December 31, 2023

Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Attention: Definition of Fiduciary – RIN 1210-AC02 Retirement Security Rule

Dear Assistant Secretary Gomez:

I am writing to express my support for the Department of Labor's proposed Retirement Security Rule. My support for the rule is based upon my experience and expertise in the areas of fiduciary responsibility and professional standards. I served in executive leadership positions at Fi360 (Chief Knowledge Officer, Chief Executive Officer, and Executive Chairman) and am now Founder and Principal of Fiduciary Insights, LLC. I have also served as a Director on CFP Board of Standards, as CFP Board Chair in 2017, and subsequently, as Chair of the commission established to provide guidance on the Board's Code of Ethics and Standards of Conduct. I currently serve on the Professional Standards Committee of the international Financial Planning Standards Board (FPSB).

While my professional experience at Fi360 (now a Broadridge company), CFP Board, and FPSB has advanced my knowledge and informed my views regarding fiduciary responsibilities in financial services, the views expressed in this letter of support are exclusively my own. This letter has not been reviewed or approved by any of these organizations.

In this brief comment letter, I focus upon two issues. First, the need to define an investment advice fiduciary in a manner that is directly aligned to statutory provisions of ERISA and the reasonable expectations of retirement investors. Second, the importance of differentiating transactional sales relationships that are governed by rules of the financial products marketplace from fiduciary relationships of trust and confidence.

The current five-part test deems someone to be an investment advice fiduciary if the person 1. receives compensation to render advice or recommendations, 2. on a regular basis, 3. pursuant to a mutual understanding with the plan or plan fiduciary, 4. that the advice will be a primary basis for decision making, and 5. will be individualized based on the needs of the plan. This test is a deeply flawed artificial construct that is often used to circumvent accountability in situations that may otherwise be deemed to be a fiduciary relationship.

The five-part test bears little resemblance to a common or accurate description of a fiduciary relationship. The dictionary (Merriam Webster) definition of "fiduciary relationship" is "a relationship in which one party places special trust, confidence, and reliance in and is influenced by another who has a fiduciary duty to act for the benefit of the party."

From an investor's perspective, knowing whether an advisor does or doesn't meet all elements of the five-part test is virtually meaningless. They would be far better informed by simply pointing to the dictionary definition of a fiduciary relationship and asking, "Is this what you would do for me?"

As is true for investors, from a legal perspective, it is the nature of the relationship that matters. In 1928, Justice Benjamin Cardozo issued a seminal opinion in *Meinhard v. Salmon* that articulated fiduciary obligations under U.S. law. In part, Justice Cardozo stated:

"Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity, when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court."[1]

Unfortunately, the five-part test has been used to lower the standard of conduct to that "permissible in a workaday word for those acting at arm's length [i.e., in sales relationships]" even when the intention of the client was to work with someone "bound by fiduciary ties." Fiduciary accountability is all too often avoided based on how the elements of the five-part test are parsed and distorted to obscure the issue that matters most - is this a relationship that demands a professional standard of trust and confidence between the advice provider and recipient?

The proposed Retirement Security Rule wisely replaces the five-part test with three contexts that truly define fiduciary relationships in a manner consistent with statutory provisions of ERISA and with the circumstances that create relationships of trust and confidence. The three contexts are: discretionary control, authoritative recommendations that are prescriptive in nature, and overt or effective acknowledgement of a fiduciary role. In these contexts, clients reasonably expect that the professional that they have engaged is operating in a professional relationship of trust and confidence that requires fulfilment of fiduciary obligations.

Many financial services firms, particularly in the brokerage and insurance industries, have deeply engrained sales cultures. A sales culture can facilitate efficiency of trading and product placement; it can also be quite profitable for product providers and sales representatives. However, a sales culture is built for the context of counter-party transactions. The premises, practices, and compensation structures associated with product sales systems are misaligned to the contexts associated with professional advice.

ERISA was crafted based upon trust law principles. It recognizes that fiduciary advisors are often needed to act on behalf of investors, especially in the realm of retirement income security. The five-part test subverts the intent of ERISA and ignores society's long-standing recognition that advisory relationships demand fiduciary accountability. That is why enactment of the proposed Retirement Security Rule is critically important.

At a more granular level, the proposed Rule must retain the provision extending fiduciary accountability for so-called "one-time advice", such as rollover recommendations. These are among the most impactful decisions retirement investors make. It is inconceivable that any advisor in a classic profession like law or medicine could evade accountability from professional standards of objective, prudent, and diligent advice simply because the paid advice is rendered in an isolated engagement. Financial advice should be no different; trust and confidence are not time or frequency dependent.

Similarly, the proposed Rule rightfully extends fiduciary accountability to those who recommend insurance-based retirement income solutions (generally involving annuities). Retirement income solutions can be valuable components of defined contribution plans to help participants plan beyond the accumulation stage through the distribution phase. Improved disclosure and conflict mitigation obligations imposed by the proposed rule can be expected to lead to simplified fee structures, more robust data for due diligence analysis, and other product enhancements that will improve the ability and confidence of plan fiduciaries to evaluate and select these products while serving the best interests of retirement investors. The change will be disruptive to the sales-based segment of the insurance industry. Nevertheless, the change is needed and overdue.

The most compelling reason to adopt the Retirement Security Rule is to protect retirement investors. But I believe the proposed rule also plays an important role in helping to elevate and more clearly define investment advice as a recognized profession. The classic attributes of a profession are: 1. public service orientation, 2. standard of conduct that places client's interests first (fiduciary standard), 3. defined body of knowledge that extends beyond what is commonly known by lay persons, 4. pathway to the profession (education, training, experience, etc.), and 5. sanctioning authority (effective regulation).

Sales relationships are not considered professional engagements because the five attributes are not in evidence. They involve arms-length transactions between parties; in concept, the parties sit on opposite sides of the table defending their own interests. The information gap between the salesperson and customer is narrow because the product attributes are clear and not complex. Both parties recognize that the salesperson is typically compensated for making sales, which conflicts with the customer's economic interests. While certain product safety and other basic disclosures may be required, they are typically limited because risks involved are specific and widely recognized.

Fiduciary accountability is a hallmark of professional advisory relationships. Professional relationships are grounded in trust and confidence. Conceptually, the parties sit on the same side of the table with the fiduciary who is committed to placing the client's interests ahead of their own. The information gap between the professional and advice recipient is large because the subject matter is complex (e.g., law, medicine, finance, etc.). The parties recognize that trust is a key requirement in these situations of asymmetric information. The advice recipient or beneficiary depends upon the professional's faithful application of specialized skills and compliance with ethical, regulatory, and legal obligations.

In commentary explaining the need for the Retirement Security Rule, the DOL mentioned the need to assure a level playing field for those who provide investment advice and noted that when salespersons skirt the legal and regulatory obligations attendant to fiduciary status, they may mislead clients and expose them to potentially undisclosed costs, conflicts, and limitations on the quality and range of services and products offered. In other words, they fall short of the clients' reasonable expectations for a professional relationship of trust and confidence, backed by fiduciary accountability.

Flawed regulatory provisions (such as the five-part test) that blur the distinction between sales activities (governed by fair dealing rules) versus advisory relationships (governed by fiduciary obligations) have long plagued the financial services sector. They are obstacles on the path to having investment advice recognized by the public as a true profession marked by the attributes mentioned earlier. Adoption of the Retirement Security Rule would meaningfully correct the ongoing failure to have an effective regulatory regime for professional investment advice, at least in the realm of investment advice for retirement investors.[2]

I applaud the Department of Labor for introducing the Retirement Security Rule and urge the Department to promptly adopt and implement it.

Sincerely,

Blaine F. Aikin, AIFA®, CFA®, CFP®
Founder and Principal, Fiduciary Insights, LLC

End notes:

1. Meinhard v. Salmon, 164 N.E. 545, at 546 (N.Y. 1928)
2. In 2010, I co-authored an article with colleague Kristina Fausti that was published in the Fall 2010 edition of the Boston University Law Review. Aspects of that article are relevant to the DOL's Retirement Security Rule proposal. [Blaine F. Aikin, CFP®, CFA, AIFA®, Kristina A. Fausti, J.D., AIF®, Fiduciary: A Historically Significant Standard. The article is available here: https://www.bu.edu/rbfl/files/2013/09/FiduciaryAHistoricallySignificantStandard.pdf]

   In the introduction to this article, we noted that the SEC was preparing to study standards of care for broker-dealers and investment advisers. The results of the study were expected to lay the groundwork for potential rulemaking by the SEC related to a fiduciary standard of care for all investment advice providers, as authorized under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. We further noted that "The firmly established history of the fiduciary standard should serve as a useful guide to the SEC and other regulators when promulgating rules that codify the fiduciary standard under the federal securities laws."

   We concluded the article with the following admonition. "Ideally, the SEC will codify the definition of fiduciary and recognize the historical significance of fiduciary principles as the agency engages in rulemaking. As lobbying efforts by special interests increase in the coming months, however, there is a real risk that investment intermediaries and regulators will get caught up in a game of semantics and lose sight of investor protection goals. The solution ultimately lies in helping regulators focus on three key facts: (1) investors are under the serious misconception that all investment professionals are equally accountable to serve investors' best interests; (2) the existing fiduciary standard is rooted in a strong foundation of loyalty, due care, and good faith; and (3) upholding these time-honored fiduciary principles and extending them to all investment advice providers is the best way to bring securities laws into alignment with existing investor expectations and provide meaningful investor protection."

   Past is prologue.