NATIONAL WOMEN'S LAW CENTER
EXPANDING THE POSSIBILITIES

July 21, 2015

Office of Regulations and Interpretations
Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: Conflict of Interest Rule, RIN 1210-AB32
Proposed Best Interest Contract Exemption, ZRIN: 1210-ZA25

To Whom It May Concern:

The National Women's Law Center, an organization that has worked for over forty years to improve women's retirement security, respectfully submits these comments in strong support of the Department of Labor's (DOL's) conflict of interest rule proposal. This rule would strengthen protections for women who are saving for retirement by requiring all those who give individualized investment advice regarding 401(k) or IRA assets for a fee to provide impartial advice that puts their clients' best interest first. Women have fewer retirement savings than men, but need to make those savings last over a longer lifespan. Women thus would greatly benefit from DOL's proposed rule, as they can ill afford to have their retirement savings further diminished as a result of investment advice that does not put women investors' best interest before their retirement advisers' own profits.

Women have fewer retirement savings than men, but need to make those savings last over a longer lifetime.

In general, women earn less than their male counterparts,[1] spend fewer years in the workforce,[2] and are more likely to work part-time.[3] Some of these work patterns are due to family responsibilities: women tend to bear greater responsibility for caregiving, including parenting and caring for sick, elderly, or disabled family members.[4] Women's work and family histories have a significant impact on women's earnings: Based on today's wage gap, a woman who worked full time, year round would typically lose $435,049 in a 40-year period due to the wage gap.[5]

Despite their relatively lower earnings and thus decreased ability to defer income, research has shown that women are doing their part to save for retirement. According to Vanguard's defined

[1] National Women's Law Center, The Wage Gap Over Time, October 2014.
[2] U.S. Department of Labor, Bureau of Labor Statistics, Number of Jobs Held, Labor Market Activity, and Earnings Growth Among the Youngest Baby Boomers: Results from a Longitudinal Study, 2015.
[3] U.S. Department of Labor, Bureau of Labor Statistics, Current Population Survey, 2014.
[4] *See* National Women's Law Center, 50 Years & Counting: The Unfinished Business of Achieving Fair Pay, 2013.
[5] *See* National Women's Law Center, How the Wage Gap Hurts Women and Families, April 2015 (figures not adjusted for inflation).

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contribution (DC) plan data, women who participated in a DC plan saved at rates higher than those of male participants across every income group.[6]

But despite efforts to save, women face a significant gender gap in retirement savings and income because of lower earnings and caregiving responsibilities that lead to time out of the workforce or in part-time jobs that do not offer access to retirement plans and reduce their ability to save early in their careers and benefit fully from compounding of investment returns.

- There is a significant disparity between men's and women's DC retirement savings account balances. The same Vanguard study that found that women saved at higher rates than men found that men's average and median DC account balances are more than 50 percent higher than those of women ($123,262 average DC account balance for men vs. $79,572 average DC account balance for women, and $36,875 median DC account balance for men vs. $24,446 median DC account balance for women).[7]
- According to the Employee Benefit Research Institute, for individuals with Individual Retirement Accounts (IRAs), the median IRA balance for men was $12,789 higher than for women in 2013 ($43,449 for men compared to $30,660 for women).[8]
- Median income for women 65 and older in 2013, from all sources was just 55 percent of men's ($29,327 for men and $16,031 for women).[9]
- In 2014, the average Social Security benefit for women 65 and older was 77 percent of the benefit for men of the same age group ($13,867 per year for women, compared to $18,039 per year for men).[10]

Because women live, on average, longer than men, they need more savings than men to get them through retirement. At 65, the average life expectancy for women is 20.3 years, compared to 17.7 for men.[11] But this does not fully capture the difference in the odds that men and women who reach age 65 will live to 80, 90, or 95. For individuals who reach 65, women are 1.5 times as likely as men to live to 90 and nearly twice as likely as men to live to age 95.[12] Thus, women must stretch fewer savings over what may be a significantly longer lifespan than men.

Women are more likely than men to seek investment advice—and they need that advice to be in their best interest.

Research shows that American investors broadly lack basic financial literacy.[13] Further, surveys have found that few women consider themselves very knowledgeable about investing, or,

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[6] The Vanguard Group, How America Saves 2015, A Report on Vanguard 2014 Defined Contribution Plan Data, Figure 33, 2015.
[7] *Id.*
[8] Employee Benefit Research Institute, Individual Retirement Account Balances, Contributions, and Rollovers, 2013; With Longitudinal Results 2010-2013: The EBRI IRA Database, 2015.
[9] U.S. Census Bureau, Current Population Survey, 2014.
[10] Social Security Administration, Annual Statistical Supplement, Table 5.a16, 2015 (monthly benefit multiplied by 12).
[11] Elizabeth Arias, United States Life Tables, 2010, Nat'l Vital Statistics Reports tbl.A (Nov. 2014), http://www.cdc.gov/nchs/data/nvsr/nvsr63/nvsr63_07.pdf [hereinafter U.S. Life Tables, 2010].
[12] NWLC calculations using U.S. Life Tables, 2010, tbl.B *supra* note 11.
[13] *See, e.g.*, U.S. Securities & Exchange Commission, Staff of the Office of Investor Education and Advocacy, Study Regarding Financial Literacy Among Investors, As Required by Section 917 of the Dodd-Frank Wall Street Reform and Consumer Protection Act at vii-viii, 2012.

more specifically, saving for retirement.[14] Surveys have also shown that women are more likely than men to seek out investment advice.[15] These factors may make women an easy target for certain unscrupulous advisers who are seeking opportunities to put their own financial interests ahead of their clients.

Given the critical importance of making the most of their retirement savings so that women's relatively lower lifetime earnings last over a longer lifespan, along with women's greater reliance on investment advice, it is imperative to women that their financial advisers act in their best interest. The DOL's fiduciary rule is a tremendous step forward towards ensuring that more retirement investment advisers do so.

This proposal addresses deficiencies in the current law.

The DOL last updated its regulations on fiduciary standards for retirement advisers in 1975. Since then, however, the retirement landscape has changed dramatically. Traditional defined benefit pensions, for which investments are managed by employers, have declined, while DC plans like 401(k)s have become the dominant vehicle for retirement assets. And when workers leave a job where they had a DC plan, many choose to roll their account balances over into IRAs—an act which may have significant financial consequences in itself—for which they must choose investment options as well. Financial advisers assist both employer-sponsored plan administrators and IRA owners to select investment options for the assets in these individually owned savings accounts. The upshot is that, since 1975, many more savers now rely, and rely heavily, on advisers to ensure that their retirement savings grow sufficiently to provide them with a secure retirement at the end of their career. But, under the current regulations, many of those advisers are not required to act in their clients' best interest.

ERISA states unambiguously that people and firms that give investment advice to people in retirement plans are fiduciaries and that fiduciaries cannot generally have conflicts of interest. But the regulation adopted by the DOL in 1975 narrowed the definition of investment advice and contains significant loopholes under which advisers may offer retirement investment recommendations without being required to act in their client's best interest. For example, under the current rule, an adviser can offer investment advice just once, or even intermittently, and evade the fiduciary standard. Similarly, under the current rule, financial professionals can disclaim in fine print that *they* do not agree that their investment advice will form the primary basis for *their client's* decision, and they will not be subject to the fiduciary standard. These loopholes allow financial advisers to act contrary to their clients' interest, and need to be closed. Furthermore, the current rule exempts recommendations to roll retirement savings over from employer-sponsored retirement plans (like 401(k)s) to IRAs from fiduciary protections under the DOL's regulation. (Further, regulations from the Security and Exchange Commission or other federal agencies fail to fully address and protect the interests of retirement savers.)

There are substantial structural incentives for advisers to act in their own interests, rather than those of their clients. For example, advisers have a financial incentive to steer clients towards

[14] *See, e.g.*, Prudential, Financial Experience & Behaviors Among Women 5, 2014.
[15] *See, e.g.*, Fidelity Investments, Are Women Standing Up to the Retirement Savings Challenge? at 3, 2013 (citing 2012 Fidelity study showing that women are more likely to work with a paid financial advisor than men (53 percent versus 44 percent)).

investments that result in higher fees for the adviser, and financial institutions have a financial incentive to encourage their advisers to recommend that an individual roll 401(k) assets into an IRA so that the financial institution that employs the adviser can capture as many assets as possible. This "conflicted advice" from advisers whom investors rely on can cost these savers dearly.

The DOL reviewed substantial academic research and found significant evidence that conflicted advice from brokers and other financial advisers has a detrimental effect on investors, including more investments in higher-fee, more poorly performing mutual funds, and more frequent trades by IRA investors (which trigger more fees and create more opportunities for timing errors, among other things).[16] The White House Council of Economic Advisors surveyed the academic literature and estimated that, with regard to IRAs alone, conflicted advice results in annual losses of about one percentage point to investors—for total losses of about $17 billion per year.[17] The high fees and poor performance that are correlated with conflicted retirement advice can have a significant cumulative impact over the course of a worker's career, and disproportionately harm savers with smaller account balances—like women—who most need to protect and grow their accounts. In a broader sense, the lack of clear rules that correspond to the reality of the current retirement savings landscape make it difficult for individuals to know whether or not the professionals providing them with investment advice are acting in their best interests.

The Department's proposed rule fixes these deficiencies in the current law. It strengthens protections for all savers, including women, and closes the loopholes discussed above. The DOL's proposal also ensures that IRA investors receiving investment advice will gain new protections, including with regard to roll-over recommendations. We strongly support these updates to the rule.

The rule also allows financial institutions to be compensated for their advice, while protecting retirement investors. The Best Interest Contract Exemption would permit advisers and their firms to charge commissions and other sales fees, as long as they agree to serve the retirement saver's best interest, without regard to the adviser or financial institution's financial or other interests. The financial institution would also be required to charge no more than reasonable fees for their services, and warrant that that the firm's fee or compensation structure does not increase the likelihood that advisers base their recommendations on self-interest, rather than their clients' best interest. In addition, advisers would be required to disclose the cost of the advice and recommended products to the client, both at the point of sale, and over the long-term. If a financial institution or adviser fails to comply with these legal requirements, a retirement saver would be able to hold the adviser accountable for any losses that resulted from conflicted investment advice.

These protections will benefit all retirement savers, but especially women.

Conclusion

[16] Employee Benefits Security Administration, U.S. Department of Labor, Fiduciary Investment Advice, Regulatory Impact Analysis 95-98, 2015.
[17] White House Council of Economic Advisors, The Effects of Conflicted Investment Advice on Retirement Savings 18-20, 2015; *see also* Employee Benefits Security Administration, Regulatory Impact Analysis, *supra* note 16, at 99 ("Losses to IRA investors from conflicted advice are expected to amount to tens or more likely hundreds of billions of dollars over the next ten years.").

Women start off with lower earnings and, over a lifetime, fewer retirement savings than men, yet need to make those savings last over a longer lifespan. Accordingly, women can ill afford to have their retirement savings compromised by conflicted retirement advice. The protections that this rule offers will ensure that billions of dollars will remain in savers' retirement savings accounts rather than be lost to fees or poorly performing investments. These protections thus would help mitigate the obstacles that women face in attaining retirement security. We urge the DOL to finalize and implement this rule as quickly as possible.

Respectfully submitted,

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