THE COMMITTEE FOR THE FIDUCIARY STANDARD

Via email to e-ORI@dol.gov re: RIN 1210-AB32

Office of Regulations and Interpretations September 23, 2015
Employee Benefits Security Administration
Attn: Conflict of Interest Rule
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210.

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

Ladies and Gentlemen,

We write in support of the Department of Labor’s Conflict of Interest Rule. We are challenging the status quo to ensure that all Americans can achieve a dignified, secure, retirement.

Americans who work and sacrifice to save and invest for their retirement should not have their nest egg diminished by Wall Street and insurance companies that place their own interests before the retirement investors they should be serving. The status quo ensures only one thing: that America’s retirees, with nest eggs diminished by conflicted advice will *not* have the spending power in retirement that they should have. Once DOL’s rukemaking is in place, steering investors into high commission, high fee investment products, often hidden costs, will be a thing of the past. Retirees will keep much more of their nest egg and have much more access to bona fide, fiduciary advice that is in *their* best interest.

We applaud the courage of the Department of Labor in standing up to ferocious opposition from well-funded industry special interests and propose a strong fiduciary rule. We encourage DOL to continue with this rulemaking without delay. This commonsense update will go a long way toward eliminating conflicts of interest that harm investors and leave them with a fraction of what they should have in their retirement nest egg.

Please, stand firm. Do not dilute the proposed rule. Of course, guidance is welcome and necessary during a transition like this one. We hope DOL will clarify and even streamline parts of the rule, but only if, when and in ways that would not dilute the proposed rule’s North Star of fiduciary duty.

DOL has done all it needs to do to propose the rule – and more. DOL has proposed, heard commentary, met with stakeholders, lawmakers, lobby groups, companies, advocates; held briefings, and communicated throughout the process. There is no need to re-propose the rule.

No individual or group has articulated any credible objection to DOL’s proposed rule or proposed any alternative “Best Interest” rule that is based on fact or bears any weight. While there are some alternative proposals put forth, they are based primarily on wishful thinking to keep or enhance the harmful status quo of conflicted advice that is materially harmful to American retirement investors. The sum total of any alternatives proposed is a standard that is nowhere near fiduciary duty, and that is in special interests’ or corporate groups' own self-interest, not in the investor's best interest. The effect of alternate proposals would be to weaken even the decades-old ERISA protections and widen or add new loopholes. Weaker investor protections are, obviously, not in retirement investors' best interests.

We do recognize that there may be ways to make small clarifications to certain provisions of the proposal that would be in the investors' best interest, in keeping with the North Star of the Fiduciary Standard and eliminating conflicts of interest, and without weakening fiduciary protections, and instead making those investor protections stronger.

However, we see no reason that any changes to the proposal in the final rulemaking would be cause for re-proposal.

In short, **no one, in testimony or comment, has made a *credible* argument for any change that is "material" enough to warrant a re-proposal by DOL, instead of proceeding to final DOL rulemaking.**

Please call upon us for our individual and collective areas of fiduciary expertise, best practices and processes during this vitally important rulemaking.

Sincerely,

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Public Policy on Retirement in America

It is important for lawmakers to understand that groups campaigning in opposition to DOL's proposed fiduciary rulemaking are in direct opposition to the millions of American retirement investors.

Instead of working on behalf of retirement investors, special interests are lobbying to kill the DOL rulemaking. The special interests do this on behalf of less progressive banks, broker-dealers, insurance companies and mutual fund companies, clinging to a dying business model that allows them to systematically harm their investor customers.

Those firms and groups, desperate to protect their dying business model, have built a fear-based campaign based on lies and deceit, and their fight against DOL's proposed fiduciary rulemaking is completely without merit. They wish to protect only their own self-interest and the current status quo – and threaten to leave the industry if they are "forced" to act in the investor's best interest. This is not a sustainable business model, not now, not ever. There is a Trillion dollars or more at stake – money that will either end up in retirees' nest eggs or Wall Street special interest' pockets through unreasonably high commissions and hidden, backdoor fees. Just 2% in extra commissions or fees means 50% less in a retirement investor's nest egg at retirement.

The special interests seek to delay DOL fiduciary rulemaking rule long enough for it to die as a new presidential administration takes office in 2017, or to kill the rulemaking outright.

Lawmakers: Choose Your Legacy on Retirement in America

Lawmakers can choose to support DOL's commonsense update to America's outdated retirement rules – an update that:

- Is in the best interest of Americans saving and investing for retirement
- Would increase the amount of genuine advice that is in the investors best interest
- Lowers costs while providing more and better services to investors as they invest for their retirement
- Results in bigger retirement nest eggs – and therefore retirees that spend much more in the American economy during retirement.

Or, lawmakers can support corporations that have been exploiting loopholes in current ERISA regulations, and systematically looting American retirement investors, for decades.

Even many well-meaning non-fiduciary reps in the broker-dealer and insurance models are hamstrung when they work with retirement investors. Because current rules have loopholes that mean their firms can evade ERISA's fiduciary duty to retirement investors.

That means even if well-meaning, non-fiduciary reps try to place the investor first, they do not have the legal, regulatory and corporate compliance support necessary to actually place the investor first, even though they may want to. Without the statutory requirements of fiduciary duty, they have to defy their loyalty to their firm in order to help, not harm, their investor customers.

Since non-fiduciary reps are ranked by their firm by how much they "produce" in commission and fee revenue – which is always paid by the investor – the incentive to sell more of the high commission, high fee products is always in play, adding incentive to sell the highest paying products.

Finally, this means retirement investors cannot be sure they are getting advice in their best interest (even as 97% think they do[1]) from a broker or insurance rep, as long as law and regulation does not currently require fiduciary advice in the best interest of the investor.

Lawmakers Must Choose: Investors or Special Interests?

Which lawmakers want to be known for supporting the millions of Americans who are not looking for a handout, but sacrificing to save and invest for their own retirement?

Which lawmakers want to be known for supporting those financial services and insurance special interests that would rather continue to gouge investors, taking enormous percentages of American retirement investors' nest eggs?

America's retirement investors deserve genuine advice that is in their best interest, from a fiduciary – not a misleading sales pitch disguised as "advice."

This would further devastate America's retirement investors, and enable the current, unacceptable status quo of investor harm. The result would be less – trillions of dollars less – in retirement nest eggs; less retiree spending power in retirement; and potential government intervention to close the retirement gap for Americans.

The Fiduciary Model Already Works For Investors and Firms

Yet, we know the fiduciary model works well for both investors and registered investment adviser firms (RIAs). RIAs are currently required to work under the fiduciary standard of the Investment Advisers Act of 1940, and ERISA for retirement investments. ***RIAs serve as fiduciary investment advisers to 30 million investors.***

Implementation of DOL Fiduciary Rulemaking

Various commenters have testified or stated that the changes required in the DOL proposal will take more time and effort than the proposal allows.

We are in no way advocates for dual registration – the hybrid, dual registration model, broker-dealer/registered investment adviser, or tri-brid broker-dealer/registered investment adviser/insurance model, because it is impossible (and unfair) for the investor to have to detect which hat a multiple registrant is wearing – and when that multiple registrant changes to a sales hat.

Most Broker-Dealers & Insurance Companies, Mutual Fund Companies and Banks Are Familiar with RIA Fiduciary Compliance

[1] 2013 fi360-ThinkAdvisor Fiduciary Standard Survey, p. 30. http://www.fi360.com/uploads/media/fiduciarysurvey_resultsreport_2013.pdf

However when it comes to implementation of the DOL Fiduciary Final Rulemaking, and compliance to a fiduciary model, it should be noted that **many broker-dealers and insurance companies have an RIA already in place, and are familiar with compliance with the Investment Advisers Act of 1940.** While those fiduciary rules are necessarily different, there are many similarities.

DOL Coordinated with SEC

DOL has used the “without regard to the financial or other interests” language of Dodd-Frank, and has coordinated this proposed rulemaking with SEC. IF the SEC ever decides to move forward with its own long overdue fiduciary rulemaking, as mandated in Dodd Frank, the rules would be more closely related than they currently are, under ERISA and the Investment Advisers Act of 1940. We point this out because the transition is not as stark if it would be if there were no mélange of models already in place.

SEC May Never Extend the Fiduciary Standard Beyond RIAs

That said, there should not be any delay in DOL issuing its final fiduciary rulemaking. Some opponents to DOL’s fiduciary rulemaking are currently attempting to put laws in place to prohibit DOL from acting before the SEC, on fiduciary rules. *In its current state, minus two Commissioners and without any perceivable investor protection agenda, it is impossible to believe the SEC would enact any meaningful fiduciary rules in the foreseeable future.* In addition, SEC rulemaking would not cover advice from insurers to retirement investors and especially not IRA rollover decision-making or accounts. This leaves retirement investors open to continued, grievous harms that accrue from conflicted advice, and high upfront and trail commissions, fees, and penalties.

Insurance companies and broker-dealers are lobbying hard to stall DOL rulemaking. Please do not let this happen.

DOL Rulemaking Would Not Be Necessary If All “Advising” *Already* Put Investor’s Best Interests First

This rulemaking would not be necessary if, as many broker-dealers, insurance companies, and mutual fund companies and their lobbyists claimed in testimony at DOL’s August hearings, these companies already placed investors’ best interests before their own.

But they do not. Yet in advertising, they claim to “advise investors with their best interests at heart.” They call their representatives “advise/ors” or “planners” or “consultants,” even if their job is to sell the firm’s or platform’s products. If there’s a problem, they disclaim any fiduciary duty, saying they are not fiduciaries.

They cannot continue to have it both ways. Advise or sell, one cannot do both. If they choose to stay in the retirement advice business, fiduciary advice must be the rule.

Let Us Be Clear: Conflicted “Advice” Is *Not* Advice

The threat that retirement investors will not have access to investment advice, products, or services is just not genuine.

Advice or Misleading Sales Pitch, Deceptively Proffered as Advice?

Advice must be in the best interest of the investor. Otherwise, it's just a misleading sales pitch. When a sales pitch is proffered as advice, it's deceptive and misleading.

Currently, investors that work with non-fiduciary "adviser-reps" at insurance companies, broker-dealer reps and mutual funds are not getting bona fide best interest "advice" (as these firms claimed in testimony); these investors are getting a sales pitch, deceptively proffered as "advice." That must stop.

Deceptive TV Ads Making False Industry Claims

Misleading TV ads, funded by the insurance industry, claim that smaller investors or smaller retirement plans won't get advice if DOL's proposal is made final. That is ridiculous – when investors work with a non-fiduciary now, they are not getting advice – they are being lied to and misled, sold to in the guise of "advice."

Many insurance and broker lobbyists and broker-dealer execs spoke of individual retirement investors as annoyances, threatening to "cut them off" if they have to put the investor's interests before their own. One industry executive even noted they'd met as a group, and "have decided on an end date," to cut off services to individual investors this Fall.

Nobody sane believes that these companies will do anything of the sort. In fact, some of the more progressive firms, across all business models, are currently getting fiduciary training and have started putting fiduciary frameworks for repeatable processes in place. They will scoop their competition, if the dinosaurs refuse to place investors firs under the DOL rukemaking.

*T**he argument that nobody will get advice if the DOL rulemaking proceeds is actually backwards.***

In fact it is many things – But it is not true. Broker-dealer and insurance reps do not provide actual advice, especially on-going advice. Conflicted "advice" is not *advice*. They sell a security, often a one-time hit – often under the guise of advice – and reap an upfront commission and then an ongoing annual fee – for doing nothing. Their firm may also get yearly back door payments taken out of investor's accounts for as long as the investor owns the security. But **that's not advice. It is, however, the way broker-dealers and insurance companies currently deal with retirement investors. It's not advice. It's not a service. And updated DOL ERISA rules that prohibit those practices are *long overdue*.**

Abandoning Investors - Empty Threat or Promise?

If what they have said is true, if insurance companies, broker-dealers or mutual fund companies would rather abandon retirement investors, than place the investors' interests first, investors will turn to bona fide fiduciaries, and – often for the first time – receive actual advice, that's in their best interest.

These same executives and lobbyists also said if they choose not to abandon investors, these firms would just move them into "higher cost fee-based accounts." *However, that's* *an empty threat as well, since that would not be "reasonable," in terms of costs to the investor.*

And just to be crystal clear: **fee-only** advisory accounts often cost investors less – and for more services -- than commission, or commission plus fee, a/k/a "**fee-based**" investment accounts.

Investors Are Learning About the Fiduciary Difference

This debate, where some firms say they will not be fiduciaries and place investor's interests before their own "It'll never happen!" some have said – is calling attention to the current disparity in investment services.

Investors are learning the word "fiduciary" and they want it. For the first time, investors are calling RIA firms and requesting a fiduciary to advise them.

Game OVER! Once that fiduciary cat is out of the bag, as it is now, there will be no going back to UN-fiduciary, pretend advice.

We Know the Fiduciary Model Works: RIAs Already Act as Fiduciaries – In Their Clients' Best Interest

Registered Investment Advisers (RIAs) are already serving plans and retirement investors as fiduciaries, across all account sizes. **RIAs currently advise millions of investors. RIAs advise or manage $67 Trillion,** through more than 11,400 (11,473) RIA firms. They employ 750,000 individuals, and **RIAs serve as fiduciaries to 30 million clients**. [2]

DOL's proposal is workable. It is do-able. And fiduciary advice – advice in the best interest of the recipient, is not only better for the investors receiving it, is profitable for the firms that provide it.

Investment Products or Services That Do Not Work For Retirement Investors

As fiduciaries already know, there are many investment products or services available that RIAs recommend because they are in investors' best interests. The product mix varies because investor's goals and risk profiles are not all the same.

It is true that there are some products that, because of their high costs, low value, or risk factors, will not be in the best interest of many retirement investors.

There are some products that are so laden with conflicted, unreasonably high commissions, fees and risks that they are not in any investor's best interest. Those products will probably decline as the transition to fiduciary advice goes ahead. This is not bad for investors – it is good for investors.

[2] Evolution Revolution – A Profile of the Investment Adviser Profession
https://www.investmentadviser.org/eweb/docs/Publications_News/EVREV/evolution_revolution_2015.pdf

There are good reasons why DOL has identified and prohibited some of those products in the proposed rulemaking. That prohibition should stay in the final rule.

Misleading Testimony or Comments

There have been many comments and testimony from opponents to the DOL proposed rule that are patently false, misleading or outright lies. Two of them are addressed here: claims by lobbyist Kent Mason, of Davis & Harmon and the American Council of Life Insurers, ACLI.

Kent Mason, Davis & Harmon Lobbyist

In testimony before DOL, and before lawmakers, and in his DOL comments, Kent Mason's comments have been particularly bombastic and misleading.

In his testimony, Mason claims to represent himself. But, in the next breath, he claims to represent everyone and asserts that "everyone" opposes the DOL proposal – that "everyone" wants to preserve the non-fiduciary status quo.

Mason is, in fact, a powerful securities and insurance industry lobbyist and attorney. He and his Washington firm, Davis & Harmon, represent SIFMA, the broker-dealer lobby group as well as many other insurance and securities firms and special interests. Mason was also the architect of the SIFMA counter-proposal, a fantasy with no basis in reality whatsoever.

Mason noted in DOL testimony[3] that "everyone" has told him the DOL proposal is "unworkable" and "no one" will work with retirement investors if the rulemaking goes through. Mason claimed to have heard from "dozens and dozens of financial institutions," that not one will use the BICE exemption. That will be fine; if they actually put the fiduciary model in place they wouldn't need the BICE exemption.

BICE is only necessary when firms want to continue to use conflicted compensation that would be prohibited otherwise.

He also asserts that if DOL requires insurance companies broker-dealers to act as fiduciaries and place retirement investor's interests before their own, those firms are currently planning to abandon smaller investors: **Mason says: "It's walking away from the small accounts where you don't make money. You make money on larger accounts. The smaller accounts are investment in the future. If it's totally impractical to work with them, they won't work with them." Or that they'll work with them only outside of retirement accounts, where they don't yet have to put the client's best interest before their own**.

So, to recap the above, Mason says it's only worth working with smaller investors if you don't have to put their interests first, and can gouge them. If you have to put small investors' best interests ahead of your own, it's not worth working with them.

[3] Kent Mason, Davis & Harmon Testimony.http://www.dol.gov/ebsa/pdf/1210-AB32-2-HearingTranscript3.pdf

Fact: Most large broker-dealers do not work with anyone with less than $250,000, $500,000 or $1 million now.

To put it another way, they want to preserve the status quo that allows them to continue to systematically exploit unintended loopholes in 40-year old ERISA regulation, and bleed retirement investors for every dollar they can grab.

Fact: Mason's clients do not provide advice now. But they pretend to. And holding out as an advice provider when you are actually deceiving investors is not acceptable.

In other areas of his testimony, Mason appeared not to have read the rule. That was rather surprising since his job is as a lobbyist for the industry. But his tactic seems to be to spread untruths and fear among both financial professionals and investors.

Bogus Research

In Mason's July 21 comment to DOL,[4] he cites various "research" funded by opponents to fiduciary rulemaking, but so far the industry has refused to provide regulators the data used in those reports.

Mason asserts that the brokerage model will become "illegal."

Fact: Actually, the brokerage and insurance models are not becoming illegal – far from it. **What would be impermissible is continuing to mislead investors into thinking they are getting advice in their best interest, when they have been manipulated via deceptive sales tactics and steered into a conflicted product** that is in the best interest of the seller, not the investor. And that should be illegal.

The Real Reason For Mason's Comments

The real reason for Mason's strange comments[5] and testimony is that Mason is attempting to set DOL up to have to re-propose the rule. Mason repeats over and over that the rule is "unworkable," and then dares DOL to make "material" changes that Mason claims would trigger re-proposal requirements. ***That tactic is only plausible if what Mason says is true; however since much of what he says is fiction – or worse, out and out lies – that re-proposal argument is just not plausible.***

Saying that the rule is unworkable or that investors won't have access to advice or products or services is just not true, and no matter how many times Mason repeats it, repeating it does not make it true, and here too, what he's saying is *just not true*.

Fact: Fiduciary advice is not only possible, it is being provided now, by fiduciaries at more than 11,400 RIA firms, employing 750,000, and advising or managing $67 Trillion in assets. As we noted earlier, RIAs are already fiduciaries, and already serve retirement and non-retirement investors across all ranges of wealth and all walks of life. **Fiduciary advice from RIAs to 30 million investors proves Mason's assumptions are all wrong.**

[4] Kent Mason, Davis & Harmon 7/21/2015. http://www.dol.gov/ebsa/pdf/1210-AB32-2-00746.pdf
[5] Kent Mason, Davis & Harmon 9/9/2015. http://www.dol.gov/ebsa/pdf/1210-AB32-2-02757.pdf

Advice to Investors In All Walks of Life In All Stages of Wealth

Mason's July 21 comment letter claims, "Small businesses could not get help setting up a retirement plan," and "Small accounts will lose all access to an investment professional." Those claims also are absolutely not true. No matter how often he repeats them.

Here are just two examples of many that refute Mason's untrue claims:

As RIA Financial Engines said, in testimony at DOL hearings in August 2015:

"It is neither onerous nor impossible for service providers to provide high quality services in a fiduciary capacity to large numbers of plans and participants. We have a proven track record of providing high-quality independent investment advice. Financial Engines is America's largest independent registered investment advisor.

Financial Engines works with 647 employers, including 143 of the FORTUNE 500 companies, and nine of the largest retirement plan providers serving the defined contribution market. As a result, over three million people have used Financial Engines Online Advice, and approximately 900,000 have their retirement account professionally managed by the company.

Nearly 240,000 of our discretionary managed account service clients have less than $20,000 in their 401(k) portfolio, and the median balance is $57,000. Over 77% of the professionally managed portfolios are uniquely tailored to the individual. The median balance for the more than 9.1 million plan participants with access to our services is $32,000, and approximately 43% of those participants have less than $25,000 in their 401(k) portfolio." [6]

And fi360,[7] a firm which provides online investment analytics tools for fiduciaries and fiduciary training for advisers across business models, found that roughly half of the tens of thousands of retirement plans under advisement by fiduciaries using the fi360 analytical tools are smaller plans with less than $100 million in plan assets.

The UK Ban On Commissions – Tougher Reforms

Mason also claims that advice reforms in the UK were a disaster. Again, what Mason says is untrue.

Fact: When the UK proposed even more stringent reforms for investment advice – banning commissions altogether – there were similar howls from UK financial services interests. But a report from the UK on the status of UK's reforms contradicts Mason's untrue claims, and made these important points: [8]

[6] Testimony of Financial Engines, before DOL, August 13, 2015.
http://blog.financialengines.com/jones_testimony_dol_fiduciary_rule/
[7] www.fi360.com
[8] http://www.fca.org.uk/static/documents/post-implementation-review-rdr-phase-1.pdf

- There is "little evidence that the availability of advice has reduced significantly as a result of the RDR (Retail Distribution Review), with the majority of advisers still willing and able to take on more clients."

- Reforms resulted in "reduced product bias from adviser recommendations reflected in a decline in the sale of products which paid higher commissions pre-RDR" reforms.

- "It has also made it easier for consumers and advisers to compare platforms, increasing competitive pressure and leading to a significant reduction in Direct-to-Consumer (D2C) platform charges."

- "Product prices have fallen by at least the amounts paid in commission pre-RDR, and there is evidence some product prices may have fallen even further. This is due in part to the introduction of simpler products and funds which have a lower charge and advisers and platforms exerting more competitive pressure on providers."

- The "vast majority of advisers are now qualified to the new minimum standards and there has been an increase in the number of advisers going beyond these minimum standards."

- Advisory companies are healthier than before, with "both average revenues and profitability of advisory firms having increased."

- "The costs to firms of complying with the RDR have been in line with or lower than expectations."

American Council of Life Insurers – ACLI

The American Council of Life Insurers has commented on the DOL proposal, [9] recommending extensive revisions to enable insurers to continue with the "business as usual" of selling as much product to retirement investors as possible, with no regard to how much it may harm the investor or how much it ultimately extracts from the retiree's nest egg.

Insurers have used deception, scare tactics, bullying, and misleading marketing materials and "disclosures" to coerce investors to entrust their hard-earned retirement savings to the insurer in an annuity. But too often the company then extracts so much in commissions and fees that it is not in the interest of the investor but rather of the insurer.

ACLI's recommended changes to DOL's proposal would continue the status quo, or worse, enlarge existing loopholes the DOL intends to close or add new loopholes to benefit the insurance and brokerage industries.

[9] http://www.dol.gov/ebsa/pdf/1210-AB32-2-00621.pdf

ACLI demands that DOL "provide the opportunity to learn about and access annuities, the sole means available in the market place by which retirees can secure income for life."

Fact: Sole means? Not true. Defined Benefit Pensions provide income for life. Certified Financial Planners and the 11,400 RIA firms typically provide income distribution planning as part of their services.

Financial Engines, the large RIA mentioned above, also offers an income distribution service across all account sizes, **at a fraction of the cost of an annuity**.

Annuities Have Serious Drawbacks

Fact: There are important drawbacks when using annuities: **they are a very, very expensive way to have one's own retirement savings paid back periodically; costs can be exorbitant, including high initial and ongoing yearly commissions, fees, and penalties for withdrawal.** They lock up the investor's own money for very long periods – often longer than the annuitant lives.

Fact: If the investor needs the money, **insurance companies assess penalties that are frequently in double digits – often 20% just in withdrawal penalties alone** for Fixed Indexed Annuities (formerly known as Equity Indexed Annuities), and some variable annuities.

Fact: And, annuities are, too often, **sold using fear and misleading, or fraudulent sales practices – often masquerading as "education."** When sales tactics are held out as "education," or "advice," that's fraud. And often it's perpetrated on America's retiring workers, seniors or the elderly.

In addition to ultra-high costs many investors incur when using annuities, particularly variable and index annuities, **here is what CNN/Money said about using annuities for retirement income:**

"The key drawbacks are that annuities are not inflation-adjusted; you may be able to generate a higher return investing on your own or with an adviser; and if you die soon after retiring, the insurance company, not your heirs, is more likely to benefit from the bulk of your savings."[10]

Fact: As far as fiduciaries advising retirement investors – Financial Engines is another source that disputes the assertion by some, including less progressive banks, broker-dealers, insurance companies and mutual fund companies, that smaller investors will not be serve if DOL's proposal goes into effect. This one, fiduciary, RIA has more than $1 Trillion in "assets under contract," with $114 billion in assets under management and 891,000 investors' assets under professional management.

ACLI goes on to politely request that DOL effectively gut its fiduciary proposal – and lessen ERISA protections, **widen current loopholes and narrow the fiduciary**

[10] "401(k) Retirement Distributions," May 29, 2015. http://money.cnn.com/pf/money-essentials-401k-distributions/

requirement even further than the current, decades-old ERISA 5-part test does. **At the same time, ACLI asks for broader exemptions to the DOL proposal,** thereby allowing the status quo to continue and even evolve in ways that will cause more harm to investors.

Not only does this leave retirement investors even more vulnerable; ACLI's specific requests would make investor harm even easier for firms to institutionalize:

ACLI asserts: "The regulatory definition must clearly link fiduciary advice with a contemporaneous transaction."

Fact: ACLI's narrowing of the fiduciary relationship effectively neuters DOL's proposal. It does nothing to mitigate conflicts of interest.

ACLI wants DOL to "Clarify agreements, arrangements and understandings are to be mutual."

Fact: Retirement investors should not have to have a law degree to understand the relationship they have with a company or individual who is advising them on retirement investments. **The function of holding oneself out as an "adviser" is reasonably interpreted by investors as advice in the investor's best interest.** There need be no mutual agreement so that someone holding out as an adviser can say, on the one hand "We put the investor's best interest at heart," but then, if there's an issue or problem "Oh, no I am not an adviser, not a fiduciary; not required to act in your best interests."

T**he contractual protections afforded IRA investors under DOL's proposal should not be eliminated by requiring that mutual understanding or neutered by anything**, including the ability to change the relationship after the fact with a "no action needed" email.

(In fact, I just received one of those "no action required" messages with new contract revisions from Fidelity Investments.)

ACLI's comment states: "The regulatory definition **must more closely align itself with the statute and past practice in focusing on activities which are "investment" in nature,**" and,

"… a **recommendation regarding a person who may be willing to serve and might be hired as an investment advice fiduciary is not a recommendation regarding the investment of plan assets.** Whether or not such person is to be "entrusted with investment authority" is a determination to be made by another party. The Department should not discourage parties-in-interest from helping plan fiduciaries identify other possible service providers."

Fact: The selection of fiduciary service providers, including investment fiduciaries or other prudent experts, is an inherently fiduciary function. Recommendations of such persons, especially someone in the investment adviser or other fiduciary role to a retirement plan, impact the formation of the plan's investment policy statement, development of investment criteria, and investment selection, monitoring and replacement process. All of these processes, therefore, heavily impact investor outcomes and are considered fiduciary functions.[11]

ACLI's alternative proposal goes on to suggest additional changes that weaken ERISA fiduciary requirements.

Again, DOL has proposed commonsense updates to decades-old ERISA rules that no longer comport with the retirement reality in America today, four decades later. The strong proposed DOL fiduciary protections will go a long way toward helping investors achieve a more secure, dignified retirement.

Fact: Nothing in ACLI's comments makes any good faith effort to improve investor protections or improve DOL's strong fiduciary proposal. Similar to Kent Mason's arguments on behalf of insurance and broker-dealer, bank and mutual fund company special interests, ACLI's comments attempt to lure DOL into making extensive changes or re-propose the rule.

ACLI's comments do just the opposite. They actually neuter the DOL's proposed rule and at the same time make current ERISA fiduciary requirements weaker, and open new loopholes that would cause serious harm to investors.

Fact: DOL's expansion of who is a fiduciary is necessarily broad and must be, if America's retirement investors are to achieve a secure, dignified retirement. America's retirement savers are doing this by sacrificing and saving their own money – and they must receive bone fide advice that is in their best interest, not scare tactics and deceptive, misleading sales pitches masquerading as advice.

FACT: DOL Re-proposal is Not Necessary.

At the same time, DOL's proposed carveouts or exemptions are, necessarily, narrow. Why? Because in the status quo, and in ACLI's alternative, proposed world of unbridled insurance sales, investors are used, not served. ACLI's comment proposes to preserve and enhance, for insurers, a status quo that is extraordinarily harmful to the retirement savings of millions of Americans.

ACLI's comment claims that DOL's proposal would result in less access to annuities, lower the number of small business retirement plans, and investment and "distribution education and guidance."

We disagree.

Fact: At this time, many in the insurance industry manage to escape fiduciary responsibilities toward retirement plans, participants, beneficiaries and, importantly, the decision whether or not to roll retirement plan assets into an IRA, and what that IRA should invest in. The solution, in the insurance world, and often the brokerage world, is to sell (in the guise of "advice"), the highest commission, highest fee, most conflicted,

[11] fi360 Handbook, "Prudent Practices for Investment Advisors," practices A-1.3, A-1.5, A-3.1, A-3.3, A-4.4 ©fi360 https://www.fi360.com/main/pdf/handbook_advisor.pdf

annuity or other product, structured to be lucrative to the insurance company or broker-dealer and reps. But that is not in the interest of the investor.

That's what ACLI is afraid of.

Fact: When appropriate – that is to say, when in the best interest of the investor – annuities may be used under DOL's proposal. But currently, they're sold because the incentives to the seller are high, without regard to whether this is in the investor's best interest.

That is why the definition of fiduciary must be broad in the DOL rulemaking, and exemptions narrow.

Agreements and Mutual Understanding

ACLI wants contracts or agreements to be made by "mutual" understanding.

Fact: That may work well among lawyers, but it does not work for retirement investors – financial laypersons – which is exactly what most American retirement investors are. They have little to no formal investment or financial training.

The Knowledge Gap

Fact: The knowledge gap is huge between a professional advising a retirement investor on retirement investments or whether to rollover assets from a retirement plan or even, sadly, a pension plan. It is much the same as the gap in cognition between an elderly person with beginning dementia issues or even Alzheimer's disease, and their guardian (a fiduciary relationship).

A recent survey[12] of RIA advisers, broker-dealer reps, insurance reps and dually registered BD/RIA reps notes that:

"Studies over the years have confirmed that ***investors believe the advice they get from their financial intermediary is in the investor's best interest.*** Do investment advisers and brokers agree on this point? They sure do. Overall, more than 97% say investors do not understand the differences between brokers and investment advisers. This very strong consensus carries through every compensation model."

"In addition, ***there is a significant knowledge gap between financial intermediaries and investors. Can the ordinary investor, entrusting their retirement savings and financial wellbeing to the broker or advisor they engage, bridge this knowledge gap on their own?***

[12] 2013 fi360-ThinkAdvisor Fiduciary Standard Survey, p. 30-31. http://www.fi360.com/uploads/media/fiduciarysurvey_resultsreport_2013.pdf

More than 68% of all participants say no, investors cannot bridge this gap. While 65% of RIA/IARs and 66% of registered reps say investors cannot bridge the investment knowledge gap, an even higher number of dual registrants (76%) say that ordinary investors cannot bridge the knowledge gap. The knowledge gap is recognized across all registration types and compensation models."

"Does the 'knowledge gap make fiduciary advice much more important for ordinary investors?" Intermediaries think so. Though 83% believe that the knowledge gap makes fiduciary advice more critical to ordinary investors, the breakout by registration shows wider variation. An overwhelming majority of RIA/IARs (91%), and dual registrants (78%), and a slight majority of registered reps (58%) believe that the knowledge gap makes fiduciary advice much more important for ordinary investors. This gap is so apparent, the majority across all compensation models agrees."

That is why the DOL's proposed fiduciary protections must be broad, and any exemptions, very narrow.

Annuities Awareness: What Annuities Owners Do and Don't Understand About Their Annuities.

Findings of a recent survey of annuity counselors in a large RIA firm indicate **that most investors are not aware of the total fees they pay** on the annuities, or of many other contract provisions. Investors are largely unaware that:

- The return percentages quoted *include the return of their own principal* that they put into the annuity. *They think the return percentage quoted is an investment return* – not return of their own principal.
- Those return percentages often include a "come hither" often eye-popping, initial return rate, which changes in as soon as six months.
- Their own principal is being returned to them, and that there is no principal left at the end, unlike in a mutual fund or most other investments.

The annuity counselors surveyed work with annuity owners to determine whether it is in their best interest to remain in an annuity or not. This RIA firm has spoken with 5,000 annuity owners regarding 10,000 annuity contracts. The annuity counselors, with the annuity owners, call the annuity-issuing insurance company, to uncover the facts about the annuities contracts. These are the counselors' conclusions from these three-party discussions with thousands of annuity owners.

Variable Annuities
How many annuity owners are unaware of the total fees they are paying annually for their VA?

- **Annuities owners are "almost always" unaware of the total fees they are paying for their VA,** according to 62% of the annuity counselors**.**
- **75% or more VA owners are unaware of the total fees they pay,** another 31% of the annuities counselors say.

How many annuity owners have a VA in their qualified retirement account?

The counselors found that **at least 50% of annuity owners have a VA in their qualified account. (That's a very expensive retirement investment, and it's not an appropriate location of that asset -- there is no need for the annuity's tax deferral in an IRA.)**

- **More than 50%, but less than 75% of the annuity owners had a VA in their qualified retirement account**, according to almost half the counselors, 46%.

- **50% of annuity owners had a VA in their qualified account,** according to 31% of the counselors.

- **More than 75% of the VA owners they talked with had a VA in their qualified retirement account,** said 23%, of the counselors.

How many annuity owners do not understand that death benefits are taxable (as opposed to life insurance, which is not)?

- **Annuities owners are almost always unaware that annuity death benefits are taxable,** according to 31% of the counselors.
- **75% or more annuity owners were unaware that the death benefit is taxable,** 38% of the counselors found.
- **50% or more of annuities owners were unaware that the death benefit is taxable,** according to another 22% of the counselors.

While 75% or more of the time, annuities owners were aware that there *was* a surrender charge on their annuities, most were unaware of the details and magnitude of that penalty for getting their money out of the annuity.

Most annuity owners under age 59 ½ did not realize that there is an additional tax penalty for surrendering their annuity.

Between 75% and almost all the time, annuity owners were not aware of that additional tax penalty, said 69% of the counselors.

Most annuity owners did not understand the interest crediting method for their fixed Indexed Annuities (FIAs). Counselors noted that:

- Annuity owners "almost never," or "less than 25% of the time," understand the interest crediting rate for their FIAs, according to 69% of the counselors.

Even though a little more than half the annuity owners realize a VA can actually lose contract value, *most annuity owners mentioned "not losing principal" was their primary reason for purchasing a VA*. "Unsophisticated investors hear the word 'guarantee' and they become anesthetized; they're sold on fear," according to the survey. The insurance company is betting you die before your account value – the principal you put in – is depleted, because they keep that. You're never getting the 5%-6% you think you are, because you're paying 4% per year (or more) in fees. Not including a surrender penalty (to get your own money out) that can be as high as 20%.

Conclusion

This is the choice we face here, and why it is so **vital that all who have the privilege of advising retirement investors must do so in the <u>Investor's Best Interest</u>.**

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. DOL articulates it in this rulemaking. And this is why this DOL rulemaking must proceed, without delay.

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

We applaud the courage and tenacity of the White House and Department of Labor in proposing the Definition of the Term Fiduciary – Conflict of Interest Rule – Retirement Investment Advice. We stand ready to act as a resource as you go forward. We especially commend your steadfastness in the face of immense and formidable opposition. And we wish to help in any way with this rulemaking to ensure that advice to the millions of Americans that are working hard and investing for retirement is, indeed, in their best interests.

Respectfully submitted,

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About The Committee
The Committee was formed in June 2009 by an all-volunteer group of investment

professionals and fiduciary experts, just as policymakers and industry leaders were reviewing the repercussions of the financial crisis, to advocate that all investment and financial advice be rendered as fiduciary advice and meet the requirements of the five core fiduciary principles. The Committee's work is pro bono.

The Committee's goal is to advocate for the authentic fiduciary standard. The Committee seeks to help inform and nurture a public discussion on the fiduciary standard. Its objective is to ensure that any financial reform regarding the fiduciary standard, 1) meets the requirements of the authentic fiduciary standard, as presently established in the Investment Advisers Act of 1940, or ERISA, and 2) covers all professionals who provide investment and financial advice or who hold themselves out as providing financial or investment advice, without exceptions and without exemptions.
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