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Office of Regulations and Interpretations
Employee Benefits Security Administration
Attention: Fiduciary Rule (RIN 1210-AB82)
U.S. Department of Labor
200 Constitution Ave., N.W.
Washington, D.C. 20210

Re: Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions

To whom it may concern:

Fi360, Inc. ("Fi360")[1] respectfully submits the following comments in connection with the Department of Labor's ("DOL" or the "Department") request for information ("RFI") regarding the Conflict of Interest Rule (the "Rule").[2]

Founded in 1999, Fi360 is the nation's leading provider of training, education and certification programs to investment fiduciaries that advise or manage assets on behalf of pension, endowment, and other institutional or retail clients.

Fi360 supports the Rule adopted by the Department in April 2016, for four primary reasons. First and most importantly, the Rule corrects flaws in the existing ERISA definition of fiduciary that, contrary to legislative intent and the interests of millions of people saving for retirement, allows most financial services representatives to render personalized investment advice without fiduciary accountability. Second, financial services firms have devoted considerable time and resources to prepare for successful implementation of the Rule and have already stated and demonstrated their ability to conform to provisions of the Rule. Third, the Rule is precipitating change in the marketplace through product innovations that drive down costs and make compensation structures more objective and transparent. Fourth and finally, the Rule is welcomed by many financial service professionals who

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[1] Fi360's mission is to help investment fiduciaries gather, grow and protect assets through better investment and business decision-making. Fi360 manages the Accredited Investment Fiduciary® (AIF®), Accredited Investment Fiduciary Analyst® (AIFA®) and Professional Plan Consultant™ (PPC™) designation programs. At present, there are more than 10,000 active AIF and AIFA designees. For more information, please visit http://www.fi360.com/.

[2] See "Definition of the Term 'Fiduciary'; Conflict of Interest Rule – Retirement Investment Advice," 29 C.F.R. 2509, 2510 and 2550, Apr. 8, 2016.

recognize that the public perception of capitalism generally, and financial advisers specifically, is damaged by persistent, systemic conflicts of interest among those who are relied upon for competent and trustworthy advice.

As with any significant, complex rulemaking, we believe there are areas where the Rule can be improved to ameliorate some of the compliance costs without reducing investor protection. We elaborate further on those and other issues in response to questions 3, 5-6, 9-11, and 18 of the RFI.

3. Do the Rule and PTEs appropriately balance the interests of consumers in receiving broad-based investment advice while protecting them from conflicts of interest? Do they effectively allow Advisers to provide a wide range of products that can meet each investor's particular needs?

The greatly expanded definition of a fiduciary under the Rule strikes a reasonable balance in protecting retirement investors from conflicted investment advice while permitting new entrants to ERISA's fiduciary requirements to continue operating under commission-based compensation models within the confines of fundamental fiduciary principles. We believe that the new and existing prohibited transaction exemptions (PTEs) will effectively mitigate the conflicts by requiring financial intermediaries to not only disclose material conflicts but more importantly, discourage certain market abuses such as excessive compensation or churning.

In addition, the failure of various administrative challenges to the Rule have reinforced our view that the Rule and PTEs indeed balance interests of consumers and advice-givers by dismissing all motions for preliminary injunctions and flatly rejecting claims of irreparable harm if the Rule were to go into effect on January 1, 2018.[3]

With respect to the second part of question 3, Fi360 believes that a wide range of products are available under the Rule to effectively meet the needs of individual retirement investors, limited only by the IRS's longstanding list of prohibited investments in IRAs[4] and the fiduciary duty imposed on sec. 3(21) advisers under ERISA. The most pertinent question is not whether a wide range of products is and will be available to help investors meet their retirement goals, but whether the pre-Rule environment encouraged recommendations to buy higher-cost, less-liquid, and more volatile investments. Put another way, Fi360 believes that compliance with ERISA's prudent expert standard

[3] *See, e.g. a*dministrative challenges filed against the DOL Fiduciary Rule, *National Association for Fixed Annuities v. Perez,* 11/23/16, stating the "injury must be unrecoverable; it must be 'both certain and great; [and] it must be actual and not theoretical,'" at 6, available at https://assets.documentcloud.org/documents/3224894/NAFA-20161123.pdf; *Market Synergy Group v. U.S. Dep't. of Labor,* 11/28/16, 3, stating the lower court "found that plaintiff could not establish irreparable harm, that the balance of equities tips in its favor, or that an injunction is in the public interest," at 3, available at https://www.gpo.gov/fdsys/pkg/USCOURTS-ksd-5_16-cv-04083/pdf/USCOURTS-ksd-5_16-cv-04083-1.pdf; and *U.S. Chamber of Commerce, et al, v. Hugler,* 2/8/17, at 30, stating the "DOL has not required Plaintiffs or its members to take a particular action; instead, the DOL has established conditions for qualifying for BICE," available at http://courthousenews.com/wp-content/uploads/2017/02/Adviser-Rule.pdf.

[4] We are referring, of course, to the longstanding ban under the Tax Code on investments in IRAs such as collectibles like works of art, valuable wines, precious gems, antiques and certain coins.

(and enforcement of the impartial conduct standards provisions of the Rule) will help spur investor-centric innovation and product developments that reduce or eliminate imprudent (unnecessarily risky and/or costly) transactions. The development of "clean shares" for mutual funds is an important example of such innovation that we have already witnessed.

Unlike the SEC's much broader mission[5] of balancing capital formation with orderly markets and investor protection, Employee Benefits Security Administration (EBSA) is focused more narrowly on the protection of plan assets and retirement investors.[6] In granting relief from a prohibited transaction EBSA must (among other things) ensure that the exemptions works in the interests of the plan and account holders, and is protective of their rights.

Finally, we would point to a 2012 study of securities brokers and their associated fiduciary duty under state common law as confirmation that a fiduciary standard does not necessarily disrupt distribution channels or product access. In a survey of brokers doing business in what the authors categorized as fiduciary and non-fiduciary states, the authors reported that "[w]e find no statistical difference between the two groups in…[their] ability to provide a broad range of products including those that provide commission compensation, the ability to provide tailored advice, and the cost of compliance."[7]

5. **What is the likely impact on Advisers' and firms' compliance incentives if the Department eliminated or substantially altered the contract requirement for IRAs? What should be changed? Does compliance with the Impartial Conduct Standards need to be otherwise incentivized in the absence of the contract requirement and, if so, how?**

Fi360 believes that if the contract requirement under the Best Interest Contract Exemption (BICE) is eliminated, a reliable replacement would be necessary to protect people saving for retirement using these accounts. The IRS does not actively review these accounts and take enforcement action against prohibited transactions under the Tax Code (the "Code"). Conversely, the DOL has no enforcement authority under the Code other than granting exemptions. This regulatory gap in supervision, without BICE or some other credible enforcement mechanism, would be a halfway solution to the problem of reducing harm from conflicted advice. It would impose a fiduciary duty but fail to provide a reliable means of enforcing the obligation. [8]

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[5] "The Role of the SEC," available at https://investor.gov/introduction-investing/basics/role-sec.

[6] The mission of the EBSA is to "assure the security of the retirement, health and other workplace related benefits of America's workers and their families." *See* "Our Mission," EBSA. Available at https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/mission-statement.

[7] Michael Finke and Thomas Langdon, "The Impact of the Broker-Dealer Fiduciary Standard on Financial Advice," (March 9, 2012). Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2019090.

[8] In addition, the absence of a fiduciary standard for securities brokers and insurance producers would result in lower fines for abuses uncovered by FINRA or state insurance regulators that generally focus on suitability violations. The laws governing these regulators do not mandate full recovery of investor losses, unlike ERISA.

The result of uneven enforcement also would create a perverse incentive for non-compliant firms to encourage rollovers from ERISA plans to IRAs, thus exacerbating the problem with biased rollover advice identified in a 2013 GAO report.[9] The GAO report prompted the SEC and FINRA to make rollover advice an examination priority.[10]

At the individual investor level, arbitration may serve to mitigate aberrant behavior on an isolated basis, but the arbitration system must be refined to address not only isolated fiduciary breaches, but systemic patterns of abuse as well. With respect to the former, additional fiduciary training of FINRA arbitrators would help, and also greater disclosure of the basis for arbitrator awards, so that industry players can better understand the boundaries for appropriate conduct.

Systemic abuse is a major threat to the financial well-being of retirees and poses a larger threat to society because if a large segment of the population is not financially secure in retirement, a significant strain would be placed on social services of federal, state and local governments. As noted by one legal scholar, there are clear distinctions between fiduciaries providing professional services, such as in financial services, law and medicine, that require a high level of expertise and an investment of time in order to acquire this expertise.[11] Therefore,

> It is in the interest of society to induce people to rely on experts rather than duplicate their efforts or avoid the services. While some situations of "information asymmetry" can be resolved by requiring disclosure of the information, in the case of most fiduciary services, the cost of understanding the information is too high and the education of the entrustors [clients] is wasteful to society.[12]

If the public is denied access to class-action protection, then regulators or Congress must be ready and willing to address cases of systemic abuse in other ways such as an active enforcement program and through closer coordination between various regulators, specifically the SEC, FINRA, EBSA, Treasury, and state securities and insurance administrators.

The Department's Request for Information also requests comment on relying on the Impartial Conduct Standards in lieu of a contract requirement through incentives of some form. It's not clear how incentivizing compliance would work in practice. The current emphasis on assisting firms to

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[9] *See* "401(k) Plans: Labor and IRS Could Improve the Rollover Process for Participants," GAO (Apr. 3, 2013). Available at http://www.gao.gov/products/GAO-13-30.

[10] *See, e.g.*, "Retirement-Targeted Industry Reviews and Examinations Initiative," SEC (June 22, 2015), at 2. Available at https://www.sec.gov/about/offices/ocie/retirement-targeted-industry-reviews-and-examinations-initiative.pdf; *see* also "Rollovers to Individual Retirement Accounts," FINRA Regulatory Notice 13-45, December 2013. Available at http://www.finra.org/sites/default/files/NoticeDocument/p418695.pdf.

[11] Tamar Frankel, "Fiduciary Duties of Brokers-Advisers-Financial Planners and Money Managers," Boston University School of Law (February 17, 2010), at 3. Available at http://www.bu.edu/law/workingpapers-archive/documents/frankelt101009revsep2010.pdf

[12] *Id.*

comply during the transition period,[13] rather than citing violations or imposing penalties, is certainly a form of incentive and no doubt helpful for firms still preparing for full compliance with the Rule after January 1, 2018. But to incentivize good-faith efforts to comply beyond the transition period or a date certain shortly thereafter would only have the deleterious effect of prolonging a waiver of fiduciary duties, which is not permitted by contract under ERISA,[14] and should not be permitted *de facto* by an agency overseeing fiduciary conduct.

In Fi360's extensive history of helping firms implement or enhance prudent practices for advisers, those firms that embed fiduciary-focused policies and procedures in their organization operate more efficiently, effectively, and profitably with lower compliance risk than firms that do not have formal protocols. The requirement to implement Impartial Conduct Standards can be expected to directly benefit firms as well as their clients, but the process requires firms to invest time and resources in the short term. Many firms have already invested – either due to the Rule or sound business decision-making – to achieve fiduciary excellence and serve clients better. New incentives for firms that are only now seeking to make the transition would be tantamount to penalizing the proactive.

6. **What is the likely impact on Advisers' and firms' compliance incentives if the Department eliminated or substantially altered the warranty requirements? What should be changed? Does compliance with the Impartial Conduct Standards need to be otherwise incentivized in the absence of the warranty requirement and, if so, how?**

The warranty requirements in BICE in effect require a firm to confirm to customers that "The buck stops here," and by clarifying that the firm has ultimate supervisory responsibility over the product transactions of its agents and employees. In lieu of a warranty, the Department may want to consider an alternative compliance solution. In 2004 the SEC adopted a rule that delegates ultimate responsibility for compliance with securities laws by investment companies and advisers to a Chief Compliance Officer ("CCO").[15] Similar to the Rule's warranty requirements, the "buck" essentially stops with the investment firm's CCO regarding all compliance requirements under securities laws. While a CCO-type rule obviously would not afford as much protection to retirement investors under the current BICE, a CCO rule nonetheless may create a powerful incentive for 3(21) fiduciaries to ensure that they are fully compliant.

9. **Clean shares, T-shares, and fee-based annuities are all examples of market innovations that may mitigate or even eliminate some kinds of potential advisory conflicts otherwise associated with recommendations of affected financial products. These innovations might also increase transparency of advisory and other fees to retirement investors. Are there other innovations that hold similar potential to mitigate conflicts and increase transparency for consumers? Do**

[13] *See* Field Assistance Bulletin 2017-02 (May 22, 2017), available at https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2017-02.

[14] 29 U.S. Code § 1110 - Exculpatory provisions; insurance.

[15] "Compliance Programs of Investment Companies and Investment Advisers," SEC, Release Nos. IA-2204; IC-26299 (February 5, 2004). Available at https://www.sec.gov/rules/final/ia-2204.htm.

these or other innovations create an opportunity for a more streamlined exemption? To what extent would the innovations address the same conflicts of interest as the Department's original rulemaking?

Based on our extensive work with a wide variety of brokerage and investment adviser firms, we can confirm that the new clean shares, fee-based annuities, and other level-fee arrangements are helping firms adapt to the Rule. Innovations such as these may obviate the need for new exemptions and allow more firms to use streamlined exemptions. These innovations may even enable some firms to avoid prohibited transactions altogether. Technology is also making a significant difference by programming fiduciary principles and procedures to prepare investment policy statements, optimize asset allocation, perform investment due diligence, monitor portfolios, and provide compliance oversight capabilities, among other things. Technology platforms built using fiduciary processes support, encourage, and can even be used to requires fiduciary conduct by users. These important applications are in addition to the well-recognized advantages of using technology to make advisory services more reliable, accessible, and affordable.

We do not believe the Department should rely solely on disclosure in proposing any new streamlined exemptions. While disclosure is always necessary when material conflicts of interest exist, disclosure alone is rarely sufficient to manage conflicts. Measures must be taken to assure that the fiduciary duties of loyalty and care are not violated.

The Investment Advisers Act of 1940 ("Advisers Act"), entails fiduciary obligations for investment advisers, but they are primarily oriented towards anti-fraud requirements and do not rely upon outright prohibitions on specific behaviors.[16] The underlying fiduciary standard of the Advisers Act is far less proscriptive than ERISA. For example, excessive fees are prohibited under ERISA; in contrast, under the Advisers Act SEC staff has taken the position that fees in excess of 3 percent are prohibited unless certain disclosures are made to make the client aware that such fees are substantially above the industry average and that investors may obtain similar services at lower fees.[17]

And while Form ADV remains a core disclosure document for investment advisers, it is not clear how effective it is in terms of informing clients of material conflicts. Conflicts are often disclosed in general terms and the SEC reminds advisers that delivery of Form ADV to clients may be insufficient. The instructions for completing Form ADV note that advisers must

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[16] Hristiyaniya Atanasova, "The Scope of Investment Advisers' Fiduciary Duties When They Merge," Boston University School of Law (2008), at 510. Available at http://www.bu.edu/rbfl/files/2013/09/Issue2Atanasova.pdf. *See* also Barry P. Barbash and Jai Massari, "The Investment Advisers Act of 1940: Regulation By Accretion," *Rutgers Law Journal* (2008), at 627, stating "the Advisers Act sets out few specific prohibitions on conduct, relying instead on broad proscriptions to curtail fraudulent conduct by investment advisers." Available at https://www.davispolk.com/files/files/Publication/3c8bafb5-6284-4fce-8f7d-571562536a9f/Preview/PublicationAttachment/7fba66d7-741b-48ce-9ba9-5bd7873bde64/jmassari.rutgers.law.journal.article.may13.pdf.

[17] *See* Charles Meyer, SEC No-Action Letter (Sept. 4, 1975).

> At a minimum, make full disclosure of all material conflicts of interest between you and your clients that could affect the advisory relationship…. To satisfy this obligation, you therefore may have to disclose to clients information not specifically required by Part 2 of Form ADV, or in more detail than the brochure items might otherwise require.[18]

Anecdotally over the years we have noticed investment advisers invariably comment about the lack of interest or questions that arise from prospective clients after providing them with Form ADV. In one typical example, an investment adviser commenting to the SEC recently on its request for comments on a uniform fiduciary standard, said

> About 99 percent of investors never read the 'fine print'. In thirty-five years of practice for hundreds of clients, I have probably seen five clients who want to read the fine print on a document or required disclosures on products or performance presentations, privacy notices, or what we write in our blog or market comment… you name it. The verbiage is daunting, and apparently useless from the client's perspective.[19]

In light of all of the above, it's not clear that any new, streamlined exemptions are needed, in particular exemptions that rely principally on disclosure as a means of managing conflicts of interest. As the Department noted in the preamble to BICE, "The most common scenario in which Level Fee Fiduciaries need an exemption is when they make a recommendation to roll over assets from an ERISA plan to an IRA." We agree and recommend that the Department wait until after the full rule is in effect before considering any new streamlined exemptions.

10. Could the Department base a streamlined exemption on a model set of policies and procedures, including policies and procedures suggested by firms to the Department? Are there ways to structure such a streamlined exemption that would encourage firms to provide input regarding the design of such a model set of policies and procedures? How likely would individual firms be to submit model policies and procedures suggestions to the Department? How could the Department ensure compliance with approved model policies and procedures?

We believe the Department's mission to protect retirement investors is best-served by relying most heavily upon principle-based requirements and providing Frequently Asked Questions ("FAQs") and other guidance to supplement the rulemaking. Exemptions, streamlined or not, should be limited in number and reserved for circumstances that clearly preserve or enhance investor protection through straight-forward and easily understood requirements. We are concerned that model policies and procedures may quickly proliferate and be outdated by new product innovations or other changes

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[18] "General Instructions for Part 2 of Form ADV," SEC, at 1-2. Available at https://www.sec.gov/about/forms/formadv-part2.pdf.

[19] Comment letter by Michelle Rand, CFA®, Cascade Investment Advisor Group, to SEC (July 12, 2017), at 1. Available at https://www.sec.gov/comments/ia-bd-conduct-standards/cll4-1851185-155301.pdf.

to business models of advisory firms. As such, model policies and procedures can stifle innovation in favor of a "safe", even if outdated, means of achieving compliance.

Since its founding in 1999, Fi360 has been training investment fiduciaries and providing best practices to fulfill their fiduciary duties and comply with the law. The best practices have been substantiated by statute, regulation and case law, principally under ERISA and trust law as articulated in a series of model state laws promulgated by the National Conference of Commissioners on Uniform State Law.[20]

For example, Fi360's *Prudent Practices for Investment Advisors*[21] contains 21 Practices ranging from the first Practice, according to which the adviser needs to demonstrate an awareness of fiduciary duties and responsibilities under an initial organizing step; to the final Practice, which reminds advisers to establish a process to periodically review the firm's effectiveness in meeting its fiduciary responsibilities.[22] The 19 other Practices cover various activities of a fiduciary including identifying and documenting the roles and responsibilities of fiduciaries and non-fiduciaries, identifying and addressing conflicts of interest consistent with the duty of loyalty, developing an Investment Policy Statement, and following a reasonable due diligence process in implementing the portfolio strategy, including selection of other service providers and investments.

Because each client of a fiduciary typically has unique goals and objectives, the *Prudent Practices* handbooks do not prescribe "one size fits all" policies and procedures, but instead provides a discussion of the purpose and substance of each Practice and criteria that describe actions or circumstances that would provide evidence of conformity to the legally substantiated Practice. Fi360's handbooks, like the fiduciary principles underlying ERISA and the Advisers Act, are intended to be adaptable to different business models and client portfolios, and have received wide circulation and adoption by hundreds of advisory firms around the country.

Certain requirements already embedded in the Rule provide model procedures that should be applied in certain high-impact types of client engagements. The Level-Fee Exemption stands out as an excellent example. It provides a built-in due diligence process: in addition to acknowledging fiduciary status, the Exemption requires an adviser providing rollover advice to follow certain steps including consideration of alternatives to a rollover (such as leaving money in the participant's current plan); taking into account the fees and expenses associated with both the plan and IRA; whether the employer pays for some or all of the plan's administrative expenses; and the different levels of services and investments available under each option.[23] These requirements can be fleshed out by

[20] *See, e.g. Prudent Investor Act* (1994), *Prudent Management of Institutional Funds Act* (2006), and *Management of Public Employee Retirement Systems Act* (1997), Uniform Law Commission. Available at http://uniformlaws.org/Acts.aspx.

[21] The *Prudent Practices* was first published in 2006 and has been periodically updated and includes a technical review by leading law firms and the AICPA's Personal Financial Planning Executive Committee. Available at http://www.fi360.com/uploads/media/handbook_advisors.pdf.

[22] *Id. at* 4, Practices A-1.1 and A-4.5.

[23] *See* BIC Exemption, Sec. II(h).

firms seeking to create policies and procedures, perhaps in the form of checklists, for advisory personnel to follow in complying with the Level-Fee Exemption.

After publishing the Rule in April 2016, the Department followed up with several FAQs that were well-received, and indeed eagerly sought, by trade groups and other interested parties. Although the due diligence process for the Level-Fee Exemption may seem straightforward, in its October 2016 FAQ the Department provided additional clarification on the extent to which the adviser can rely on the Exemption if he or she is unable to collect the necessary data from the client or plan.[24] In its response, the Department explained how an adviser could satisfy this data collection requirement. In our opinion, this is the ideal form of guidance that complements the original exemption that appropriately safeguards investor interests and allows a firm the flexibility to adapt its own policies and procedures to the requirements of the exemption without the need for frequent revisions by the Department.

11. If the Securities and Exchange Commission or other regulators were to adopt updated standards of conduct applicable to the provision of investment advice to retail investors, could a streamlined exemption or other change be developed for advisers that comply with or are subject to those standards? To what extent does the existing regulatory regime for IRAs by the Securities and Exchange Commission, self-regulatory bodies (SROs) or other regulators provide consumer protections that could be incorporated into the Department's exemptions or that could serve as a basis for additional relief from the prohibited transaction rules?

As noted earlier, the fiduciary standards under ERISA and the Adviser Act differ considerably in the approach to managing conflicts. Under either law, the ideal solution is to avoid conflicts. Various firms have reviewed this issue of broadly harmonizing regulatory requirements across both laws in order to generate as much efficiency as possible. While there are areas that may suggest cooperative efforts would benefit industry, regulators are inevitably required to interpret their respective statutes as they believe Congress intended after completing the legislative process.

Prior to the most recent delay in the applicability date of the Rule, we heard in various quarters that many firms were likely to comply with the highest standard, which by default is ERISA, and not the securities laws. To the extent that other regulatory agencies, including SROs, can coordinate their requirements to meet ERISA's fiduciary standard, we wholeheartedly support those efforts. But it will not be easy. Form ADV, which serves as the core disclosure document for registered investment advisers, obligates advisers to ensure that the client is provided with sufficient information to make an informed decision. This may at times require the adviser to include additional information beyond the basic disclosures contained in the ADV. Thus, even within the confines of circumstances covered by disclosure obligations of the Advisers Act, the broad range of facts and circumstances that can come into play prevents regulators from setting requirements that will fulfil all of the possible scenarios.

[24] "Conflict of Interest Exemption FAQs (Part I – Exemptions)," DOL (Oct. 27, 2016), at 14. Available at https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/coi-rules-and-exemptions-part-1.pdf.

Merging regulations covering both retirement and non-retirement accounts makes the endeavor much more complex.

There are situations when reciprocity is likely to work. For example, under the Rule's principal transactions exemption, the Department states that advisers seeking best execution under that exemption can satisfy that requirement if they comply with FINRA rules 2121 and 5310 and their firm is a member firm of FINRA. This seems like a reasonable opportunity for the regulatory regimes to successfully converge.

Similarly, the prudent expert requirement under ERISA requires an adviser to consider several different suitability factors such as investment objectives, financial circumstances (or situation), risk tolerance and needs of the investor. These suitability considerations mirror FINRA's and state insurance regulators' suitability rules.

Looking forward, one other possible area of regulatory harmonization is to limit the use of fiduciary-like titles, such as "adviser," to fiduciaries only. A 2008 report[25] commissioned by the SEC and many other studies confirm the widespread confusion among investors about who is legally required to act in their best interest.

The origin to this problem can be traced back to at least the 1990s when securities brokers began to adopt advisory titles. However, as early as 1940, when Congress enacted the Advisers Act, there was concern about the use of adviser-like titles by brokers. After concerns were expressed by advisers during hearings, the final bill signed into law contained a prohibition on use of the title "investment counselor" except for those persons or firms whose principal business was acting as an investment adviser, and a substantial part of its business involved rendering investment supervisory services.[26]

We also note that legislation passed in early June by the House of Representatives would require the SEC to explore ways to simplify the titles used by brokers, dealers and investment advisers as an alternative to the Rule.[27] While Fi360 does not support repeal of the Rule, and would not want to imply that title simplification alone is a complete solution, we believe this particular issue can and should be addressed by the Department in cooperation with other regulators.

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[25] A RAND report noted that during focus group interviews of investors, that even after being presented with fact sheets describing common job titles, legal duties and typical compensation, "participants were confused by the different titles." The report also noted that "Some did not understand such terms as fiduciary and whether fiduciary was a higher standard than suitability." *See* Angela Hung et al, "Investor and Industry Perspectives on Investment Advisers and Broker-Dealers," RAND Institute for Civil Justice (2008), at 111. Available at http://www.rand.org/pubs/technical_reports/TR556.html

[26] 15 U.S. Code § 80b–8(c).

[27] *See* H.R. 10, the Financial Choice Act of 2017, sec. 841(c)(3)(B)(i).

18. Communications with Independent Fiduciaries With Financial Expertise. To the extent changes would be helpful, what are the changes and what are the issues best addressed by changes to the Rule or by providing additional relief through a prohibited transaction exemption?

Fi360 generally supports the existing carve-out in the Rule's definition of a fiduciary for sophisticated counterparties acting in what are essentially arms-length transactions and who meet certain conditions. As we noted earlier in our comments about the impact of fiduciaries on society, in some situations "information asymmetry" in a professional relationship can be resolved through disclosure,[28] but in most cases the reason society demands fiduciary services is because the cost of understanding information by the end-user is too high, and at the end of the day, wasteful.

The circumstances and assumptions associated with counter-party transactions and fiduciary advice are vastly different, as illustrated in the table below.

Attributes	Counterparty Transactions	Professional Advice
Relationship Involved	Arms-length; parties are unrelated with no special obligation to one another	Property or power is entrusted to to the care of the professional; Trustee/trustor relationship
Handling of Conflicts	Conflicts are acknowledged; each party serves their own self-interest	Conflicts must be avoided or managed and mitigated in the interest of the client
Knowledge Gap Involved	Narrow knowledge gap; material information is readily accessible	Wide knowledge/skill gap between the client and professional and is not easily bridged
Required Standard of Care	Fair-dealing; do not deceive	Fiduciary; serve clients' best interests
Regulatory Regime	Rules-based; delineates the "you may and may not" boundaries (rules) of fair dealing	Principles-based; captures the duties associated with professional conduct

As a consequence, the Department should proceed carefully in its review of broadening the exclusion of counterparty transactions from fiduciary accountability. Fi360 does not believe the Department should consider financial wealth as a benchmark for financial sophistication. For example, the SEC is required by law to periodically revisit the definition of a sophisticated investor for purposes of determining which investors have the financial capacity and knowledge to take on speculative investment risk. For decades, the SEC has relied on a measure of sophistication based solely on net worth and income restrictions, although it is not clear that these requirements are closely correlated with financial sophistication. We would strongly recommend against using financial net worth as a satisfactory proxy for arms-length transactions in the absence of other evidence.

To the extent that certain counterparties hold current financial accreditations, or relevant academic degrees, then we would recommend that the Department explore these options. But at the

[28] *Supra* note 12.

same time, the Department should refrain from aggressively expanding carve-outs from the definition of a fiduciary that would expose vulnerable investors to fraud and other abusive conduct.

Summary

For the above reasons, and others cited by other interested parties in support of the Rule, we urge the Department not to precipitously dismantle the progress made in previous rulemaking to apply a robust fiduciary standard to firms and advisers with whom millions of Americans have entrusted their retirement assets. The Rule as written greatly assists workers in reaching financial independence at retirement, enhances the integrity of the profession of financial advice, and makes meaningful progress towards addressing the systemic problem of conflicts of interest in financial services. While the compliance costs are considerable, they are greatly exceeded by the benefits to investors and society at large.

We are very happy to answer any additional questions.

Very truly yours,

Blaine F. Aikin, AIFA®, CFA, CFP®
Executive Chairman, Fi360

J. Richard Lynch

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