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National Association of Federally-Insured Credit Unions

August 4, 2017

Office of Exemption Determinations, EBSA
U.S. Department of Labor
200 Constitution Avenue NW., Suite 400
Washington, D.C. 20220

RE: Fiduciary Rule and Prohibited Transaction Exemptions
RIN 1210-AB82:

On behalf of the National Association of Federally-Insured Credit Unions (NAFCU), the only national trade association focusing exclusively on federal issues affecting the nation's federally-insured credit unions, I am writing in response to the Department of Labor's ("the Department") request for information regarding the Fiduciary Rule and Prohibited Transaction Exemptions. On July 21, 2017, NAFCU submitted comments asking that the Department reconsider the Fiduciary Rule in its entirety. We also supported delaying the applicability dates for new contract, disclosure, and warranty requirements contained in the Fiduciary Rule's prohibited transaction exemptions (PTEs) and best interest contract (BIC) exemption by one year. Although NAFCU still urges the Department to exempt credit unions from the broad scope of the Fiduciary Rule, this letter narrowly addresses the question of whether certain exemptions should be adopted for investments in bank deposit products.

General Comments

As we have stated in our previous comments, credit unions exist for the primary purpose of serving their membership—not for earning fees on investment brokerage. The recommendations that a credit union may provide in the context of helping members understand retirement investment options are meant to be educational. This is because the National Credit Union Administration (NCUA) has traditionally stated that federal credit unions may not act as broker-dealers in securities or provide investment advice of the type that would render them “investment advisers” under state or federal securities laws.¹ However, the Fiduciary Rule covers transactions and relationships that are significantly broader in scope, including a significant number of transactions and relationships relating to individual retirement accounts (IRAs).

NAFCU and our members are concerned that the Fiduciary Rule casts a wide net that unfairly burdens credit union activity with complex requirements and potential litigation risk. For example, the requirements of the rule are triggered when an individual provides a “recommendation,” which is defined as “a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or

¹ See, NCUA Letter to Federal Credit Unions 10-FCU-03 (Dec. 2010) (broker-dealers); NCUA Legal Opinion Letter 09-0511 (June 3, 2009) (investment advisers).

refrain from taking a particular course of action.”² Accordingly, NAFCU asks that the Department consider exemptions that would relieve credit unions of substantial uncertainty when providing members with basic information about certain investment products.

The Department should exempt recommendations concerning the selection of a credit union service organization (CUSO).

Given the rule's extraordinarily broad scope, credit unions may decide that it is no longer worthwhile to recommend an investment advisory CUSO to a member to either set up an IRA or create an employee welfare benefit plan (if the member is a business). This is because the Fiduciary Rule defines “investment advice” to include “a recommendation as to the...selection of other persons to provide investment advice or investment management services.”³

Although the Fiduciary Rule provides a Best Interest Contract Exemption, it imposes costly burdens by requiring credit unions to adopt anti-conflict policies before offering certain retirement planning recommendations. Credit unions frequently rely on third parties or CUSOs to act as broker-dealers; however, the rule could require extensive analysis of existing business relationships to determine whether there are conflicts of interest. Performing this type of analysis on a semi-regular basis may impact the prices consumers must pay to access retirement planning services and disrupt existing third party arrangements, resulting in less choice and fewer options among investment products. Traditionally, credit unions have served their members' best interests by building trusted relationships, and the success of the credit union model has never depended upon the imposition of sweeping fiduciary standards.

The Department should exempt recommendations relating to bank deposit investments.

NAFCU also disagrees with the Fiduciary Rule's uncompromising view of recommendations regarding investment property such as CDs and other similar depository investment products.⁴ Depository products are not complex and the explanatory statements a credit union representative may provide regarding these types of investments should not trigger fiduciary responsibilities or necessitate new modes of compliance. Part of what distinguishes credit unions as unique financial institutions is a commitment to personalized service—a feature that the Fiduciary Rule severely compromises by restricting the extent to which credit union employees may offer responsive investment information. Accordingly, NAFCU asks that the Department amend the Fiduciary Rule such that recommendations relating to depository investment products do not trigger fiduciary responsibilities.

Conclusion

NAFCU believes that there is little merit in requiring credit unions to comply with a complex fiduciary duty requirement when available data does not suggest that the "conflicts" envisioned

² 29 C.F.R. § 2510.3-21(b)(1).

³ 29 U.S.C. § 2510.3-21(a)(1)(ii).

⁴ See Department of Labor, Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice, 80 Fed. Reg. 20946, 20962 (Apr. 8, 2016).

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by the final rule have ever detracted from credit unions' high standards of member service. Conversely, the potential for litigation risk is measurable and will ultimately lead to a reduction in consumer access to trustworthy investment advice. Accordingly, the Department should revoke its Fiduciary Rule in order to advance financial choice and independence. Alternatively, the Department should seek to exempt credit unions from the Fiduciary Rule consistent with the goals of tailored regulation outlined in the U.S. Treasury's recent report on "*A Financial System that Creates Economic Opportunities.*"

NAFCU appreciates the chance to submit comments regarding the Department's request for information. Should you have any questions or concerns, please do not hesitate to contact me at amorris@nafcu.org or (703) 842-2266.

Sincerely,

A handwritten signature in black ink that reads "Andrew Morris". The signature is written in a cursive, flowing style.

Andrew Morris
Regulatory Affairs Counsel