

January 2, 2023

Office of Regulations and Interpretations
Employee Benefits Security Administration, Room N-5655
U.S. Department of Labor
200 Constitution Ave. NW
Washington, DC, 20210

Via Electronic Submission - Federal eRulemaking Portal: <http://www.regulations.gov>

Re: RIN 1210-AC02 - Retirement Security Rule: Definition of an Investment Advice Fiduciary and Associated Prohibited Transaction Exemption Amendments

Dear Assistant Secretary Gomez:

1. Introduction

The National Association of Personal Financial Advisors (“NAPFA”) welcomes the opportunity to provide comments on the Department of Labor’s (the “Department’s”) proposed Retirement Security Rule and related Prohibited Transactions Exemptions (together, the “Proposed Rule”). NAPFA members provide fiduciary-level financial planning services and retirement advice to Americans from all backgrounds. As a longtime advocate for a robust fiduciary standard to apply to all financial advice, NAPFA supports the Proposed Rule which, if adopted, will substantially improve retirement security for all Americans and urges the Department to promptly adopt it.

The Proposed Rule would establish a “level playing field” for all retirement advice and retirement investments; would require that all retirement advice and retirement investments meet the stringent fiduciary standards under the Employee Retirement Income Security Act of 1974 (“ERISA”);¹ and would provide other urgently needed regulatory protections for retirement savers. Fiduciary-level retirement advice is particularly critical when Americans roll over their 401(k) plan assets into IRAs. For many Americans, whether to roll over, and how to invest their retirement assets, are among the most important financial decisions they will ever make. NAPFA believes that financial professionals who provide retirement advice, especially advice concerning ERISA qualified plans, must always act in a fiduciary capacity.

2. NAPFA Advisors Today Provide Retirement Advice Consistent with the Proposed Rule

NAPFA was founded in 1983 and is the nation’s leading organization of “Fee-Only” comprehensive financial planning professionals. There are more than 4,600 NAPFA members across the nation serving clients from all backgrounds. NAPFA members adhere to standards of professional conduct that are widely recognized as among the highest in the financial planning profession.

Each year a NAPFA member must sign NAPFA’s *Fiduciary Oath and Code of Ethics*² which generally require a NAPFA member always to act in good faith; to be proactive in disclosing conflicts of interest; and to not accept any commissions, referral fees, or compensation that is contingent upon the purchase or

¹ See, e.g., ERISA Sections 404(a)(1) and 406(b) and Internal Revenue Code Section 4975(c)(1)(E) and (F).

² NAPFA’s *Mission, Fiduciary Oath and Code of Ethics* available at <https://www.napfa.org/mission-and-fiduciary-oath>.

sale of a financial product. NAPFA members hold themselves out to the public as, and must conduct their business as, Fee-Only financial professionals.

A NAPFA-Registered Financial Advisor (a “NAPFA Advisor”) must be registered with the U.S. Securities and Exchange Commission (the “SEC”), or with a state securities regulator, as a “registered investment adviser”³ and commonly referred to as a “RIA.” Under the securities laws, the Investment Advisers Act of 1940 (the “Advisers Act”) imposes a fiduciary duty on all RIAs.

Each NAPFA Advisor also must hold the CERTIFIED FINANCIAL PLANNER™ designation from the Certified Financial Planner Board of Standards.⁴ A CFP® professional must comply with the CFP Board *Code of Ethics and Standards of Conduct* (the “CFP Standards”) which reflect the commitment of CFP professionals to high standards of competency and ethics. NAPFA and NAPFA members have worked closely with CFP Board over the years to develop and to implement the CFP Standards as a commonsense, workable, and ethical framework of business practices to guide financial professionals who provide financial planning services and retirement advice. NAPFA endorses the CFP Standards and asks the Department to carefully consider CFP Board’s public comments on the Proposed Rule.

As a result, NAPFA Advisors operate under three complementary sets of ethical standards: one set under NAPFA’s *Fiduciary Oath and Code of Ethics*; a second set under the Advisers Act, which imposes securities law fiduciary requirements on all RIAs; and a third set under CFP Standards.

Prospective clients sometimes ask why NAPFA Advisors are Fee-Only, do not accept commissions, and are compensated only from the fees that their clients pay them. NAPFA’s answer is that financial professionals who receive commissions typically are paid based on the financial products they sell to their clients. This can lead to a conflict of interest between the financial professional, whose compensation may be tied to the recommendation of a financial product, and the client who, in this relationship of “trust and confidence,” reasonably expects financial advice that is solely in the client’s best interest. Because of this conflict of interest, financial professionals who are paid from commissions may have difficulty placing the client’s best interest above the financial professional’s personal financial interest. NAPFA’s position is that the Fee-Only method of compensation is the most transparent and objective compensation method available in the marketplace today; minimizes conflicts of interest; and allows NAPFA Advisors to act as true fiduciaries.

NAPFA Advisors are well positioned to always act solely in the best interest of each client and to serve each client in a holistic, transparent, and comprehensive manner without the distraction of having to generate commission compensation. NAPFA believes that retirement savers and the American public increasingly will recognize the similarities between the updated and strengthened fiduciary standards contained in the Proposed Rule and how NAPFA Advisors provide financial advice to retirement savers every day. In other words, NAPFA Advisors today provide fiduciary-level financial planning services, investment advisory services, and retirement advice to clients in a manner that is consistent with the Department’s Proposed Rule and ERISA’s public policy objectives.

³ See, https://www.sec.gov/about/offices/oia/oia_investman/rplaze-042012.pdf, <https://www.finra.org/investors/investing/working-with-investment-professional/investment-advisers> and <https://www.nasaa.org/industry-resources/investment-advisers/investment-adviser-guide>.

⁴ CFP Board, founded in 1985, is a professional standards-setting body that has been committed to the public interest for nearly 50 years. The CFP® certification program rests on both competency and ethics standards and is accredited by the National Commission for Certifying Agencies. Today, more than 98,000 CFP® professionals (or approximately one-third of all financial advisors) voluntarily commit as a part of their certification to abide by high standards of competency and ethics. The cornerstone of the CFP Standards is the requirement to act as a fiduciary, and therefore, to always act in the best interests of the client when providing financial advice. CFP Board adopted the fiduciary standard in response to the reasonable expectations of investors and to promote investor access to competent, ethical financial advice.

3. NAPFA Supports the Proposed Rule

Since 2010, when the Department first proposed updating the 1975 “five-part test” to determine ERISA fiduciary status, NAPFA has consistently called for an unambiguous fiduciary standard to apply to all persons who provide advice to retirement savers. NAPFA advocated in favor of the Department’s successful adoption of the 2016 Investment Advice Rule.⁵ NAPFA recognized that, unlike the past when traditional pension plans assured financial independence in retirement, today’s retirement savers increasingly are responsible for making the key decisions about how their retirement savings are invested.

The Proposed Rule Closes Critical Regulatory Gaps

The Department’s adoption of the Proposed Rule would close several critical regulatory gaps that exist under the current fiduciary definition and that harm retirement savers. This would promote retirement savers’ “trust and confidence” in the financial professionals they choose.

First, the Proposed Rule would cover rollover recommendations to ensure that retirement savers receive appropriate protections when they are most vulnerable to receiving conflicted advice. Financial professionals often have strong personal financial incentives to recommend rollovers because each rollover sale can trigger payments of significant financial awards, bonuses, and commissions to the financial professional. Second, the Proposed Rule would cover advice to employers who sponsor 401(k) plans to ensure that the advice employees receive about 401(k) plan investment options is not tainted by conflicts of interest. A one-time recommendation to a 401(k)-plan sponsor may include investments that have high costs and low performance, which can erode employees’ hard-earned savings and investment returns. This could cause a retirement saver to lose tens of thousands, if not hundreds of thousands, of dollars over time. Third, the Proposed Rule would apply to all retirement advice and to all classes of retirement investments including securities, non-securities, insurance products, and a wide range of other investments not covered by the current rule.

NAPFA believes that closing each of these critical regulatory gaps is a major step in the right direction to improve the quality of retirement advice and to protect the best interests of American retirement savers.

SEC Regulation Best Interest Is Insufficient to Protect Retirement Savers

NAPFA also called for the SEC to include strong fiduciary standards, such as those under CFP Standards, in its 2019 Regulation Best Interest, commonly known as “Reg BI.” NAPFA has continued to urge the SEC to do more to protect retail investors and retirement savers. Reg BI, however, does not solve the problem of conflicted retirement advice. Since Reg BI only applies to securities recommendations, transactions involving non-securities are not covered. Equally as important, Reg BI does not apply to ERISA retirement plan advice. NAPFA believes that the protections available to retirement savers under ERISA should exceed those available under the SEC’s Reg BI and should apply to all retirement assets. The Proposed Rule intends to accomplish that goal.

⁵ See, <https://www.federalregister.gov/documents/2016/04/08/2016-07924/definition-of-the-term-fiduciary-conflict-of-interest-rule-retirement-investment-advice>. From 2008 through 2022, NAPFA, the Certified Financial Planner Board of Standards (CFP Board) and the Financial Planning Association® (FPA®), the leading national organizations representing the development and advancement of the financial planning profession, collaborated on public policy issues through their sponsorship of and participation in the Financial Planning Coalition (“Coalition”). Through the Coalition, NAPFA supported the Department’s adoption of the 2016 Investment Advice Rule, submitted public comments on that proposed rule, and provided oral and written testimony from a NAPFA Advisor during the Department’s 2015 public hearings.

The Proposed Rule Does Not Limit Advice to Underserved Communities

Critics argue that the Proposed Rule would reduce access to retirement advice, especially to middle-income retirement savers. NAPFA disagrees with this assertion and believes that the Proposed Rule will not reduce access to retirement advice to the American public. NAPFA Advisors provide financial planning services and retirement advice to clients from all backgrounds and income levels. Rather than limiting access, adoption of the Proposed Rule will likely lead to increased marketplace innovation and to the development of improved financial products and services benefitting all retirement savers.⁶

The Proposed Rule Promotes Trust and Confidence in Retirement Financial Professionals

Studies have found and commentators frequently point to a disturbingly low level of financial literacy among the American public.⁷ A common conclusion is that most Americans are ill-equipped to evaluate and monitor the financial products and alternatives available to them. Retirement savers need competent and ethical financial advice from financial professionals in whom they can have trust and confidence. NAPFA believes that, by closing regulatory gaps and establishing a uniform national standard for retirement advice, the Proposed Rule will improve the quality of retirement advice and promote retirement savers' trust and confidence in the financial professionals they choose.

4. Recommendations To Improve the Proposed Rule

NAPFA supports the following amendments to the Proposed Rule:

- Retaining DOL Interpretive Bulletin 96-1's exception for investment education and guidance regarding when an investor communication is considered educational and when it is considered a recommendation.
- The Department's recognition that there are many ways to compensate a financial professional (including hourly engagement and subscriptions) and for using language that does not limit future, innovative ways of paying for financial advice that facilitates greater access to financial advice.
- The Department's determination that firms should be obligated to mitigate firm-level conflicts, including limited menus of investment options that generate third party payments, which will provide a strong threshold foundation for the formulation of best interest investment recommendations. Neither Reg BI nor the NAIC Model Regulation requires firms to mitigate or manage all material conflicts of interest. Reg BI requires mitigation of conflicts that create incentives for financial professionals but, with some exceptions, does not require mitigation of firm conflicts. The NAIC Model Regulation states that insurance producers must mitigate conflicts but does not require the firm to do so and, more importantly, excludes compensation from the definition of conflict of interest. The Proposed Rule would fill this gap and provide appropriate protections for retirement assets.

⁶ NAPFA believes that financial planning services and retirement advice should be available to all regardless of income level. To meet these needs, NAPFA and the NAPFA Foundation have partnered with "Advisers Give Back," a platform that allows NAPFA Advisors to provide pro-bono financial planning services to qualifying clients at no cost. NAPFA Advisors also can volunteer to provide pro bono financial services to underserved communities through The Foundation for Financial Planning®.

⁷ *See, e.g.,* U.S. Securities and Exchange Commission, Office of Investor Education and Advocacy, "Study Regarding Financial Literacy Among Investors" (August 2012) available at <http://www.sec.gov/news/studies/2012/917-financial-literacy-study-part1.pdf>; Time Magazine, June 10, 2022, "Financial Literacy Education Could Help Millions of Americans" available at <https://time.com/6186290/americans-financial-literacy/> discussing "Financial Literacy for All" ("FL4A") a private-sector, national initiative launched in 2021 to embed financial literacy into American culture; Harvard College Guide "Financial Literacy" available at <https://college.harvard.edu/guides/financial-literacy>.

- The Department’s determination that compensation is a conflict of interest. NAPFA supports the Proposed Rule’s measures to ensure that transactions in all annuity products, regardless of registration status, are subject to the requirements of PTE 2020-02. Because the NAIC Model Regulation excludes cash and non-cash compensation from the definition of the conflict of interest, it contains no obligation to manage conflicts arising from compensation. This creates a disparity in the standards of conduct applicable to recommendations of variable annuities, which are securities, and those applicable to fixed index annuities, which generally are not securities. This disparity is particularly inappropriate for retirement assets. Compensation-related conflicts, which can result in the sale of lower quality products and higher fees, are especially important to identify and effectively mitigate.

NAPFA requests that the Department consider the following modifications to the Proposed Rule:

- Clarify that the term “recommendation” should be interpreted consistently with how the term is interpreted in guidance from the SEC and from the Financial Industry Regulatory Authority (“FINRA”).
- More clearly define the “documentation” of disclosures that PTE 2020-02 requires for rollover recommendations. PTE 2020-02 Section II(c)(3) currently states that, with respect to rollovers, advisers must provide retirement investors in writing the specific reasons why the rollover recommendation is in their best interest. The Department should clarify the proposed PTE 2020-02 Section II(b)(5) revision that would require that “... *the Financial Institution and Investment Professional must consider and document the basis for their conclusions as to whether a rollover is in the Retirement Investor’s Best Interest and must provide that documentation to the Retirement Investor.*”
- Require plans to provide a plan prospectus with cost details, as with their annual reports on Form 5500. NAPFA supports the requirement that financial professionals analyze the retirement investor’s plan options to determine if their recommendation, whether a rollover, transfer or distribution, is superior to those provided by the retirement investor’s plan options. Access to the plan prospectus will better enable financial professionals to analyze the retirement investor’s plan options to determine if their recommendation (a rollover, transfer or distribution) is a superior alternative to achieve the retirement investor’s goals.
- Exempt from the annual review and reporting requirement those financial professionals and firms that make only a limited number of covered recommendations, provided that the firm otherwise complies with the rule’s requirements and a qualified person reviews each covered recommendation. This would reduce compliance burdens for financial professionals in small firms.
- The Department should carefully assess any potential increased compliance burdens and costs that the Proposed Rule might impose on smaller firms and retirement advisors that do not have the substantial compliance departments and resources that larger firms maintain. The Department should consider and adopt, wherever possible, compliance guidelines that do not increase the compliance obligations and costs that smaller firms and retirement advisors are already subject to.

5. Conclusion

Congress enacted ERISA in 1974 to protect assets held in tax-preferred retirement savings vehicles from market abuses. Congress thus recognized that encouraging all Americans to save for a financially secure retirement is a critically important public policy goal. The Department must now revise the ERISA

fiduciary standard to accommodate the evolution of retirement savings vehicles, retirement investor expectations, and the regulatory environment that has developed since 1975.

The current fiduciary definition under ERISA contains significant regulatory gaps that allow financial professionals to provide retirement advice, and to sell financial products, which are not always in the best interests of retirement savers. The current regulatory framework allows financial professionals' interests to be misaligned with retirement savers' best interests. While some financial professionals attempt to do what is best for their clients, others can take advantage of regulatory gaps to steer their clients into high-cost, substandard investments that pay the financial professional well, but diminish overtime retirement savers' hard-earned nest eggs.

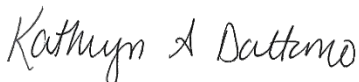
The Proposed Rule is a major step forward to update and to strengthen the ERISA fiduciary standard that Congress intended to protect American retirement savers. NAPFA commends the Department for taking this necessary and important step to revise the Department's regulations and reflect both today's marketplace realities and retirement savers' pressing needs for fiduciary-level retirement advice.

NAPFA encourages the Department to adopt new regulations that do not merely mirror language from the SEC's Regulation Best Interest and instead establish strengthened safeguards under ERISA to protect retirement savers against conflicts of interest. The NAPFA *Fiduciary Oath and Code of Ethics* and the CFP Standards are aligned with the Proposed Rule and provide workable frameworks, used by NAPFA Advisors today, to help the Department develop and implement the proposed ERISA fiduciary definition.

NAPFA believes that requiring financial professionals to work always in the retirement saver's best interest is an essential and long overdue reform. We urge the Department to move forward promptly to promulgate a final rule that incorporates the modifications described above. This would result in a final rule that is more workable for financial professionals while retaining key provisions to protect retirement savers.

NAPFA appreciates the opportunity to comment on the Proposed Rule. We are pleased to meet with the Department at your convenience to discuss these issues further. Should you have questions regarding NAPFA or this comment letter, please contact me at (847) 483-5400 or DattomoK@napfa.org.

Sincerely,



Kathryn Dattomo, CAE
Chief Executive Officer