From: James D. Keeney, Esq. <jim.keeney@gmail.com>
Sent: Tuesday, July 14, 2015 4:15 PM
To: EBSA, E-ORI - EBSA
Subject: RIN 1210 AB32

Follow Up Flag: Follow up
Flag Status: Flagged

James D. Keeney, Esq.

4830 Shadyview Court

Sarasota, Florida 34232

(941) 928-3378

July 14, 2015

Office of Regulations and Interpretations

Employee Benefits Security Administration

Attn: Conflict of Interest Rule, Room N-5655

United States Department of Labor

200 Constitution Avenue NW.

Washington, DC 20210

Re: DOL Fiduciary Conflict of Interest Regulation RIN 1210-AB32

I write as a Florida attorney who has represented individual retirement investors in hundreds of disputes with securities broker-dealers and their associated persons over the last 25 years. I am also an active FINRA arbitrator who has served on FINRA customer arbitration panels including in the role of chairperson in cases involving investor disputes with RIA's, financial advisors, securities brokerage firms and their associated persons. I am a former Trustee of the Public Investors Arbitration Bar Association (PIABA), a national group of 400 attorneys who specialize in representing securities investors. Typically, these investors have lost their retirement savings and seek to recover these losses in arbitration against their financial advisors and securities brokerage firms.

I strongly urge DOL to amend the proposed regulation so as to prohibit a "best interest contract" from "requir[ing] that individual disputes be handled through arbitration." Otherwise, the "best interest contract exemption" will effectively swallow the entire proposed regulation, making its well-intended new protections for retirement investors mainly illusory.

Allowing financial institutions to require mandatory arbitration of customer disputes will undercut the well-intended retirement investor protections in this proposed regulation because arbitrators are not required to follow federal or state statutes or regulations, including this one. Both state and federal courts routinely hold that even the most outrageous refusals of arbitrators to follow the law are not sufficient grounds to vacate or modify an arbitration award.

The "private right of action for breach of contract" contained in the "best interest contract exemption" is plainly intended to allow individual retirement investors to hold their fiduciary advisers accountable for failing to act in their customers' best interests. Allowing securities brokerage firms to include mandatory arbitration provisions in their customer agreements, however, renders this "private right of action" provision worthless and illusory. This is a huge loophole that must be shut. Historically since 1987, FINRA rules and court decisions have allowed brokerage firms to include mandatory arbitration provisions in their customer agreements. Nearly all securities firms now do so, routinely forcing their retail customers to submit "all disputes" to mandatory FINRA arbitration. The securities industry controls FINRA, and that control is reflected throughout the FINRA arbitration process, especially in the final results. This practice serves the industry well, but it is not in the best interest of the retirement investor.

The United States Supreme Court has heldill that mandatory pre-dispute arbitration clauses in securities industry contracts are not unlawful and will be enforced, but that does not *ipsofacto* make inclusion of such arbitration clauses in the best interest of a securities firm's customer. On the contrary, mandatory arbitration is almost never in the customer's best interest, because in arbitration there is no way to be sure that DOL regulations or any other form of law will actually be applied. In practice, mandatory FINRA arbitration viltually insures that a ttue fiduciary standard will NOT actually be applied to resolve customer disputes.

Mandatory arbitration clauses are always, by their very nature, contrary to the best interest of the retirement investor. This is true regardless of the rules of the arbitration forum, the backgrounds of the arbitrators, or anything else. Arbitration clauses necessarily require all parties to give up their legal rights, substituting in their place the decision of a panel of arbitrators who are not required to follow the law. If a customer is not given the right to have disputes with her stockbroker decided according to law, she is thereby denied the right to have DOL regulations and other protective provisions of state and federal law applied to her dispute.

In arbitration, no one can insure that a fiduciary standard will actually be applied to the facts, regardless of what any statutes and regulations may say. **Arbitrators are not required to follow the law.** They are generally not even required to give reasons for their decisions. Frequently, they choose to ignore the law in favor of "common sense" or rules of thumb they have learned or developed based upon nothing more than their own personal philosophy or experience. Their decisions are not subject to any form of appeal and cannot be overturned by any court regardless of even the most obvious and outrageous failures to follow the law. A long line of cases has clearly established that short of proving that an arbitrator actually took a bribe, there is virtually no way for a disappointed party to vacate or even obtain modification of an arbitration award.

FINRA arbitrators are not required to follow the law in rendering their decisions. Therefore, they will be free to ignore the entire proposed fiduciary standard regulation, just as they already often effectively ignore the presently existing fiduciary standard requirements when deciding cases involving RIA's or insurance agents.

Class actions are allowed to proceed in court pursuant to statutes, rules and regulations as the sole exception to mandatory arbitration under FINRA rules regarding customer agreements. This proposed new DOL regulation will therefore actually affect class action cases Very few such actions are filed, however, because FINRA arbitration discovery rules generally prohibit disclosure of the identities of other customers placed into the same unsuitable securities by the same broker or his firm. Accordingly, few plaintiffs alleging financial advisor negligence or malfeasance can meet the basic class action requirements of "commonality, typicality, and numerosity" to get into court. Moreover, in securities class action cases, it is well known that individual investors rarely recover even a significant portion of their losses. Instead, brokerage firms and lawyers who specialize in such cases almost always settle the cases on terms that provide for attorney fees, but no admissions of liability that could be used by other customers in arbitration, and only tiny returns to individual aggrieved investors.

Since this proposed fiduciary standard conflict of interest regulation will therefore not materially improve net recoveries of losses caused by conflicts of interest and suffered by retirement investors---not in individual arbitrations nor in class action cases---it is almost worthless to individual retirement investors as presently proposed.

The essential change required to improve this proposal so as to meaningfully protect retirement investors is to treat the action of including a mandatory arbitration provision in a customer agreement as what it is: a conflict of interest per se. Simply change the proposed regulation to state that a "best interest contract" CANNOT (instead of "may") require that individual disputes be submitted to mandatory pre-dispute arbitration.

Respectfully,

Isl

James D. Keeney

ill.American Express vs. McMahon (1987).

James D. Keeney
4830 Shadyview Ct.
Sarasota, FL 34232
Phone (941) 928-3378
email: jim.keeney@gmail.com