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**Sent:** Tuesday, July 21, 2015 5:48 PM  
**To:** EBSA, E-ORI - EBSA  
**Subject:** RIN 1210-AB32, Conflicts of Interest Rule Proposal

July 21, 2015

Office of Regulation and Interpretations  
Employee benefits Security Administration  
Attn: Conflicts of Interest Rule, Room N-5655 and [e-ORI@dol.gov](mailto:e-ORI@dol.gov)  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

Subject: RIN 1210-AB32, Conflicts of Interest Rule Proposal

Dear Ladies and Gentleman,

### **I. Small Investors Take Warning**

My Name is Frank Congemi and I have been registered as a financial advisor since 1986. I have been educating and delivering financial services as an independent advisor to individuals, families and businesses during this time. The initial investment amount to open an account with me is \$250, which is accessible to anyone and still by far lower than any of the no load/low cost companies that DOL seems to favor.

Since all of the investments that I offer have beaten all the indexes at the cheapest cost quartile, I am alarmed that the US Department of Labor is recommending substandard and frankly negligent policies in relation to “small investors.” When the Department of Labor (“DOL”) begins framing what the retirement choices must be and recommending “low cost” and “index funds” and “a fiduciary standard” as the single model of delivering these services, the message loudly resonates as “government knows best.”

### **II. The DOL Proposal Is Unsuitable for the Public.**

The proposition that investor underperformance necessitates a single class of financial advisory services under a fiduciary standard is an exercise of gross regulatory overreach that exceeds the scope of authority granted to the DOL.<sup>1</sup><sup>[1]</sup> The Congress, in an exercise of fitting modesty in passing the Dodd-Frank Act did not legislate a unitary fiduciary standard. Instead, it asked the SEC, not the DOL, to study the matter carefully while at the same time specifying certain features of current commission business models that would not themselves be a violation of such

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<sup>1</sup>[1] See Stroock & Stroock & Lavan, *DOL's Fiduciary Re-Proposal: Caveat Venditor or "Death of a Salesman"?*, May 18, 2015, Chart III on “Best Interest Contract” Class Exemption.

a standard. Moreover, the approach is paternalistic and elitist to seek to impose a new legal regime on settled client relationships totaling many trillions of dollars.

### **III. DOL Has a Flawed Understanding of the Marketplace and Draws the Wrong Conclusions.**

Dalbar's comment letter (June 5, 2015) on the pending proposal is significant for the insight that it affords on investor underperformance. It finds that 88% of the 20-year under-performance experienced by equity investors is attributable, not to bad investment advice or conflicts of interest, but to investor behaviors, specifically, panic selling, exuberant buying and market timing (43%) and withdrawal needs and lack of funds to invest (35%). These sobering statistics undermine the premise that investors will achieve better retirement investing if they were all limited to consulting fiduciaries. The client of the commissioned broker, Dalbar found, far from suffering retirement goal impairment, is more likely to start investing sooner, maintain a consistent investing practice and mitigate untimely withdrawals.

Let me just say that I completely support removing from the industry those advisers or salespersons who abuse clients and industry rules. Yet the vast majority (at least 90%) of independent financial advisors and their firms are legitimate and serve their clients remarkably well (17 trillion dollars in retirement assets alone). The enormous effort expended on twice proposing this conflicts of interest would have been better spent in bringing two or three cases directly focused on firms that were systematically abusing the trust and confidence of investors. And if those cases were not there in the marketplace, then why are we even considering a government mandated "solution" to a non-existent problem?

If unsuitable products, sales contests and excessive fees are ongoing problems at certain firms, have at them! I and my fellow brokers will cheer your efforts, as our reputations are sullied by a marketplace that fails to call out egregious behaviors. DOL's work on the "Best Interest Contract" Exemption shows attention to several areas of misbehavior that are amenable to specific conduct rules. This is a far superior approach than seeking to re-engineer an entire marketplace into an imagined fiduciary promised land.

Rather than overturn the broker-dealer service model, the DOL should, to the extent that there have been abuses in miss-sold retirement products, propound prophylactic anti-fraud rules, including barring unsuitable products or those imposing excessive fees. With a re-focused, harms-based approach, which is familiar to virtually every other sector of government market intervention, DOL will focus on fixing real issues instead of seeking a far-reaching proposal suppressing the commission-based service channel and likely further, unforeseen market impacts.

### **IV. The Primary Regulator Should Have Primacy in Framing on Rulemaking**

The Congress in Section 913 of the authorized the Securities and Exchange Commission to study and impose, if warranted, a uniform standard of conduct for broker-dealers and investment

advisers when providing personalized investment advice about securities to retail customers. SEC Chairman Mary Jo White informed the Congress in testimony on March 24, 2015 that she believed that the SEC should undertake the careful study of the challenges required to frame a uniform fiduciary standard for advisers and brokers, asking the SEC staff to develop rulemaking recommendations for Commission. As the Chairman in her confirmation speech committed to “rigorous economic analysis” before putting rules in place to avoid “unnecessary burdens or competitive harm,” the Commission’s activity should displace the current, flawed proposal.

## V. FINRA’s Experience Must be Utilized.

Similarly, on May 1, 2015, Richard Ketchum, Chairman and CEO of the Financial Industry Regulatory Authority (“FINRA”), which regulates the broker-dealer channel serving retirement-planning clients, expressed his support for a uniform standard of conduct for broker-dealers and investment advisers.<sup>2</sup><sup>[2]</sup> Importantly, he stated that the SEC, in consultation with FINRA, should develop and lead the proposal. Further, he observed that the DOL draft *Best Interest Standard* was inadequate and “doesn’t really describe a broker-dealer model that I’m aware of.”

## VI. Conclusion.

In summary, the imposition of the DOL’s unitary conduct standard across different client service models will harm investor choice and access to retirement counselors. I endorse the Dalbar conclusion that the DOL proposal is: “certain to cause massive confusion and needless changes while providing little or no discernible benefit. Forcing the inclusion of persons into a regulated class based on a complex definition of services provided is ineffective.”

The opening of an IRA with an initial \$1000 and a commitment to deposit \$150 per month does not require a fiduciary. It is unwarranted regulatory overreach to require a homeowner to consult an architect or engineer when a contractor suffices. The DOL approach to re-make the range of retirement planning services in its conception is justified by neither market conditions nor the inadequacy of personal retirement assets. The DOL must abandon its unitary approach and adopt a consultative approach with the SEC, FINRA and other industry participants.

I would welcome and hereby request the opportunity to share my views, informed as they are by my long engagement with the investors I serve, regarding this ill-advised policy at the next public hearing. I would like to offer some semblance of balance to the top-down view that seems to drive the re-proposed Rule, as, up till now, it has been one-sided and filled with many factual inaccuracies by those who neither hold securities licenses nor have any idea how the securities business functions.

Thank you for your consideration.  
Frank Congemi

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<sup>2</sup><sup>[2]</sup> <http://www.corporatedefensedisputes.com/2015/05/finra-chairman-sec-should-lead-on-uniform-fiduciary-standard/>

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