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Submitted electronically by e-mail to:
e-ORI@dol.gov (enter into subject line: Definition of Fiduciary Proposed Rule)
April 12, 2011

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Definition of Fiduciary Proposed Rule
Room N–5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Definition of the Term "Fiduciary"

Ladies and Gentlemen,

I write to support the Department of Labor Employee Benefits Security Administration (DOL EBSA)"Proposed Rule Definition of the Term 'Fiduciary'" (29 CFR Part 2510 RIN 1210-AB32) (http://webapps.dol.gov/FederalRegister/HtmlDisplay.aspx?DocId=24328&AgencyId=8&DocumentType=1) (1)

I am the Wealth Editor-in-Chief of AdvisorOne.com,(www.AdvisorOne.com), a founding member of the Committee for the Fiduciary Standard, (www.thefiduciarystandard.org) and previously was a Series 7 Registered Representative, an bond trader and underwriter and after that, an investment adviser.

This letter represents my own views, and not those of any other company or organization.

The proposed rule will be good for investors, many of whom are thrust into investing whether they want to be or not, in order to be able to retire. Many of these investors are, on their own, unprepared to make the kinds of investment choices that are required to put together a prudent, diversified portfolio that would likely help them to achieve their retirement goals and dreams.

The propose rule states that it would "upon adoption, would protect beneficiaries of pension plans and individual retirement accounts by more broadly defining the circumstances under which a person is considered to be a ``fiduciary'' by reason of giving investment advice to an employee benefit plan or a plan's participants. The proposal **amends a thirty-five year old rule that may inappropriately limit the types of investment advice relationships that give rise to fiduciary duties on the part of the investment advisor. The d rule takes account of significant changes in both the financial industry and the expectations of plan officials and participants who receive**

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investment advice; it is designed to protect participants from conflicts of interest and self-dealing by giving a broader and clearer understanding of when persons providing such advice are subject to ERISA's fiduciary standards. For example, the proposed rule would define certain advisers as fiduciaries even if they do not provide advice on a ``regular basis." Upon adoption, the proposed rule would affect sponsors, fiduciaries, participants, and beneficiaries of pension plans and individual retirement accounts, as well as providers of investment and investment advice related services to such plans and accounts." (1)

This would be beneficial to individual participants who want to save for their retirement.

I write as, simply, one who has had the experience of being captive in a bad retirement plan and been frustrated by the lack of information from and integrity of the plan broker, who has made a point of being called "unbiased" and an "adviser" when in point of fact he has not acted as a fiduciary. I am sure my experience is not unusual, but many plan participants are not equipped to judge or even understand how bad their retirement plan actually is, and how bad the advice they are receiving is. This may be one reason why DOL may not receive many comments from individual plan participants. Often participants cannot tell how badly they are being "advised" until it is too late and damage has been done.

The leakage of participants' assets through years of high fees or commissions is subtle; investors captive in those plans may not be able to discern or articulate that their assets are underperforming because of high fees or costs—not performing as they would be with more reasonable fees or costs, and since investors a not generally equipped to make a judgment as to whether their assets are in a plan that is being managed in their best interests, with reasonable fees and costs, and authentic fiduciary advice, or not, DOL will not likely hear from them.

This all contributes to investors' disgust at, and mistrust of, financial services firms, including banks, brokers and insurers, some of which provide advice that is in the firms' or brokers' interest, at the expense—literally—of the plan participant investors.

The elimination of the DOL's "five-part" test to determine who must act as a fiduciary to retirement plan sponsors and participants is long overdue and I am happy to see this being addressed. Anyone who provides advice to retirement plans or participants should have to do this as a fiduciary.

Plan Participants are Captive

To me, perhaps the most important reason for this is that investors in company-sponsored plans are captive. They have no other choice—other than individual retirement accounts in which less is allowed to be saved each year—of a retirement vehicle. That is, to me,

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reason enough that the advice provided to plan sponsors and investor participants must be fiduciary.

This includes disclosure of the total costs the investor pays and any other costs to the plan that participants pay—in ways that they investor can readily see what is being charged, overall in their account(s), by investment choice (fund, managed account, trust, annuity security, ETF, etc.) and overall. It is only fair that they understand what they are paying and what this is for. Costs that a plan sponsor picks up should also be disclosed. This should be readily available on a participant and sponsor basis. The responsibility to provide this should rest on the vendor(s) of any and all services provided to the plan and participants. In addition, the providers should abide by all ERISA fiduciary provisions.

Conflicts arise when providers' intermediaries advise plan sponsors what to include in their plans and are compensated on the choices that are provided, thereby opening the door for fund classes, or investment vehicles that pay more to the person advising than other more prudent and available choices. One example of this would be the lack of a money market fund as an asset choice in a plan, to be used as part of an overall allocation across the asset spectrum, and the substitution of a fixed rate fund that is much higher in risk and cost—and pays more to the plan's broker and "adviser."

In addition, advice to participants who are taking money out of plans or IRAs should be required to be fiduciary advice. All too often, we hear of advice to participants who have been "advised" to take money out of IRAs or retirement plans and place it into high risk, high-commission or fee vehicles. Here is the case of an intermediary acting like an "adviser" but who is actually a salesperson acting in the interest of themselves or their firm and not in solely in the best interest of the investor.

This hurts chances of the investor's retirement goals being realized in three important ways:

- Evisceration of assets through high up-front fees or commissions
- Leakage of assets from high annual fees or commissions
- Lost investment opportunity when an investor is "advised" to put their retirement savings into vehicles that do not perform as well over the long term on a risk-adjusted basis as more prudent, diversified portfolio should

As my article, "The SEC and the Fiduciary Study: The Process," states,

"Although investment advisors have had a fiduciary duty to clients since the '40 Act, the '34 Act, which governs purchases and sales of securities through brokers, mandated a suitability or commercial, fair-dealing standard. Both Acts became law in a very different

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era: No advice was provided by brokers; banks were separate from brokers and insurers were a wholly different kind of entity. Most investors in stocks or bonds were wealthy.

Now, responsibility for one's own retirement cuts across nearly all income strata in the United States and rests with many workers who were thrust into investing not because they have spare dollars to play with, but because they must make investment choices to fund their own retirement, college and other savings. Gone are the 5% or higher guaranteed bank savings accounts. The financial product array is so complex and extensive, and advice is so critically important to investors, that it is a totally different situation today than when those Acts became law.

To top it off, since the elimination of Glass-Steagall, banks, insurers and brokers have merged, and the functions of brokers and investment advisors often look identical—as do titles—leaving investors understandably confused about the type of relationship they have with their financial professional (Broker? Investment advisor? Trustee? Fiduciary? Salesperson? How is an investor to know, when nearly everyone's business card carries a financial advisor or similarly vague—if important sounding—title?), how that individual is paid, and what other conflicts may exist. This all set the stage for the changes being contemplated at the SEC right now." (2)

Investors and Intermediaries are 'Separated by a Knowledge Gap'

As the SEC's 1995 "Report on Broker-Dealer Compensation," also known as the Tully Report,
(http://www.sec.gov/news/studies/bkrcomp.txt) points out, investors are separated by a knowledge gap that, since the report's issue in 1995, has only become larger.

"As a general rule, RRs and their clients are separated by a wide gap of knowledge--knowledge of the technical and financial management aspects of investing. The pace of product innovation in the securities industry has only widened this gap. It is a Rare client who truly understands the risks and market behaviors of his or her investments, and the language of prospectuses intended to communicate those understandings is impenetrable to many.

This knowledge gap represents a potential source of client abuse, since uninformed investors have no basis for evaluating the merits of the advice they are given. It also makes communication between a registered representative and an investor difficult and puts too much responsibility for decision-making on the shoulders of Errs--a responsibility that belongs with the investor." (3)

The SEC's Rand Report, "Investor and Industry Perspectives on Investment Advisers and Broker-Dealers" http://www.sec.gov/news/press/2008/2008-1_randiabdreport.pdf

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indicates, pp 96-97, the vast investor confusion about what and how their advisors are paid, what they are paid and whether the relationship is fiduciary or not.

"Responses to the questions on methods of payment suggest that many respondents are Confused about the methods of payment or the type of firm with which their individual professional is associated. For example, 84 respondents indicated that they receive advisory services (either alone or in conjunction with brokerage services) from an investment advisory firm that is not also a brokerage firm. Of these respondents, 19 percent reported that they pay for these advisory services based on a percentage fee, and 22 percent indicated that they pay commission for advisory services. However, recall from Chapter Four that 97 percent of SEC-registered investment advisers that are not registered broker-dealers reported that they are compensated by asset-based fees, and only 10 percent reported that they receive commissions.

Finally, 14 respondents did not answer the estimated annual expenditure question for Advisory services, and ***41 reported that they pay $0.*** *For brokerage services, 18 respondents did not answer the estimated annual expenditure question,* ***and 34 reported that they pay $0.***

For firms, as opposed to individual professionals, respondents reported the most common Form of compensation for brokerage services was commission and, for advisory services, was other (see Figure 6.4). Of the 28 other responses, 16 had further explanations. ***The most common explanations for the other responses were that the respondent does not pay for the service (six responses) or does not know what he or she pays for the service (four responses).****"* (emphasis added) (4)

A Vocal Financial Services Lobby for Status Quo

The extension of the fiduciary standard has generated an outcry from the companies that will have to culturally and materially change in order to serve the plan participant and plan sponsor (instead of the other way around, as is co common today. But this change is essential.

We must build a "Fiduciary Society," in the words of Vanguard Founder John Bogle:

"[T]his fiduciary industry standard must be extended to other financial advisors, including *broker-dealers who elect to act as advisors.*

Of course this idea generates considerable heat, but I am not sure why. Surely it should be made clear to clients whether they are relying on (1) trained investment professionals, paid solely through fully-disclosed fees to oversee their investments; or (2) sales representatives who sell the products and services of the companies that they represent, whether life insurance, annuities, mutual funds, or anything else. Simply put, the first group is representing its clients; the second group is representing its employers." (5)

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Five Final Points

Most brokers and advisors surveyed in December for the fi360-AdvisorOne Fiduciary Survey believe that, "disclosures are not enough to manage conflicts" (81.4%); feel they already "have a fiduciary relationship" with clients (58%); believe that extending the fiduciary standard to brokers this "will not raise costs for investors" (74%); "will not reduce product or service choice for investors" (68.6%); or "price some investors out of the market for advice" (66.9%). (6)

In conclusion, I support adoption of the proposed rule because it would be a big improvement for Americans who would like to retire, so many of whom are captive in defined contribution (DC) plans that were never meant to be the primary retirement vehicle for Americans but an adjunct to a defined benefit (DB) plan. These DC vehicles removed retirement risk and funding liability from the employer and placed it squarely on the backs of the employee.

Americans who are saving in the DC plans and are ill-equipped to make investment decisions are hampered by intermediaries who are not acting as fiduciaries under ERISA and providing advice to plan sponsors and participants is solely in the best interests of the participants but rather in their firms or their own interests.

Please make the Proposed Rule the law without loopholes proposed in their comment letters and testimony that will benefit the financial service industry at the expense of the participant. As a rebuttal to those letters, I support the views of Ron A. Rhoades, JD, in his letter: http://www.dol.gov/ebsa/pdf/1210-AB32-T5.pdf (7)

Sincerely,

Kathleen M. McBride

Sources

1. DOL EBAS Proposed Rule Re: Definition of the Term "Fiduciary" http://webapps.dol.gov/FederalRegister/HtmlDisplay.aspx?DocId=24328&AgencyId=8&DocumentType=1

2. "The SEC and the Fiduciary Study: The Process," Kathleen M. McBride, *Investment Advisor* March 2011; AdvisorOne.com http://www.advisorone.com/article/sec-and-fiduciary-study-process

3. SEC's Report on Broker-Dealer Compensation,1995 also known as the Tully Report http://www.sec.gov/news/studies/bkrcomp.txt

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4. SEC's Investor and Industry Perspectives on Investment Advisers and Broker-Dealers
http://www.sec.gov/news/press/2008/2008-1_randiabdreport.pdf

5. "Building a Fiduciary Society," John C. Bogle
http://www.vanguard.com/bogle_site/sp20090313.html

6. fi360-AdvisorOne Fiduciary Survey, 2010; with 684 advisor and broker participants
http://www.advisorone.com/article/8-surprising-findings-fi360-advisorone-fiduciary-survey

7. Ron A. Rhoades, JD, in his letter: http://www.dol.gov/ebsa/pdf/1210-AB32-T5.pdf