BETTER MARKETS

**For Immediate Release:**
June 23, 2020

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# While American Workers Face Ongoing Struggle to Save for Retirement, Department of Labor Appears Poised to Strip Them of Important Protections

*New Standard for Retirement Investment Advice is Expected to Weaken Protections Against Conflicted Advice and Reopen Loopholes, Exposing Retirement Savers to New Risks*

With the country struggling to address pandemic-related economic disruptions that have made it harder than ever for working Americans to save for a secure and independent retirement, the Department of Labor ("DOL") is expected to release its new investment advice rule for retirement plans within weeks, if not days. Advocates for workers, investors, and retirees are concerned the new rule could make matters worse by stripping retirement savers of already inadequate protections from faulty investment advice.

The DOL needs to close loopholes in the definition of investment advice and maintain a high fiduciary standard for that advice or retirement savers will end up worse off than they were when the DOL first took up this issue back in 2010.

Sadly, however, no one who has been paying attention to the issue expects DOL either to close those loopholes or to retain the high fiduciary standards retirees deserve. On the contrary, the DOL's own statements about its regulatory approach suggest that the new standard will be based on the Securities and Exchange Commission's ("SEC") non-fiduciary "best interest" standard for broker-dealers, which is far weaker than the "sole interest" standard that ERISA applies to retirement advice. Meanwhile, rumors from industry lobbyists who claim familiarity with the DOL's thinking indicate that, far from closing loopholes in the current definition, the new proposal is likely to expand those loopholes.

If these predictions prove true, not only would the current fiduciary standard be replaced with a non-fiduciary standard, but financial professionals could also find it easier than ever to escape the reach of the weakened standard that would apply to retirement advice. If such an approach is adopted, conflicted advice will continue to drain the nest eggs of retirement savers.

With the country in the midst of a retirement savings crisis, made worse by the COVID-19 pandemic and associated economic disruptions, the DOL should be looking to enhance protections for workers and retirees seeking to fund a secure and dignified retirement. Instead, it appears likely to strip them of even the inadequate protections that currently apply.

Advocates for retirement savers will be asking the following questions when the rule proposal is released to determine whether it strengthens, maintains, or weakens current standards.

**Will retirement advice be held to a fiduciary standard?**

The DOL has made clear that it plans to "harmonize" its standard with the SEC's Regulation Best Interest ("Reg. BI"), the new standard of conduct for broker-dealers due to take effect at the end of this month. But in adopting Reg. BI, the SEC was explicit that it is *not* a fiduciary standard. Allowing compliance with Reg. BI to satisfy compliance with the DOL fiduciary standard would be a dramatic (and legally indefensible) weakening of that standard.

- The "best interest" standard in Reg. BI is undefined. The limited guidance the SEC has provided on how it interprets that standard suggests that there is little difference between its new "best interest" standard and the existing suitability standard under FINRA rules.

- Reg. BI does little to limit the impact of conflicted advice. Under Reg. BI, firm-level conflicts can be addressed entirely through disclosure, while representative-level conflicts must be "mitigated." But the SEC's own research shows disclosure is ineffective in protecting investors from the harmful impact of conflicts, and it has failed to clarify how it will judge whether conflict mitigation is adequate. Meanwhile, it has made clear that its goal is not to "disrupt" the broker-dealer business model – which is rife with conflicts of interest. This is a far cry from ERISA's sole interest fiduciary standard.

- Reg. BI does not apply to insurance recommendations. The standards that apply to insurance recommendations, including the new model "best interest" standard adopted by the National Association of Insurance Commissioners, offer even weaker investor protections than the SEC rule.

Given that ERISA intentionally applies a heightened fiduciary obligation to retirement investment advice, and requires the DOL to ensure that any exemptions to that standard adequately protect retirement savers, it is difficult to see how the DOL could meet that legal obligation if, as expected, it adopts an exemption based on Reg. BI.

**Will the new advice standard apply to the broad range of investment advice?**

Because of loopholes in the regulatory definition of fiduciary investment advice, much of the investment advice investors, workers and plan sponsors rely on has not been held to a fiduciary standard. This includes rollover recommendations, which pose significant risks both because they can be among the most important investment decisions retirement savers make and because financial firms have strong financial incentives to recommend rollovers even when it is not in the retirement saver's best interest. The loopholes also are often used to exempt advice given in connection with individual retirement accounts ("IRAs").

When the DOL previously sought to close those regulatory loopholes, brokerage, mutual fund, and insurance industry lobbyists strenuously objected. Intent on preserving their conflict-driven business models, they fought any attempt to subject their recommendations to a fiduciary standard.

If, as some industry lobbyists seem to expect, the DOL reopens, or even expands, the loopholes in the definition of fiduciary investment advice, retirement savers would be even worse off than when the DOL first took up the issue in 2010. Important recommendations that retirement savers clearly rely on as fiduciary advice would not be covered by the rule, and even advice that does fall within the definition would be held to a much lower, non-fiduciary standard.

**Will small plans get enhanced protections?**

Workers depend on their employers to make sound selections regarding retirement plan investment menus. But, as the DOL previously documented, many employers lack the financial sophistication to make those selections. The previous DOL rule would have extended fiduciary protections to small plans. Unless the DOL restores that aspect of the over-turned rule, which no one seems to expect, millions of workers are likely to be stuck with workplace retirement plans that are encumbered by poorly performing, high-cost investment options.

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Until we see the actual rule text, we cannot know for certain whether the DOL's new rule will strengthen or weaken protections for retirement savers. But, based on the DOL's own statements and the predictions of industry lobbyists, it appears that things are about to get much worse for workers and retirees struggling to afford an independent retirement. It couldn't come at a worse time in our country's history.

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