UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

OFFICE OF
THE COMMISSIONER

July 21, 2015

*via e-mail: e-ORI@dol.gov*

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

Re: Fiduciary Proposal

Dear Secretary Perez:

I submit this comment letter on my own behalf and representing my own views in connection with the Department of Labor's ("DOL") proposed rules addressing the definition of "fiduciary," conflict of interest requirements for retirement investment advice, and related proposed exemptions and amendments ("the Fiduciary Proposal").

It is clear to me that the DOL rulemaking is a fait accompli and that the comment process is merely perfunctory, yet I feel compelled to weigh in on the Fiduciary Proposal because I am convinced that the rule, when finalized, will harm investors and the U.S. capital markets. The proposal is grounded in the misguided notion that charging fees based on the amount of assets under management is superior in every respect and for every investor to charging commission-based fees. It brazenly dismisses both suitability as a proper standard of care for brokers and the FINRA arbitration system as a mechanism to resolve disputes between financial professionals and their clients – good for plaintiffs' lawyers, bad for investors.

Broker-dealers utilizing a commission-based fee structure will find it difficult, if not impossible, to navigate the labyrinth of prohibitions and exemptions contemplated by the proposal, and many will make the unfortunate – yet entirely rational – choice to stop servicing certain retirement accounts. High net worth broker-dealer clients will be moved into fee-based advisory accounts and will pay a premium to the existing commission structure. Less well-heeled customers will be "fired" by their brokers or jettisoned to robo-advisers. I find it very convenient that the disparate impact the proposed rule will have on low to moderate income workers has received scant attention from supporters of the proposal. Like so many other bad government policies, the DOL rule will affirmatively harm those it ostensibly sets out to help.

Proving that the nanny-state is alive and well, DOL is proposing to substitute its judgment for that of investors in deciding the type of financial professional and fee structure *all*

investors should use when investing their retirement savings. In doing so, it has ignored the benefits to investors of a disclosure-based approach to mitigating potential conflicts of interest. Investors benefit from choice: choice of products, choice in advice providers, and choice in making decisions for themselves.

Since DOL first proposed changes to its fiduciary and conflict of interest rules in 2010, the industry has been scrambling to find a workable path forward. One particularly popular notion has been that a Securities and Exchange Commission ("SEC") rulemaking under Section 913 of the Dodd-Frank Act could stave off an ill-conceived DOL rule. Indeed, many observers were delighted and encouraged by remarks made by SEC Chair Mary Jo White in March of this year announcing her view that the Commission should move forward with such a uniform fiduciary duty rule.[1]

Unfortunately, those who believe that the SEC can stave off the heavy hand of DOL are chasing fool's gold. Section 913 gives the SEC the authority to conduct rulemaking with respect to broker-dealers' standard of care when providing personalized investment advice about securities to a retail customer. Any such standard "shall be no less stringent than the standard applicable to investment advisers" and "any material conflicts of interest shall be disclosed and may be consented to by the customer." Moreover, Section 913 makes clear that commission-based fees must be permissible under any SEC rules.

Brokers could comply with an SEC rule under Section 913 while continuing to charge commissions and using disclosure to mitigate conflicts of interest. However, compliance with an SEC fiduciary rule does not mean compliance with the DOL rule. In the event that the Commission moves forward with a Section 913 rulemaking, the industry will most likely end up with two incredibly burdensome and redundant rules. It would have been possible to conduct a coordinated rulemaking process, but to date the DOL's actions, and the substance of the DOL Fiduciary Proposal, reflect a lack of concern for the Commission's views on these issues.

You have stated that you and Chair White have extensively discussed the Fiduciary Proposal.[2] DOL also maintains that the staffs of the two agencies have worked very closely throughout the drafting process.[3] As you know, I was not included in any of these conversations. From a distance – a place where a presidentially-appointed SEC Commissioner should not be in this context – it appears that any interaction between staffs at DOL and the SEC and all of these discussions with Chair White have borne no fruit. Strikingly, the Fiduciary Proposal does not contemplate or even mention potential SEC rules or the SEC's existing regime for regulating

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[1] http://www.investmentnews.com/article/20150317/FREE/150319919/secs-mary-jo-white-says-agency-will-develop-fiduciary-rule-for.

[2] *See* Letter from Adri Jayaratne, Acting Assistant Secretary, Department of Labor, to The Honorable John Kline and The Honorable Phil Roe dated March 16, 2015, available at http://edworkforce.house.gov/uploadedfiles/2015.03.16.dol_ltr_to_ew.pdf.

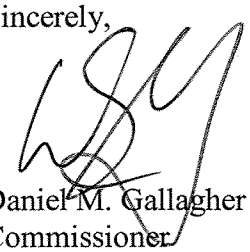
[3] *Id.*

broker-dealers and investment advisers. If the DOL were actually serious about working together with the SEC on an implementable standard, it could have – and should have – included in its proposal some type of substituted compliance mechanism, in which compliance with an SEC fiduciary standard would satisfy the DOL rules. Instead, DOL is choosing to substitute its judgement for that of the expert regulator of broker-dealers, in the process denying investors a choice in products, services, and financial professionals.

There was a different path that the DOL could have taken. In conjunction with the SEC, the DOL could have pursued a disclosure-based solution to the alleged excessive fee problem. Indeed, the Commission has employed a combination of tailored disclosure and market forces for eight decades to ensure that investors can make informed investment decisions. In the context of broker fees, fairness is usually in the eye of the beholder – i.e., the investor. Before rolling out another draconian proposal, the DOL could – and should have – engaged the SEC in a dialogue about fee disclosure. Indeed, the Commission has been debating this issue for over 12 years, and despite a failed attempt at broker point of sale disclosure in 2003, the idea of an appropriately-tailored point of sale disclosure regime is still worthy of pursuing. Perhaps if the Commission had not been so busy over the last five years rotely implementing nonsensical Dodd-Frank mandates such as the conflict mineral disclosure rule (which, it turns out, was proposed right about the same time as the 2010 DOL fiduciary proposal), the agency could have been focusing on key issues like broker fees.

DOL should scrap the Fiduciary Proposal and start working in a meaningful way with the Commission to address the DOL's concerns about broker fees for retirement accounts. The Fiduciary Proposal will harm investors, plain and simple, and an SEC rulemaking under Section 913 of Dodd-Frank will only make a bad situation worse. Let's end the rampant nanny-statism that is motivating both of these rulemakings and instead focus on a disclosure regime that empowers investors and allows brokerage firms to continue to offer a menu of services to all types of investors, not just the affluent. Despite the rancor surrounding this debate, it is my hope and belief that the DOL and SEC can find a reasonable path forward.

Sincerely,



Daniel M. Gallagher
Commissioner