in their best interest, and they trust and rely on the advice they receive.

Unfortunately, because of loopholes in the almost 50-year-old regulatory definition of who is considered a fiduciary under the Employee Retirement Income Security Act (ERISA) of 1974, some financial professionals are allowed to provide investment advice without being held to the high professional standards appropriate to their consequential role. They may steer retirement investors into products, services, or account types that maximize their own revenues but come with excessively high costs, poor performance, unnecessary risks, or illiquidity, jeopardizing retirement investors' financial security. Conflicts of interest among many investment professionals and firms take a huge toll on the ability of millions of workers and retirees to have a financially secure and dignified retirement.

A major loophole in the current rule is that one-time advice—no matter how financially consequential—is not covered. This means that when an individual leaves a job, a recommendation to roll over their 401(k) to an IRA is currently not covered—even if doing so would leave the retirement investor worse off. Firms and investment professionals often have strong incentives to recommend rollovers because it can mean a big pay day for them. There have been cases of investment professionals winning all-expense paid exotic vacations for persuading retirement

investors to roll over their life savings to their firm. Similarly, a one-time recommendation to a 401(k) plan sponsor as to the menu of investment options provided to employees may include investments marked by high costs and low performance, which can erode employees' hard earned savings and returns. Studies indicate that the annual costs to retirement investors attributable to conflicted advice is huge, representing billions of dollars in lost savings every year. At an individual level, retirement investors may lose tens if not hundreds of thousands of dollars over time.

Another major loophole in the current rule is that the advice must form a primary basis for the investment decision. Some firms seek to evade their fiduciary duty by using fine-print legal disclaimers stating that investors should not rely on their recommendations as a primary basis for their investment decisions, despite the fact that the purpose and effect of the investment professional's actions is to create a relationship of trust with the retirement investor, function as an advice provider, and induce reliance on their advice.

The Proposed Rule Includes Key Protections for Retirement Investors.

The DOL proposal would close the current regulatory loopholes:

- It would cover rollover recommendations to ensure that retirement investors receive strong protections when they are most vulnerable to receiving conflicted advice that harms their financial security.
- The proposal would cover advice to employers who sponsor 401(k) plans to ensure that the advice they receive about the menu of 401(k) plan investment options they should offer to their employees is not tainted by conflicts of interest.
- The proposal would apply to all retirement investments, including not only securities but also non-securities such as many insurance products and a wide range of other investments not currently covered.

Further, the proposal would make clear that firms can't use fine-print legal disclaimers to avoid ERISA fiduciary status when they provide advice that an investor would reasonably view as individualized and based on the retirement investor's best interest. Under the proposal, a person who makes an investment recommendation in one of the following contexts would be a fiduciary:

(1) The person has discretionary authority or control over the retirement investor's investments;

(2) The person makes investment recommendations on a regular basis as part of their business and the recommendation is provided under circumstances indicating that the recommendation is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest; or

(3) The person represents or acknowledges that they are a fiduciary.

The proposal is designed to ensure that ERISA's strong fiduciary standards uniformly apply to all situations where retirement investors reasonably expect that their relationship with an advice

provider is one in which the investor can—and should—place trust and confidence in the recommendation.

To the extent a firm or an investment professional has a conflict of interest when providing investment advice, the proposal requires firms and investment professionals to comply with certain protective conditions to ensure that the advice they provide is in the retirement investor's best interest. These include:

- Meeting a professional standard of care when making investment recommendations (giving prudent advice);
- Never putting their financial interests ahead of retirement investors' when making recommendations (giving loyal advice);
- Avoiding misleading statements about conflicts of interest, fees, and investments;
- Following policies and procedures designed to ensure that they give advice that is in retirement investors' best interest;
- Charging no more than is reasonable for their services; and
- Giving retirement investors basic information about conflicts of interest.

These protective conditions would ensure that, regardless of the financial professional a retirement investor turns to for advice and regardless of the type of investment they are recommended, retirement investors will be able to trust that they will receive professional quality advice that is not tainted by conflicts of interest and their investments won't be laden with excessive fees. These features of the proposal will improve protections and outcomes for retirement investors.

Unsurprisingly, many in the financial services industry have long opposed Department of Labor efforts to fix the problem of conflicted retirement investment advice. Their interest is in preserving the very profitable status quo. And their arguments against the rule are unpersuasive. One of industry opponents' claims is that investors with low account balances or of modest means would be worse off because they would lose access to investment advice under this rule. This is little more than a scare tactic based on their 2016 rule assumptions, which are not applicable to the current proposal.

The reality is that strong protections won't deprive retirement investors of access to advice. In fact, many financial professionals already support and successfully operate under a strong fiduciary standard while serving clients all along the income spectrum. Far from harming small savers, the proposal would provide them with important protections. Small savers are particularly vulnerable to the detrimental effects of conflicted advice. With fewer economic resources, they can least afford to lose any of their retirement savings to bad advice. Contrary to the rule opponents' assertions, small savers, in fact, have the most to gain from the DOL's proposed rule.

We strongly support this proposal and urge the Department to finalize it without undue delay.

Respectfully submitted,

Alliance for Retired Americans
American Association for Justice
Americans for Financial Reform Education Fund
Asset Building Strategies
Better Markets
California Low-Income Consumer Coalition
Center for Economic Integrity
Consumer Action
Consumer Federation of America
Consumer Federation of California
Consumer Reports
Consumers for Auto Reliability and Safety
DC Consumer Rights Coalition
Delaware Community Reinvestment Action Council, Inc.
Economic Opportunity Institute
Economic Policy Institute
FL National Organization for Women
Greater Orlando National Organization for Women
Interfaith Center on Corporate Responsibility
Massachusetts Teachers Association
National Association of Consumer Advocates
National Committee to Preserve Social Security and Medicare
National Organization of Social Security Claimants' Representatives
National Organization for Women
National Women's Law Center
NJSaves
Pension Rights Center
Private Equity Stakeholder Project
Public Citizen
Public Investors Advocate Bar Association
The Center for Economic Justice
The Committee for the Fiduciary Standard
UnidosUS
USPIRG
Virginia Citizens Consumer Council
Voices Organized in Civic Engagement (VOICE)
Woodstock Institute

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