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August 6, 2020

Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave., N.W.
Suite 400
Washington, D.C. 20210

Re: Application No. D-12011
Improving Investment Advice for Workers & Retirees

Dear Officers,

On behalf of more than 500,000 members and supporters of Public Citizen, we offer the following comment on the Department of Labor's (DOL) new suite of retirement advice rules. We offer these comments in protest of the 30-day comment period, and reference our signature on a group letter stating this.[1] Specifically, we first oppose the final rule reinstating the 1975 regulatory definition of fiduciary investment advice; and second, we oppose the proposed exemption allowing investment advice fiduciaries to recommend products where the commission received can compromise the fidelity of said advice.

At stake is the retirement security of American workers and retirees who will now be exposed to suspect gambles. There's a reason some investment products generate the advisor more commission prize money than other products: they're not readily "bought;" they're not popular, proven products. They must be "sold" precisely because they can be dangerous.

Many of Public Citizen's members are retirees. While they are astute, well read, and engaged with current events involving corporations, they should still not be exposed to professional scam artists. The Bernie Madoff scandal, which involved investment victims-- some of whom were leaders in their fields such as Steven Spielberg, Elie Wiesel, and Larry King-- attests that smart people can be misled and fleeced.[2]

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[1] Letter to DOL from numerous signatories. (As of July 31, 2020, this letter does not appear on Regulations.gov; in fact, no letters are posted)
[2] *Bernie Madoff: Six Famous Victims of his Ponzi Scheme*, BIOGRAPHY (June 24, 2019) https://www.biography.com/news/bernie-madoff-famous-victims

The landscape for retirees has become more treacherous in the last half-century. Defined contribution retirement accounts, where the retiree must make sound decisions, have replaced defined benefit pensions, where the retiree was guaranteed a set retirement income, as the primary form of workplace retirement plan. Workers must not only be capable brick layers, or brewers, or bank tellers, they must also be smart brokers of their savings.[3] The self-directed Investment Retirement Account (IRA) is a major source of retirement protection for some 36 percent of U.S. households.[4] And gone are the days when the basic options were either bonds or stocks. The landscape is crowded with new devices, some useful, but others designed to separate the saver from her savings.

That makes honest investment advice critical. It is obvious from the very name of major institutions that the investment advisors know that enduring security, honesty and fair dealing rank high on the investors' minds: Fidelity, US Trust, Blackrock. Yet history shows that names can deceive: Lincoln Savings & Loan[5] (presumably named for Honest Abe) and Bankers Trust[6] both failed after scamming depositors and Proctor & Gamble derivatives customers respectively. This list of deceptively named institutions that scammed customers is very long.

With this context, the Department of Labor now proposes to expose retirement savers to greater risks.

First, the DOL has adopted a final rule reinstating the 1975 regulatory definition of fiduciary investment advice. We protest this. This 1975 definition includes a sinister loophole: Under the definition, only advice that is provided on a regular basis is considered fiduciary investment advice. A fiduciary is one who puts the customer's interests ahead of her own. As a result, one-time recommendations, no matter how consequential, are exempted. When a firm does provide advice on a regular basis, it can still evade its fiduciary obligations by claiming it never intended for the advice to serve as "a primary basis" for the retirement saver's investment decision. As a result, financial firms and investment professionals will only be considered retirement investment advice fiduciaries when they choose to be, even as they market themselves as trusted fiduciary advisors.

For example, on rollovers, which is a momentous decision to move assets from one account, such as a company-sponsored 401(k), to another account, conflicted advice can lead to disastrous results. Exposing the saver to a broker on the prowl to maximize commissions strips retirement savers of the protections of a fiduciary standard precisely when the risks to the investor and the conflicts of interest are greatest.

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[3] Employee Benefits Security Administration, U.S. Department of Labor, Private Pension Plan Bulletin Historical Tables and Graphs 1975-2017, September 2019 https://www.dol.gov/sites/dolgov/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletin-historical-tables-and-graphs.pdf at p. 1 and p. 32.
[4] Investment Company Institute, The Role of IRAs in US Households' Saving for Retirement, 2019, ICI Research Perspective, December 2019, Vol, 25, No. 10 https://ici.org/pdf/per25-10.pdf.
[5] *The Lincoln Savings & Loan Investigation: Who is Involved*, NEW YORK TIMES (Nov. 22, 1989) https://www.nytimes.com/1989/11/22/business/the-lincoln-savings-and-loan-investigation-who-is-involved.html
[6] *Two Early Derivative Blow Ups*, FRONTLINE (website visited Aug. 4, 2020) https://www.pbs.org/wgbh/pages/frontline/warning/etc/warnings.html

This final rule must be rescinded.

Second, the DOL proposes a broad new exemption to what are known as prohibited transactions under the Employee Retirement Income Security Act of 1974 (ERISA) and the tax code. . We note that Congress approved ERISA amidst numerous scandals such as pension funds being pilfered for personal projects.[7] The DOL proposes to return to some of these scandalous days and allow sales agents who fly under the banner of fiduciaries (otherwise committed to the customer's best interest) to sell products that maximize their commissions, and not the stable returns to the investor. This borrows from and compounds the harmful actions by the Securities and Exchange Commission (SEC), which recently implemented Regulation Best Interest (Reg. BI).[8] Reg. BI does not protect investors from the harmful impact of conflicts of interest within the broker-dealer business model but does preserve the brokerage industry's ability to engage in a variety of practices that are profitable for brokers that may be harmful to investors.

There will also be no mechanism for IRA investors to enforce infractions of the remaining tissue-thin protections offered by the proposed rule. There is no private right of action. If an individual IRA investor is scammed, she has no recourse. Nor can the DOL enforce the standard as it applies to IRAs. IRA investors who are financially harmed by the conflicted advice unleashed by this proposal would have no recourse and no ability to recover their losses.

These flaws are fatal.

Of course, the DOL does not confess that these changes are intended to help the potential wrongdoing of those Wall Street firms whose names are meant to convey trust. It falsely claims that these changes will help protect investors. This sham reasoning is not dissimilar to the deceptions that Public Citizen members will now be forced to confront if this proposal moves forward.

We ask the DOL to withdraw this suite of finalized or proposed changes.

For questions, please contact Bartlett Naylor at bnaylor@citizen.org.

Sincerely,
Public Citizen.

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[7] Committee on Government Operations, *Diversion of union welfare-pension funds of Allied Trades Council and Teamsters 815;* U.S. SENATE (1966) Washington, D.C.: U.S. Government Printing Office.

[8] Barbara Roper, Micah Hauptman, on behalf of Consumer Federation of America, *Letter to SEC re Reg BI*, SECURITIES AND EXCHANGE COMMISSION (Aug. 7, 2018) https://www.sec.gov/comments/s7-07-18/s70718-4181971-172530.pdf, Also: Bartlett Naylor, on behalf of Public Citizen, *Letter to SEC re Reg BI,* SECURITIES AND EXCHANGE COMMISSION (Aug. 7, 2018) https://www.sec.gov/comments/s7-07-18/s70718-4121827-171606.pdf