

September 24, 2015

The Honorable Thomas E. Perez  
Secretary  
U.S. Department of Labor  
200 Constitution Avenue NW  
Washington, DC 20210

**Re: Definition of the Term “Fiduciary” Conflict of Interest Rule (RIN 1210-AB32)  
Proposed Best Interest Contract Exemption (ZRIN 1210-ZA25)**

Dear Secretary Perez,

I am writing to express my support for the Department of Labor’s work to update and expand the definition of fiduciary for employer and individual retirement plans and to highlight several key provisions that I believe would be especially helpful to workers and retirees if included in a final rule.

Planning for retirement is hard, and Congress has made it harder over the years by shifting more of the burden and responsibility to the worker. I think that shift is fundamentally a mistake, but I commend the Department for adapting to the world we live in. The only way our approach to retirement planning can succeed is with strong guidance from trained professionals who have the expertise to evaluate a complex investment world and who can cultivate respect and trust to overcome all of the natural human impulses against saving for the future. This rule’s focus on improving the quality of advice is absolutely necessary, and a well-written rule should also enhance the trust between investors and advisers.

I want to thank you and your team for the outreach that you have done to me and to my office as you have gone through this process. I also want to commend you on the extended comment period, the public hearing, and the willingness to engage with all interested parties during the consideration of this proposal. I have had dozens and dozens of meetings with constituents on this issue over the last several months, and almost every one of them was followed or preceded by a meeting with your experts working to craft this rule. A transformative regulation like this deserves intense engagement, and I commend you for recognizing that.

I have also been struck by the earnestness of several people I have met with on this issue over the last two months. I want to encourage you to take close notice of several of their points and proposals on how best to achieve the Department’s (and society’s) goals for retirement savings:

**Encouraging Retirement Plans at Small Employers**

The Department notes that the strong majority of retirement assets are either in employer-sponsored plans or are the result of rollover from an employer-sponsored plan, and research shows strong correlation between an employer offering a plan and higher savings rates by employees. In addition to the clear benefit of retirement plans in encouraging savings, I have noted that the Department has offered employer-sponsored plans, with the scale and cross-subsidization they bring, as an effective vehicle for solving the problem of how to provide advice to workers with small account balances.

For all of these reasons, I think we should have a clear goal of encouraging employers to sponsor retirement plans, and we should be deeply concerned that only a quarter of small businesses (those with fewer than 25 employees) offer plans. In light of this goal, I am worried about a gap left in the proposed rule for employers with under 100 employees. The primary exception for larger employer plans (the seller's exception) is not available to businesses with under 100 employees, and the primary exception for individuals (the best-interest contract exception) is not available for employee-directed plans. The final rule must close this gap. I believe that the Department has identified simple fixes that would leave no gaps in the rule, and I encourage the Department to address this issue and ensure that small employers have ready access to advice.

It will take more than tailoring the rule to encourage small businesses to set up plans. Setting up an employer plan is a costly, complex and burdensome undertaking, and the Department notes that small business owners are experts in providing the goods and services they sell, not in financial planning. The Department should take affirmative steps to encourage markets that allow small businesses to set up plans at a minimum of time and expense. My state of Washington recently enacted the Small Business Retirement Marketplace, a multiple employer plan (MEP) for small businesses to access in setting up retirement plans. I am optimistic that this initiative will result in lower costs through economies of scale and better results through standardization around the best approaches. I believe MEPs, both state-sponsored and private, could be a meaningful improvement for small business employees, and I encourage the Department to speed its forthcoming rulemaking on MEPs and to craft the fiduciary relationships in the final conflict-of-interest rule with an eye toward encouraging the broader implementation of MEPs.

### **Encourage Advice and Education**

As I noted, I fear that shifting the responsibility for retirement planning and saving on to the worker has proven to be an unwise policy change. I have known brilliant pension fund managers who have enriched the retirements of hundreds of thousands, and I have seen that investing and retirement planning take time, education, skill and talent. But as we have shifted the burden from pension funds to workers, we have not provided workers with the education or freed up the time for them to do it right. We are setting people up to fail and this has led to what many have called a retirement savings crisis. I know that you share this concern, and I appreciate the work that the Department has done in implementing automatic retirement plan enrollment and encouraging better default investment alternatives. Still, there is much work left to be done if we want most workers reach retirement with adequate savings.

Changing the default retirement settings has been an effective way of minimizing the number of decisions required to start saving for retirement, but it only goes so far. All workers in a defined contribution framework will eventually need help confronting difficult decisions, making good choices and reviewing progress toward goals as they age. This can only be done with the assistance of financial professionals.

I support the Department's proposal to preserve an education exception first outlined in 1996. I believe that vastly more education is needed to help workers tackle complex retirement decisions, and I believe it is especially important that the education exception cover personalized retirement adequacy models. Asset adequacy calculators are critical in reminding workers of the need to monitor and revisit their investments. They challenge the same status quo bias that the Department

responded to in encouraging default enrollment and investment options in 2006. I hope the Department preserves a strong education exception encouraging frequent education utilizing personalized measures wherever available under the interactive material provision.

Even with the benefit of education, it will never be realistic for the typical worker in a defined contribution plan or IRA to carry out on their own all of the roles of the employer and pension fund manager in a defined benefit plan. Workers will have to depend on outside advisers to help set retirement goals and to choose the savings targets and investment allocation to reach that goal. Even after the initial plan is set, academic research shows most investors would also benefit from someone to discourage reacting to market volatility. I am skeptical that these roles can be filled completely by so-called “robo advisers.” I think the role of person-to-person interaction is vital. Workers need advisers whom they trust and respect and can empower to carry out a plan that will deliver the worker retirement security.

The fiduciary duty ought to significantly increase the trust between advisers and clients once the relationship is established, but I take seriously the concerns that the proposed timing of the Best-Interest Contract (BIC) may block the relationship from being consummated in the first place. I encourage you to look carefully at how to craft the paperwork and timing of the BIC so as to maximize the opportunity for workers to interact and benefit from advisers legally bound to act in the client’s best interest.

### **Preserve and Promote Options for Guaranteed Lifetime Income**

Pensions are superior retirement plans not only in putting investment decisions in the hands of financial professionals but also in providing a monthly income stream rather than accumulating a lump sum. I have always believed that it is far easier for the typical worker to envision their retirement needs in terms of monthly income and expenses than in terms of the total cost over the years and the total assets necessary to cover that. In addition, I hear from my constituents that outliving their retirement assets is among their greatest fears for old age. For all of these reasons, I think we should work to promote products in worker-directed retirement plans that replicate pensions’ promise of guaranteed lifetime income.

I appreciate the thoughtful discussion in the proposal to provide a supplemental exemption for annuities in Section VI of the BIC and to preserve the proposed transaction exemption 84-24 for annuity sales. I know that the Department recognizes the importance of guaranteed lifetime income, and I think the proposal’s requests for comment show a commitment to getting the rule right, but it has caused understandable confusion about what the final rule will look like. I urge you to finalize the rule with an eye toward preserving the opportunity for workers to replicate a pension-like retirement in defined contribution plans and IRAs.

### **Encourage Good Actors**

One way Washingtonians buy annuities is through fraternal benefit societies. Because of their structure as non-profit member organizations similar to cooperatives, fraternal avoid many of the conflicts of interest between client and adviser that this rule is designed to address. With other consumer financial protections, regulators have modified regulations for certain situations where the provider and customer’s incentives are well aligned, and that may be possible here as well. I know

you have acknowledged the distinct role played by fraternal in testimony before the House, and I encourage you to especially consider how the rule would affect this unique structure.

I also applaud the Department's effort to recognize good actors in the industry and consider whether to create an exception for the best products. While I have heard strong concerns about the wisdom of a low-cost high-quality exception, I do believe that there are companies pioneering better approaches to retirement, and the Department is right to take note that the market is improving for retirement savers. I was struck by data on how much the mutual fund market has shifted from funds with sales fees to no-load mutual funds over the last decade, and that makes me optimistic that innovators will keep driving competition that ultimately better serves retirees.

### **Going Forward**

I have been impressed with the sincerity of the folks I have met with on this issue over the last two months. It seems like there are a lot of people working in good faith to get to a better rule and better service for workers and retirees. There is a clear consensus that the legal standard for investment advice needs to be raised and some current activities need to be prohibited. I hope these suggestions help you in tackling the difficult work of identifying exactly where the new line should be drawn and which activities should be ended.

This rule is sweeping in its impact, and even with innovation and good faith effort, implementation will take time. In considering the effective date, I urge the Department to consider carefully the comments of systems providers and of small advisers on reasonable time frames for implementation. I also encourage transition relief like temporary safe harbors for good-faith actors and time-limited grandfathering for existing clients. This rule is meant to make things easier on workers, and that purpose is served by minimizing disruption during the implementation process.

Investment advisers are professionals because investing is really difficult. When individuals seek help on these sorts of complex questions, they should be able to rely on their advisers to act with loyalty, care and prudence, and I thank you for your efforts to ensure that happens.

Sincerely,

Denny Heck  
Member of Congress (WA-10)