

# PUBLIC SUBMISSION

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Definition of the Term ‘Fiduciary’; Conflict of Interest Rule—Retirement Investment Advice; Notice of proposed rulemaking and withdrawal of previous proposed rule.

**Comment On:** EBSA-2010-0050-0204

Definition of the Term Fiduciary; Conflict of Interest Rule- Retirement Investment Advice

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## General Comment

The testimony of various broker-dealer groups in opposition to the proposed fiduciary rule has raised the question of whether, if implemented, a wide swath of consumers will lose access to advice and financial advisors.

However, it's crucial to recognize that the "financial advisors" under such broker-dealer groups would ALREADY be subject to fiduciary obligations as a Registered Investment Adviser under the Investment Advisers Act of 1940 if they were primarily in the business of giving financial advice for consumers, as mandated under Section 202(a)(11) of the law, which states that as investment advisers means "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities..."

To allow broker-dealers to still function, when implementing the Investment Advisers Act, Congress stipulated under Section 202(a)(11)(C) that the definition of investment adviser would not include "any broker or dealer whose performance of such services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor." Thus, by NOT being registered as investment advisers, broker-dealers are implicitly claiming that their registered representatives are still primarily in the business of selling brokerage services, such that any advice they provide is "solely incidental" to the conduct of his/her business as a broker-dealer.

In other words, broker-dealer groups are claiming to the SEC under Section 202(a)(11)(C) of the Investment Advisers Act that their registered representatives are NOT primarily in the business of giving advice and that their advice is solely incidental to the sale of brokerage products, even as their testimony regarding the proposed

fiduciary rule is that their registered representatives ARE primarily in the business of giving advice (such that the implementation of the rule would limit access to advice)!

These are fundamentally contradictory positions. Either registered representatives ARE in the business of giving advice, which would render them no longer eligible for the broker-dealer exemption from registration as an investment adviser (and being subject to fiduciary duty) under Section 202(a)(11), or registered representatives are NOT in the business of giving advice, in which case the objection that consumers would lose access to that advice is no longer valid.

Which means ultimately, the implementation of the proposed fiduciary rule would not limit consumer access to advice, because either registered representatives of broker-dealers are not actually giving advice that would be constrained in the first place (which is how they remain eligible for the broker-dealer exemption), or they ARE giving advice and should ALREADY be registered as investment advisers and operating as fiduciaries (in which case the rule has no adverse effect as fiduciary duty already applies).

Unfortunately, in practice today registered representatives of broker-dealers routinely hold out to the public as though they are financial advisors in the business of giving advice, even as they rely on the broker-dealer exemption to avoid being held accountable for their advice, due to the SEC's failure to enforce the law as written (see <https://www.kitces.com/blog/is-the-sec-failing-to-enforce-the-solely-incident-advice-exemption-for-broker-dealers-under-the-investment-advisers-act-of-1940/> for further discussion of this issue). Nonetheless, as long as registered representatives operate under an exemption that only applies when their advice is "solely incidental" to the delivery of non-advice brokerage services in the first place, regardless of the titles they use, the idea that the Department's fiduciary rule could cause consumers to lose access to "advice" from those registered representatives is not logically valid.

Respectfully,  
- Michael Kitces