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Via email to [e-ORI@dol.gov](mailto:e-ORI@dol.gov) re: RIN 1210-AB32

Office of Regulations and Interpretations  
Employee Benefits Security Administration  
Attn: Conflict of Interest Rule  
U.S. Department of Labor  
200 Constitution Avenue NW  
Washington, DC 20210.

July 20, 2015

Re: Definition of the Term “Fiduciary”; Conflict of Interest Rule -  
Retirement Investment Advice. Document No. 2015-08831, RIN 1210-AB32

Ladies and Gentlemen,

I write in support of the Department of Labor’s Conflict of Interest Rule.

Thank you for the opportunity to comment on the Department of Labor’s Conflict of Interest proposal. I appreciate the thoughtful, substantive approach and the intellectual rigor that so many individuals on your team have contributed to this effort.

I would like to personally thank the White House and the DOL for making fiduciary advice – advice that is in the best interest of retirement investors – a priority.

I especially appreciate the leadership of President Obama, Jeffrey Zients, Director of the National Economic Council; Labor Secretary Thomas Perez and Asst. Secretary Phyllis Borzi, and their fearless, resolute team. Your collective efforts will have an enduring and positive effect on the retirement wellbeing of millions of Americans.

The courage and commitment of the White House and DOL to make these proposed rules a priority is vital to helping to ensure that millions of Americans working and investing for a secure, dignified retirement will keep much more of their nest egg.

This is especially significant in light of the current environment in Washington – since 2009, but in a most acute campaign at this moment – in which insurance and Wall Street special interests are attempting to overrun Washington with enormous amounts of money and propaganda to fight off the DOL proposal, and retain the status quo and the enormous profits to firms at a directly correlated, and exceedingly harmful, cost to retirement investors. This status quo carries with it short- and long-term negative impacts on the American economy.

Thank you also for covering IRA rollovers and IRA retirement investors in this proposal. This vitally important life transition – many retirement investors’ most vulnerable point – needs and deserves every aspect of fiduciary duty and care.

I appreciate that the DOL has issued a significant proposed rule covering so many retirement investors, many of whom have not been beneficiaries of fiduciary advice. The

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current rules are ineffective in preventing harm to IRA owners. Too many, who claim to “advise” retirement investors, avoid ERISA’s fiduciary responsibilities of loyalty and due care by slipping through current rules in unforeseen ways. Certain parts of ERISA and the Code have failed to protect many of America’s retirement investors, especially during that most vulnerable, infrequent decision about whether or not to roll over retirement plan assets into IRAs. This is why the rules must be updated.

Millions of American retirement investors would, for the first time, have the benefit of advice that is in their “Best Interest” – fiduciary advice – once the proposed rules are effective.

I also appreciate the continued “special emphasis,” as DOL’s proposal puts it, “on the elimination or mitigation of conflicts of interest and adherence to substantive standards of conduct as reflected in the prohibited transaction rules and ERISA’s standards of fiduciary conduct.”

“The specific duties imposed on fiduciaries by ERISA and the Code stem from legislative judgments on the best way to protect the public interest in tax-preferred benefit arrangements that are critical to workers’ financial and physical health. The Department has taken great care to honor ERISA and the Code’s specific text and purposes.”

I support the avoidance of conflicts of interest and mitigating unavoidable conflicts, by which I mean *managing unavoidable conflicts of interest in the investor’s favor*.

Please call upon those of us who understand and practice as fiduciaries for our individual and collective areas of fiduciary expertise, best practices and processes during this vitally important rulemaking.

Sincerely,

Kathleen M. McBride, AIFA®  
732.241.4988

Kathleen M. McBride is Chair, The Committee for the Fiduciary Standard; an Accredited Investment Fiduciary Analyst®, and CEFEX Analyst with the Centre for Fiduciary Excellence, [www.CEFEX.org](http://www.CEFEX.org). She is founder of FiduciaryPath, LLC, conducting research, consulting and assessments for CEFEX Certification of organizations’ investment fiduciary excellence.

By way of this comment letter I also refer to and agree with the comment letter submitted on July 21, 2015 by The Committee for the Fiduciary Standard.

## **Comments on DOL's Definition of the Term "Fiduciary"; Conflict of Interest Rule - Retirement Investment Advice.**

In my work in research, consulting and as a CEFEX Analyst, I am invited to look deeply into the investment fiduciary practices and processes of many registered investment adviser (RIA) firms – firms that embrace the fiduciary standard and place their client's interests first. These are progressive firms that already have as their backbone a framework for placing the investor's best interests before their own. It requires a thoughtful, deliberate application of fiduciary principles as a way of looking at investing in a client-centric way.

Some RIA firms desire to have their investment fiduciary practices reviewed by an independent third-party for conformance to Global Standard of Fiduciary Excellence. If they substantially conform to the principles outlined in the handbook, "Prudent Practices for Investment Advisors," published by fi360,<sup>1</sup> they may be eligible for CEFEX Certification of their excellent practices. CEFEX has found that Certified RIA firms grow much faster, nearly twice as fast, as the average RIA firm. Certified firms have lowered their fiduciary risk by deliberately putting excellent fiduciary practices in place. In addition, they are generally a better insurance risk, and some get a break on liability insurance.

Firms that use a framework for fiduciary decision-making do not find it cumbersome, difficult, or unworkable. Once that framework for fiduciary decision-making and processes is in place, it is not more difficult, nor more expensive to act as a fiduciary.

Advice is a fiduciary function. I believe that the fiduciary – best interests of the investor business model, is the highest quality, most sustainable model for every firm advising investors. Conflicted models will be left behind, as investors who are listening to the current discussion demand advice that's in their best interest.

Even now, more progressive firms that have not yet moved to the fiduciary model are planning and getting the requisite skills and knowledge to do so. They will be far, far ahead of firms that say they will abandon investors if they're "forced" to provide advice in the retirement investor's best interest.

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<sup>1</sup> "Prudent Practices for Investment Advisors," [https://www.fi360.com/main/pdf/handbook\\_advisor.pdf](https://www.fi360.com/main/pdf/handbook_advisor.pdf)

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## Dispelling the Myths About the Fiduciary Standard

Since 2010, I've worked with fi360 on an annual survey of financial intermediaries – brokers, registered investment advisers, dually registered reps, dually registered-plus insurance reps. It's meant as a gauge of their attitudes toward the fiduciary standard and advice to their clients.

Opponents of expanding the definition of fiduciary advice assert it would reduce access to advice and investment products, and raise investment costs for investors with small and middle-sized accounts. That's not true, according to survey respondents, who work with investors every day.

### Myth #1 It Costs Investors More to Get Advice From A Fiduciary

The survey asked, **“Do you believe it costs more to work with fiduciary advisers than brokers when all costs to the investor (not only the advisor’s compensation) are considered?”**

Nearly 91% of respondents overall say no. There is a strong majority view across registration types: 94% of RIA/IARs, 83% of dually registered-plus insurance, 73% of dual registrants and 62% of registered reps indicate it does not cost more to work with a fiduciary advisor than with a broker.

Many of the comments from survey respondents indicate that, **rather than a higher cost to the investor to work with a fiduciary adviser, it actually costs investors less.** There is much academic research that supports this on-the-ground finding.<sup>2 3 4</sup>

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<sup>2</sup> Ayres, Ian and Curtis, Quinn, “Beyond Diversification: The Pervasive Problem of Excessive Fees and 'Dominated Funds' in 401(k) Plans” (February 21, 2014). Yale Law & Economics Research Paper # 493. Available at SSRN: <http://ssrn.com/abstract=2399531> or <http://dx.doi.org/10.2139/ssrn.2399531>

<sup>3</sup> “Broker Incentives and Mutual Fund Market Segmentation,” Diane Del Guercio, Jonathan Reuter, and Paula A. Tkac, National Bureau of Economic Research, <http://www.nber.org/papers/w16312>

<sup>4</sup> “It Pays to Set the Menu: Mutual Fund Investment Options in 401(k) Plans,” Veronika K. Pool, Clemens Sialm, Irina Stefanescu, NBER Working Paper No. 18764 February 2013 <http://www.nber.org/papers/w18764>

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## **Myth #2 It Would Cost Us Too Much to Provide Fiduciary Advice; We'd Have to Pass that Along to Investors**

The survey asked: ***“Do you believe a fiduciary standard of care would price some investors out of the market for investment advice?”***

The survey has included this question each year because opponents of extending a fiduciary standard to brokers have made unsubstantiated claims that smaller and medium-sized investors would be priced out of the market for advice if the fiduciary standard were required of brokers when they advise investors.

Survey respondents disagree: Overall, more than eight out of ten, **83%, say no, that's not the case.** Concurrence is deep, across all compensation models and all but one registration type.

By compensation model there's also strong consensus: 85% of fee only, 72% of fee/commission, and two of the three commission-only respondents say **no, a fiduciary standard of care would not price some investors out of the market** for investment advice. Analysis by registration type also reveals strong consensus: 85% of RIA/IARs, 73% of dually registered-plus insurance, and 62% of registered reps say that a fiduciary standard of care would not price some investors out of the market for advice.

## **Myth #3 if We Are “Forced” to Provide Advice That's in the Investor's Best Interest, We Will Abandon Retirement Investors**

Opponents of a fiduciary standard claim products and services would be reduced for smaller and middle market investors if brokers were required to act as fiduciaries. This year's survey asks once again: ***“Do you believe a fiduciary duty for brokers who provide advice would reduce product and service availability for investors?”***

Once again, there is strong consensus: **a majority of 78% say no, fiduciary duty for brokers who provide advice would not reduce product or service availability for investors.** That's up from a 68% majority in 2013.

**Strong agreement is reflected across registration types and compensation models. By registration type, 79% of RIA/IARs, 73% of registered reps, 54% of dually registered, and 77% of dually registered-plus insurance respondents do not believe that a fiduciary standard for brokers would reduce the availability of products or services. Similarly, 78% of fee only, 76% of fee/commission and two of the three commission-only respondents agree.**

Survey participants added detail to their responses. Some note that extending a fiduciary duty to brokers may “filter out products that may be suitable but are not in clients' best interests. That's a good thing.” I agree.

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This year, as in every year we've asked, financial professionals working with investors every day indicate requiring the fiduciary standard for advice to investors **would not limit investor access to products or services, or price investors out of the market for advice.**<sup>5</sup> In addition, academic research indicates that in states where there already is a fiduciary requirement extended to brokers, there has been no change in the number of brokers providing advisory services to investors.<sup>6</sup>

To recap:

- Nearly 91% say no, it does not cost more to work with a fiduciary advisor than a broker.
- 83% say no, a fiduciary standard would not price investors out of the market for advice.
- 78% say no, fiduciary duty for brokers who provide advice would not reduce investor access to products or services for investors.

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<sup>5</sup> Report on the 2015 fi360 Fiduciary Standard Survey from fi360 and FiduciaryPath, "Seeking Trusted Advice for Individual Investors." <http://www.fi360.com/uploads/media/2015fiduciarysurvey.pdf>

<sup>6</sup> Finke, Michael S. and Langdon, Thomas Patrick, The Impact of the Broker-Dealer Fiduciary Standard on Financial Advice (March 9, 2012). Available at SSRN: <http://ssrn.com/abstract=2019090> or <http://dx.doi.org/10.2139/ssrn.2019090>

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## **Strong Support Among Financial Professionals for the ERISA Fiduciary Standard**

Most questions in the survey relate to the RIA/IAR fiduciary standard, regulated under the Investment Advisers Act of 1940. This year, for the third year, the survey asked questions about support for the fiduciary standard under ERISA. Why? Because **the fiduciary standard under ERISA, with a clear statutory mandate that “*plan fiduciaries...act prudently and solely in the interest of plan participants and beneficiaries,*” is even more rigorous than the Investment Advisers Act of 1940 standard of fiduciary care.** For this reason, we have been surprised at the support intermediaries have shown for the more rigorous requirements of the ERISA fiduciary standard.

The survey asked: **“Do you agree in concept with the Labor Department’s plan to propose a rule that would expand the number of advisors who are considered fiduciaries under ERISA?”**

**Yes, say 74% of respondents overall, vs. 61% last year.** There’s strong consensus across registration types and compensation models.

Analysis by registration type shows **strong agreement in nearly every category of registrant: 74% of RIA/IARs, 73% of registered reps, 73% of dually registered-plus insurance and 54% of dually registered respondents agree in concept with expanding the number of advisors who are considered fiduciaries under ERISA.** A lone insurance producer disagrees - but the lone insurance consultant agrees with the Labor Department’s plan.

Across compensation models, **75% of fee only and 70% of fee/commission respondents would agree in concept with a Labor Department plan to expand the number of advisors who are considered fiduciaries under ERISA.** The three commission-only respondents disagree.

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## **Should the ERISA Fiduciary Standard That Applies to 401(k) Plans Also Apply to Advice on IRA Accounts?**

As with support for extending the ERISA fiduciary standard to cover more service providers such as securities brokers, **respondents indicate support for the ERISA fiduciary standard, even more emphatically than last year.**

When the survey asked: ***“Should the same fiduciary standard that applies to 401(k) accounts also apply to advice on IRA accounts?”*** nearly 82% say yes, up from 72% in 2013.

And the answer is yes, across the board: **the majority, across all compensation models and all registration types, says yes, the same fiduciary standard that applies to 401(k) plans should also apply to advice on IRA accounts.**

Looking at compensation models, 86% of fee only, 65% of fee/commission and two of the three commission-only respondents say yes, the same fiduciary standard that applies to 401(k) accounts also apply to advice on IRA accounts.

Analysis by registration type reveals that 84% of RIA/IARs, 80% of registered reps, 73% of dually registered and 60% of dually registered-plus insurance respondents all say yes, the same fiduciary standard that applies to 401(k) accounts also apply to advice on IRA accounts.



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## Advice on Rollovers From 401(k) to IRA Accounts

Many consumer and investor advocates and labor organizations believe that there may be no more vulnerable transition for a retirement investor than when advice is proffered on money rolling over from a retirement account. The survey asked, “***Should the fiduciary standard apply to advice to investors on rollovers from 401(k) to IRA accounts?***”

This particularly vulnerable point for investors – when leaving a company, retiring or just consolidating retirement accounts from former employers or financial institutions, is a critical decision point. The advice they get at this time can affect whether they will be able to retire with dignity – or even at all. And because the retirement system in America consists largely of individual corporate defined contribution plans that vary wildly in size, fees and the quality of investment choices, there is no single answer to questions such as:

- Should the investor stay in their 401(k) or rollover to an IRA?
- Should the investor move to a new employer’s 401(k)?
- Should the investor entrust their retirement savings to an annuity?
- Who is the best person to advise the investor about this transition?

It all depends on the facts and circumstances of individual investor’s individual situation:

- How old is the employee? Risk tolerance, marital status, kids to get through college?
- What is their overall financial situation? Other assets?
- Are costs in the current 401(k) high or low relative to other plans of the same size?
- What is the quality and cost to the investor of the choices on their current 401(k) platform?
- Why should there even be a difference between a 401(k) at one company and another?
- Would moving to a new institution be in this investor’s best interest?

The fact is that the size, cost, and quality of a particular 401(k) plan or IRA and the quality and intent of the advice the investor receives at this point makes a great deal of difference in the quality of their life in retirement.

**The 91% overall response is yes, the fiduciary standard should apply to advice to investors on rollovers from 401(k) accounts to IRA accounts.** That’s up from 79% in 2013. As in the previous question, respondents indicate a majority across the board - **all compensation models and registration types affirm this sentiment.**

Analyzing responses by compensation model, 93% of fee only, 81% of fee/commission and two of the three commission-only respondents **say yes, the fiduciary standard should apply to rollovers from 401(k) to IRA accounts.**

Across all registration types, the answer is yes: **92% of RIA/IARs, 86% of registered reps, 85% of dually registered-plus insurance, and 82% of dually registered respondents say the fiduciary standard should apply to advice on rollovers from 401(k)s to IRAs.**

**Survey findings indicate many intermediaries who do not have to place their client's interests before their own, want to do so.** And every year I've been surprised how strong support is for the tougher ERISA fiduciary regulations and for the fiduciary standard for rollovers from 401(k)-type accounts to IRAs

To recap:

- 91% say yes, the fiduciary standard should apply to advice to investors on rollovers from 401(k) accounts to IRA accounts. That's up from 79% in 2013.
- Nearly 82%, up from 72% in 2013, say the same fiduciary standard that applies to 401(k) accounts should also apply to advice on IRA accounts.
- 74% of survey participants agree in concept with the Labor Department's plan to propose a rule that would expand the number of intermediaries who are considered fiduciaries under ERISA.

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## In Conclusion

Thank you for the opportunity to comment on the DOL's thoughtful and substantive proposal. I believe an undiluted ERISA fiduciary standard should be the rule when it comes to any person firm or entity that has the privilege of advising retirement investors, including plans, participants, beneficiaries and IRA owners, including the decision whether or not to rollover.

The comment letter submitted by The Committee for the Fiduciary Standard outlines lines of agreement and specific suggestions regarding the proposal. I agree with all of the suggestions in that letter, so there's no need to repeat those in this personal comment letter.

I want to mention once more how much I admire the courage and tenacity, and the depth of economic analysis that the leadership and indefatigable team at the White House and the DOL have put into this proposal.

Thank you for not backing down in the face of ferocious opposition and the flood of lobbying and money with which they are trying to stall or derail the rulemaking. It is a last stand by those who would like only the status quo to continue. I hope that this letter has helped to refute many of the false claims they continue to make, which have no basis in fact or reality.

So many Americans have little idea why this rulemaking is so important – yet they do know something is not right. They cannot always articulate it. You and we must articulate it in this rulemaking. And this is why this rulemaking must proceed, and quickly.

So that all Americans saving and investing for a dignified and financially secure retirement can attain that worthwhile goal.

Please call upon me if you would like more information on any of the discussion presented here or if I can assist in any way.

Sincerely,

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This letter of support for the DOL Definition of the Term "Fiduciary"; Conflict of Interest Rule - Retirement Investment Advice contains my own personal opinions and does not necessarily reflect the opinions of any entities I am affiliated with.