



September 24, 2015

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

Via email: e-ORI@dol.gov

Subject: RIN 1210-AB32

Ladies and Gentlemen:

Americans for Annuity Protection appreciates the opportunity to comment on the Department of Labor's (the Department) April 14, 2015, proposed rule, RIN 1210-AB32 (the Rule), defining who is a "fiduciary" of an employee benefit plan or individual retirement plan under the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code of 1986. We agree that retirement investment rules should align the incentives of advisors with investors in order to most effectively enhance Americans' retirement security. However, we believe that retirement insurance products, specifically annuities, are harmfully misaligned and need to be further analyzed before sweeping them under the Rule's provisions.

At Americans for Annuity Protection our job is to make sure the annuity consumer is represented in a well-regulated and comprehensive annuity marketplace. That means we are here to ensure a safe and trustworthy sales environment for consumers¹ that provides:

- **Information** that is easy-to-understand and conveniently available;
- **Choice** of competitive, comprehensive and abundant annuity products; and,
- **Affordable Access** to experienced and well-trained professionals that provide annuity guidance and assistance.

We appreciate and empathize that the development of the Rule has been a long and arduous process with thousands of comments, hundreds of meetings and a significant number of hearings. Therefore, as we have submitted written comments throughout the process and met with the Department on a number of occasions, we will keep our final comment short and to the point.

¹ Americans for Annuity Protection is not an industry trade association or membership organization. We do not represent annuity product providers, distributors or agents/advisors. We are knowledgeable annuity specialists who have worked in every aspect of the annuity industry and who want to provide the unheard consumer a voice about the consequences, perhaps unintended, of a regulation that may not be in their best interest to access annuities for an insured retirement.



EXECUTIVE SUMMARY

Executive Orders 12866 and 138563 state that:

The Department must determine whether a regulatory action is ‘significant’ and therefore subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB).

The order defines a “significant regulatory action” in part² as,

- (1) having an annual effect on the economy of \$100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as “economically significant”);*

Specifically, Executive Order 138563 was issued to emphasize the importance of protecting “public health, safety and our environment while promoting economic growth, innovation, competitiveness, and job creation.” Executive Order 13563 points to the need for predictability and for certainty, and for use of the least burdensome tools for achieving regulatory ends.

We are pleased that, as the Department informs us, the OMB has determined that this action is “significant” and therefore requires OMB review. And, we ask that the Rule be returned for reconsideration because the quality of the Department’s analysis is inadequate as it relates to the individual retail annuity marketplace. As a result, its impact on annuity consumers seeking retirement insurance is neither certain nor predictable.

Unfortunately, we have learned with the Affordable Care Act and Dodd-Frank, releasing regulation that is not carefully analyzed before a complete determination is made on the consequences to **all areas of impact**, causes significant harm to American consumers who end up paying more and suffering through service reductions.

Americans for Annuity Protection believes that annuity consumers would benefit by the Department’s further consideration and review.

Americans for Annuity Protection makes this request because The Analysis, the primary document used by the Department to justify the regulation, did not include of the following:

- The **annuity consumer’s** willingness to limit the amount they are able to save in exchange for paid advice;
- The **annuity consumer’s** cost/reward of court and arbitration actions versus the existing annuity complaint system through their state insurance department;
- A demonstration of the **annuity consumer’s** harm received from commission-based insurance advice;

² Only the test impacting the annuity marketplace was included in this list.



- A quantitative (not anecdotal) determination of the Rule's impact on the availability of insurance advisors to **annuity consumer's** as a result of the compliance costs and legal exposure the rule creates;
- The impact of the reduction in the **annuity consumer's** retirement savings resulting from paying for fee-based advice and fee-only services;
- A demonstration of the **annuity consumer's** cost/reward of the commission-based compensation model;

In this comment, Americans for Annuity Protection will address our key areas of concern with the claims made in The Analysis and demonstrate why the Department could further refine the Rule and thereby avoid annuity market disruptions and ensure that Americans are given unfettered and affordable access to annuities.

Americans for Annuity Protection will also, respectfully, make recommendations that will address those concerns in the interest of a Rule that adequately updates ERISA and addresses the harm to consumers caused by conflicted investment advice, while maintaining the benefits that consumers gain from receiving affordable and tailored insurance advice.

Annuities are the only retirement product available today that provide the insurance guarantee that you will NOT outlive your savings and with all fixed annuities and some variable annuities you are guaranteed NOT to lose money in the stock market. This last is an important feature especially for Americans nearing or in retirement.

BACKGROUND

OBAMA Administration Support of Annuities

Americans for Annuity Protection is encouraged by the Administration's commitment to fostering retirement security, in particular by creating The White House Task Force on the Middle Class, chaired by Vice President Joe Biden, in January 2008. The mission of the Task Force, as stated in the Executive Order that created it, "is to work with member agencies and councils to ensure that the economic challenges facing the American middle class - challenges that predate the recession that was deepening as the Task Force was formed - always remain front and center in the work of the Administration."

In the report presented by Vice President Biden in February 2010, the Task Force stated ways to enhance retirement security by, in particular, updating "401(k) Regulations to Improve Transparency and Reliability." Citing that a majority of American workers rely on 401(k)-style plans to finance their retirements, it was critical that the 401(k) system be safe, transparent, and well-regulated. Even workers who save significant amounts may see their returns eaten away by fees and expenses.



The Task Force acknowledged that we need to do more to give families better choices to reach a secure retirement. In the report, the Task Force specifically stated that the FY 2011 Budget will ***promote the availability of annuities and other forms of guaranteed lifetime income, which transform savings into guaranteed future income, reducing the risks that retirees will outlive their savings or that their retirees' living standards will be eroded by investment losses or inflation.***

Annuities do not “reduce” the risk they ELIMINATE the risk.

What Annuities Do

A 2014 LIMRA Secure Retirement Institute study found that half of all pre-retiree and retiree U.S. households with assets of at least \$100,000 are interested in converting assets into guaranteed lifetime income for retirement.

Just as the public demands a wide range of phone models and options, the public demands a wide range of financial products and options. This wide range of financial products and options is a great advantage to the investing and saving public, because it allows a person to find a product that can be customized to his or her individual needs.

Despite much negative media and regulator misunderstanding, annuities are nonetheless becoming increasingly popular with the public. As with cash value life insurance products, annuities are a combination of insurance and accumulation features.

All annuities offer guaranteed income that will last a lifetime. In addition, fixed annuities offer guaranteed preservation of premium and earned interest, coupled with guaranteed growth, with the potential for additional interest during better economic periods. Alternatively, variable annuities offer the opportunity for the consumer to invest directly in the stock market using mutual funds or other investment products. Because variable annuities invest directly in the market, they offer opportunity for market gains as well as the risk of market losses. Even though there is no guaranteed return in variable annuities, there are products available that offer a fixed account with a guaranteed minimum interest rate.

These insurance guarantees mean that only life insurance companies can issue annuities. Life insurance companies are subject to strict regulation by the states. State regulation is designed to assure that life insurance companies will have sufficient assets to make good on their guarantees, even if the general economy or the business fortunes of an individual life insurance company fall. Moreover, fixed annuities are backed by state Guaranty Funds. These funds – pooled from financially healthy carriers - provide the money to compensate owners if a life insurance company defaults.



What Annuities Don't Do

Insurance companies selling fixed annuities do not pay fees to annuity advisors or agents from plan assets.³ The insurance company does not require that an investor or annuity purchaser pay either the advisor/agent or insurance company a fee to issue a policy. Any fee charged to a fixed annuity owner is either for an additional annuity benefit (e.g., guaranteed lifetime withdrawal benefit) or when the annuity owner surrenders the annuity prematurely⁴. Any fees associated with an annuity are transparently and clearly disclosed in the annuity policy and reported regularly to the annuity owner.

MAJOR AREAS OF CONCERN

Analysis Must Include the Annuity Marketplace

The Employee Retirement Income Security Act of 1974 (ERISA) was enacted to address public concern that funds of private pension plans were being mismanaged and abused. Updating the Act through the proposed Rule to address the increasing reliance on defined contribution plans and IRAs is a worthwhile endeavor. Unfortunately, the Department's Fiduciary Investment Advice Regulatory Impact Analysis (The Analysis) makes it clear that the Department's analysis, research and understanding of the IRA marketplace is almost exclusively limited to securities and the IRA investment marketplace. This is understandable considering that less than 1% of today's employer-sponsored plans offer annuities.

Americans for Annuity Protection strongly recommends that the Department not impose this Rule on annuity consumers.

If the Rule is finalized as proposed, it is most likely to cause severe market disruption, consumer confusion and significantly reduce opportunities for savers to consider annuities. Without robust research and fact-based analyses on the impact to the retail annuity marketplace and annuity consumers our claims cannot be disputed or disregarded as "fear mongering." Significant areas of the Analysis where the annuity marketplace or the annuity consumer were ignored are:

CLAIM: Intersections with Other Governing Authorities

RESPONSE: No consideration, other than recognition of insurance agents, was given to state insurance regulation, oversight and enforcement.

³ For the purpose of the Comment Letter, plan assets mean the participants savings in the 401(k) or IRA.

⁴ Surrender charges are the fairest way to protect all annuity owners by only charging those who do not meet their contractual obligations and terminate early.



CLAIM: Well qualified advisers compete vigorously for investors' business, but investors' high information costs prevent this competition from producing efficient results.

RESPONSE: No analysis was completed for insurance distribution despite the fact that NAIC and FINRA both report on consumer complaints/arbitration on a regular basis.

CLAIM: [T]he academic literature documents [show] many investors pay more and earn lower returns than they would in the absence of harmful conflicts in spite of the current regulatory regime.

RESPONSE: The academic literature dealt exclusively with mutual funds.

CLAIM: Affected Universe - The Analysis describes the following affected parties:

1. IRA Investors;
2. RIAs - Over 11,000 RIAs are registered with the SEC. These SEC-registered RIAs managed more than \$62 trillion;
3. Broker-Dealers; and,
4. Mutual Funds and Other Product Providers - There are approximately 9,000 U.S. registered mutual fund companies holding approximately \$15 trillion in assets.

RESPONSE: There is no mention of insurance companies and annuity assets held or insurance agents/advisors and annuities sold.

What the Rule does to the annuity consumer is to provide a prescription without a diagnosis.

Insurance Distribution and Compensation Model

All of the Department's assertions about commissions are based solely on research that studied the impact of payments made directly from the investment or from the overall performance of the investment. There is no analysis of the performance impact of the payment of insurance commissions paid out of the general fund by the insurance company and amortized over the life of the annuity. For fixed annuities, NO commission or fee is paid to the advisor/agent out of the annuity owner's account. While the advisor or agent is still being paid commission, there is no analysis of the cost/reward of the commission paid and the insurance protection or product features provided by the annuity.

A comprehensive analysis of commission-based payments paid from the insurance company's pocketbook and not the consumer's must be completed before any conclusions of costs, conflicts of interest, and impact on IRA investors can be asserted.



The insurance industry, including annuities, has a 150-year history of paying commissions to advisors and agents to provide insurance advice in all forms - property, life, long term care and retirement insurance - and to make insurance recommendations. The conclusion from customer satisfaction studies and complaint reports demonstrates that commission-based insurance advice is serving consumers' interest. As experienced annuity product developers, we know that the commission-based payment model is one of, if not the, most cost-effective for the consumer and, in turn, provides the best value proposition for the annuity consumer.

A study released by LIMRA in 2012 indicates very high satisfaction levels among buyers of fixed annuities. The survey reveals that 8 in 10 customers of fixed annuities are satisfied with their purchase and 7.5 in 10 are satisfied with their variable annuity. According to the Study, the most popular reasons given for purchasing an annuity were:

1. To supplement their Social Security or pension income; and,
2. Accumulation of assets (especially by those under age 60).

Overall, the surveyed individuals most often described their single most important financial objective was to ***have enough money to last their lifetime.***

An earlier LIMRA survey from 2003 (latest available) shows that 82% of immediate annuity buyers believe that it was the best financial decisions ever made (22%) or a good financial decision (60%).

A conclusive 2013 report of annuity satisfaction by the NAIC (available at www.naic.org) shows that the number of closed complaints in the "annuities" category has fallen over 40% since 2010 and numbered just 335. FINRA also tallies "arbitration cases" filed. Arbitration cases are a measure of complaint activity for a variety of securities products, including variable annuities. The FINRA data shows that in 2013 variable annuity arbitration cases numbered 174, which is down 40 percent from 2009. That is about 500 complaints from consumers saving almost \$2.5 trillion in annuity assets.⁵

These satisfaction percentages and the minimal complaints make it difficult to conclude that the existing insurance business model of paying commission from the general funds of the insurance company to the insurance agent or advisor creates an incompatibility between personal interest of the advisor or agent and the public interest of the plan participant or IRA owner – the very definition of a conflict of interest.

Empirical evidence of harm to annuity consumers as a result of commission-based insurance advice must be provided before we can conclude that commissions cause conflicted advice.

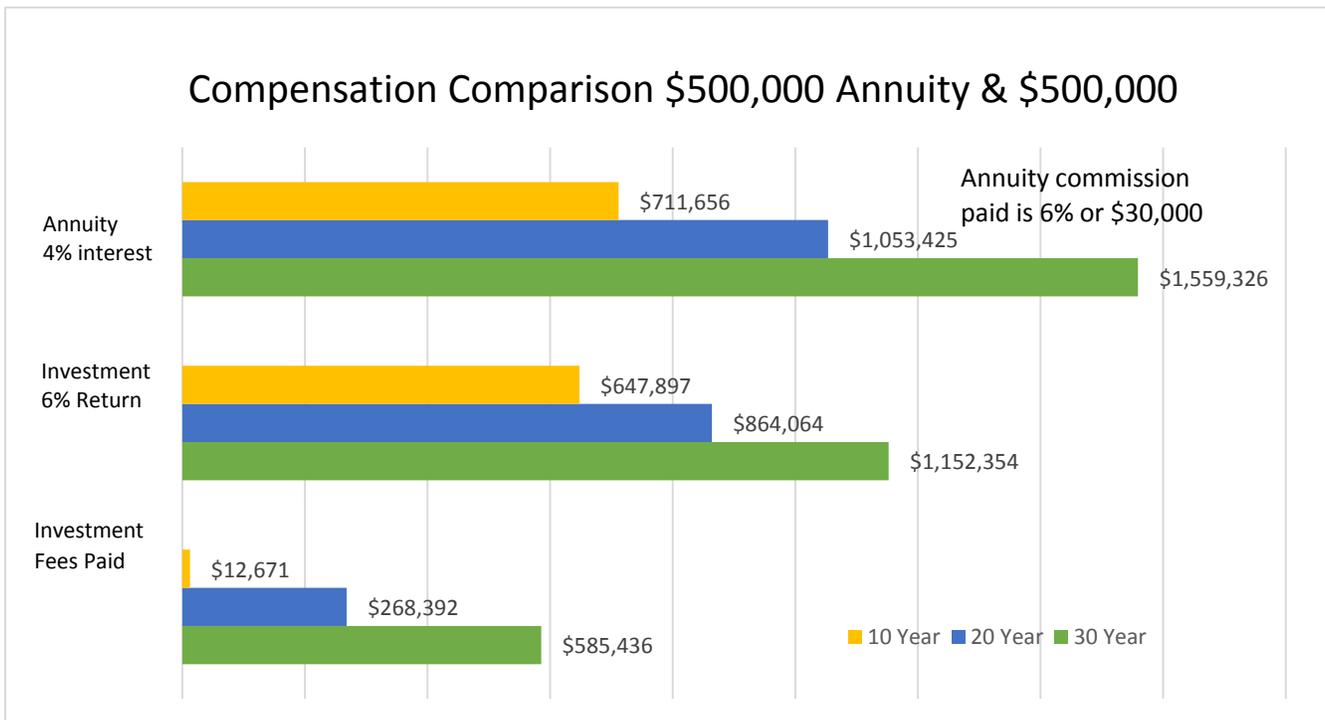
A report out this month from [Personal Capital](#), an online advisory firm, shows how much money investors lose paying fees to financial institutions, and why they would benefit from the Department of

⁵ Source: Morningstar and LIMRA Report on Annuity Net Assets.



Labor’s proposed fiduciary rule. The report shows fees ranging from just over 1% to almost 2% - every year - on investors’ retirement income.

The Chart below shows the comparison of fees charged over 30 years of the life of the investment and commission paid over the life of an annuity held 30 years. We assumed an “average” of a 1.5% fee and a typical 6% commission. We assumed the investment would earn 6% a year and the annuity, 4%.



Certainly, compensation in any form can potentially cause a conflict of interest. Only by providing advice for free can all conflict of interest be avoided.

The actual reduction in the annuity consumer’s retirement savings resulting from paying for advice and the annuity consumer’s willingness to limit the amount they will save to pay for advice must be determined before the Rule is finalized.

The Cost and Stress of Court and Arbitration Actions is Harmful to Consumers

Neither the courts nor arbitration are the easiest or most cost-effective form of resolving consumer complaints for the consumer. Forcing consumers through the stressful and potentially expensive process of a court action or arbitration is not necessarily an effective solution to helping consumers who believe the annuity is not in their best interest. Facing the advisor as the grieved party will be very scary and challenging for many consumers, especially seniors. The fear of confrontation alone may deter



consumers from seeking resolution. And, hiring someone to handle it for you can be costly. Insurance complaints are handled by a qualified staff member of the state insurance department whose job it is to protect consumers. Many departments have fraud divisions as well and, typically, the consumer never needs to interact with the other party.

In addition, there is a study that shows FINRA arbitration is not effective as a means to seek redress for a conflict of interest claim. A study by [PIABA](#), Public Investors Arbitration Bar Association, from the fall of 2014 states that FINRA's "increasingly homogenous arbitrator pool has led to a reduction in the number of cases in which investors prevail," PIABA president Jason Doss said, [and] [t]he "win rate" for claimants has dropped from about 60% in the early 1990s to 42% in 2013."

The PIABA study also claims that FINRA's arbitrator recruiting is flawed and that its arbitrator disclosure process fails to give investors a clear understanding of potential arbitrator conflicts and biases.

A comprehensive analysis of the annuity consumer's cost/reward of court and arbitration actions versus the existing insurance department complaint process must be completed before conclusions can be drawn about the benefit of a new "enforceable conflict of interest" Rule on the backs of annuity consumers.

1. Best Interest Requirement - Definition of Fiduciary

When such advice is provided for a fee or other compensation, direct or indirect, **and paid from plan assets and/or a direct out-of-pocket expense of the participant or IRA owner, thereby reducing the amount of savings to be invested or remain invested**, the person giving the advice is a fiduciary.

2. Impartial Conduct Standards - Disclosure Requirement

Require clear, easy to understand disclosure that states in writing prior to any annuity recommendation the following: I am a licensed annuity agent in the state of XX. I am appointed and paid by Insurance Company XYZ whose product I am recommending. I am regulated by state insurance laws that are enforced by STATE Insurance Department. I am required to educate annuity buyers on the various features of the annuity, such as the potential surrender period and surrender charge, potential tax penalty if the consumer sells, exchanges, surrenders or annuitizes the annuity, mortality and expense fees, investment advisory fees, potential charges for and features of riders, limitations on interest returns, insurance and investment components and market risk. I am also required to make product recommendations based on the suitability of the product to your investment objectives, risk tolerance, financial circumstances and needs, without regard to my financial or other interests or the financial or other interests of any other party. If you have any questions, you may call [STATE INSURANCE DEPARTMENT] or [COMPANY].



CONCLUSION

At these perilous times when Americans need to save more and have easier and affordable access to insurance advice about annuities, a Rule imposing severe restrictions and prescriptive compliance on the advisor to give that advice without the necessary analysis of its impact to ALL of the “affected universe” is at best ill-advised and at worst can have disastrous consequences on Americans who seek the insurance guarantee that they will not outlive their savings. We strongly encourage the department to reconsider the Conflict of Interest Fiduciary Definition and allow advisors that do not take compensation from the plan assets - or the pocket of the investor - to continue their insurance services to retirement savers.

A quantitative (not anecdotal) analysis of the Rule’s impact on the availability of insurance advisors to annuity consumer’s as a result of the compliance costs and legal exposure the rule creates must be completed before any conclusion about the Rule’s benefits to consumers can be assumed.

Respectfully Submitted,

Kim O’Brien, Chief Advocate

Americans for Annuity Protection is a nonprofit 501c4 organization formed in 2015 by insurance and annuity veterans to ensure a diverse and competitive annuity marketplace serving Americans across the economic spectrum. Its offices are located in Phoenix, Arizona; Washington, D.C., and Camp Hill Pa. Visit www.AAPNow.org to learn more.