

From: Matthew Bahrenburg
Sent: Thursday, March 23, 2017 11:13 AM
To: FiduciaryRuleExamination - EBSA
Subject: FW: RIN 1210-AB79 -- Letter regarding Labor Department Investigation of the Investment Advice Fiduciary Rule

TO: US Department of Labor

I am writing on behalf of cfd Investments, Inc. and Creative Financial Designs, Inc., and on behalf of the clients that we serve, in order to provide support and assistance to the Department of Labor with respect to its investigation of the Investment Advice Fiduciary Rule and the effects of that rule on the industry and on retirement investors.

By way of background, cfd Investments, Inc. is a registered broker/dealer with approximately 190 producing financial advisers whose primary business is serving middle-America. We are an independent broker/dealer which is not owned or controlled by a major insurance company or banking organization, and also does not have the proprietary products that come with that business model, although we do have access to a large number of investment and retirement income products available to the independent broker/dealer marketplace.

Creative Financial Designs, Inc., an affiliate of cfd Investments, Inc., is an SEC registered Investment Adviser that offers money management services and planning services to our clients. Through these two affiliated companies, our financial advisers are able to offer a wide array of products and services, and they have the flexibility to provide the products and services that are in the best interests of our clients. This has always been the goal of cfd Investments, Inc. and Creative Financial Designs, Inc. (hereinafter collectively referred to as "CFD").

CFD always puts the best interests of the client at the forefront, and we will always continue to do so. We support the imposition of a uniform standard designed toward achieving the best interests of clients. We do not, however, believe that the current Investment Advice Fiduciary Rule is the best rule, in the best form, to achieve that objective.

Current SEC Chairman Michael Piwowar recently expressed his view of the Rule, by stating "I have a very nuanced view of the DOL fiduciary duty rule: I think it is a terrible, horrible, no-good, very bad rule. For me that rule was never ever about investor protection. To me, that rule, it was about one thing and it was about enabling trial lawyers to increase profits." We find ourselves substantively agreeing with the SEC Chairman with respect to his analysis of the Investment Advice Fiduciary Rule.

Indeed, CFD is in favor of having a uniform standard where the best interests of the client are at the forefront, and we believe that the SEC is in the position to create such a uniform standard. One huge deficiency of the current iteration of the Investment Advice Fiduciary rule is that it creates a fragmented standard, and not a uniform standard. The SEC, and only the SEC, could create a uniform standard.

The purpose of this letter is to support the Department of Labor in its investigation that has been requested by President Trump. Particularly, the Presidential Memorandum requested the Department of Labor to evaluate three points relating to the Rule as written. These points are:

- Whether the anticipated applicability of the final rule has harmed or is likely to harm investors due to a reduction of Americans' access to certain retirement savings

- offerings, retirement product structures, retirement savings information, or related financial advice;
- Whether the anticipated applicability of the final rule has resulted in dislocations or disruptions within the retirement services industry that may adversely affect investors or retirees; and
 - Whether the final rule is likely to cause an increase in litigation, and an increase in the pieces that investors and retirees must pay to gain access to retirement services.

We are confident that at the end of the day, the Department will likely conclude that the rule, as currently written, would produce an affirmative answer to each question posed by the Memorandum.

We will address each of these issues, in turn.

I. **The Investment Advice Fiduciary Rule, as currently written, would harm investors due to a reduction of Americans' access to certain retirement savings offerings, retirement product structures, retirement savings information, or related financial advice.**

A. **The Investment Advice Fiduciary Rule, as currently written, would harm investors due to a reduction of Americans' access to certain retirement savings offerings or retirement product structures.** The use of the BIC Exemption allowing financial advisers to offer commission based products (such as mutual funds, variable annuities, stocks, bonds, and other general securities) in the best interests of the customer, puts firms in a position of deciding whether they are going to enter into the BIC and take on the additional liabilities that result therefrom, or to decide to not offer these commissioned based options at all. Indeed, several prominent financial services firms have decided and publicly announced that they will not enter into the BIC, and instead that they will preclude investors from using any commission based options for retirement income purposes. Investors that have been using commission-based products through such firms that have made such a choice are in a position where they will be forced to choose between working with their existing trusted financial adviser, or finding another financial adviser that can offer them the same variety of commission based products.

Let's be very clear, for some investors, commission based products are the best option for the client. Most companies have limits on managed account options based on account size, and typically investors just starting out don't have sufficient assets to justify establishing a managed account. In such an instance, the client needs to choose between a commission-based product, paying an investment advisor directly for advice given on a fee basis (which would typically be a very expensive option), or going it on their own and not having a financial adviser. The Investment Advice Fiduciary Rule will result in fewer and fewer firms offering the commission-based option, and this will effectively limit the choices available to certain retirement investors. When the commission-based option is in the investor's best interest, removing that option will cause harm to the retirement investor.

Additionally, one of the key principles that is firmly established in the financial services industry are the benefits associated with a well-diversified portfolio which exposes the investor to a wide array of market segments. Of course, all investments carry with them some risks, but a well-diversified portfolio reduces the over-all risk, as the investor in a

well-constructed portfolio will have smaller percentages of assets held subject to the same type of risk, thereby reducing the over-all risk of the portfolio. This generally means that an investor should have available investment options that provide the investor with risks and rewards that are unique from other areas of the market.

Specifically, the Investment Advice Fiduciary Rule precludes some investments from being options for retirement accounts. These include non-traded REITs and other alternative investments. Though these investments should rarely be a prominent part of a well-diversified portfolio, they often provide an added exposure to real estate or other market segments, and create real value to a properly constructed portfolio. For these investments to be excluded in whole does reduce the diversification in the available portfolios, and this does harm retirement investors.

- B. The Investment Advice Fiduciary Rule, as currently written, would harm investors due to a reduction of Americans' access to retirement savings information.** Based on the Rule, it will be more difficult for a financial professional to provide education services to retirement plan investors due to the narrow definition of "investment education" contained within the Rule and in particular, providing such education to IRA investors. Otherwise, financial advisors will be forced to embrace all of the rigors of becoming an investment advice fiduciary under the Rule. Changes in this Rule will force financial professionals who have been previously serving in a non-fiduciary status with respect to qualified retirement plan business and acting in a strictly educational role, to make a decision about whether to get out of that line of business or to become a fiduciary, subjecting themselves to the additional administrative challenges and potential liability. Additionally, many employers that are offering retirement plans and who routinely provide educational efforts to their employees, will find it more difficult to provide this information to their employees without the assistance of an outside independent educator.
- C. The Investment Advice Fiduciary Rule, as currently written, would harm investors due to a reduction of Americans' access to retirement related financial advice.** An individual's retirement is very important, and can involve a significant amount of time. There are a lot of factors that go into building a successful retirement plan, and this is often very complex. Additionally, each retiree only gets one shot at this. For these reasons, it is important that retirees and pre-retirees have full access to investment advice, so that they can navigate through the complexities that are inherent in the process.

Retirees and pre-retirees can often make errors in navigating through the complexities of the retirement investing maze. This is why a professional is often necessary to assist retirees and pre-retirees with this process. Of course, where there is a professional, there needs to be a way of paying for the services that are being provided. This is no different from any other service where it is difficult to do it on your own.

Of course, there are different business models relating to how these services are paid for. Some of them include the payment of commissions only for products/services, while others involve the payment of a fee particularly for planning services and investment advice. No one model is better than another, but all models can serve clients well, depending on the particular circumstances of the client.

The Investment Advice Fiduciary Rule puts restrictions on certain business models, and specifically limits the ability of a financial adviser to charge commissions for services rendered. Of course, if the commission is exclusively for the sale of an investment, then this would not relate to this point, but for many financial adviser professionals, much investment advice and retirement planning on behalf of clients is conducted through a commission-based model. This is perfectly appropriate, and permissible under current law, and even under the Investment Advice Fiduciary Rule, however under the rule, this option is greatly curtailed by the pronounced bias in the Rule towards fee-based advice..

Some retirement investors are clearly better served by a commission-based model. Limiting an investor's access to that model, and to the investment and planning advice to be paid for through that model, may require that an investor seek the advice of a financial adviser different from their current trusted financial adviser, which might not be their desired option, or even in the individual's best interest, thereby harming that investor. Additionally, it may, and often will, over time, involve the investor paying more to the financial professional in fees and other expenses than they would pay in the commissions charged for the same service. This additional cost would also harm the investor.

Of course, there are times when commissions are not in the best interest of the investor, and under those circumstances, that business model should not be recommended by the financial professional. Financial professionals subject to FINRA jurisdiction are subject to a suitability standard which requires the financial adviser to look at the options available to the client and to recommend one or more options that fits the investor's needs and objectives. When a financial adviser fails to do that, that financial adviser becomes subject to liability, and rightly so. That said, when a regulation prohibits or significantly curtails options that may otherwise be in the best interest of the investor, that regulation limits the investor, and thereby causes harm to the investor. This can be done at the product level, or at the level of the financial adviser's business model.

The business model selected by the financial adviser should be driven by the needs of the client, and the marketplace will drive the financial adviser to select a model that will be most conducive to serving his clients in the best possible way. Complex and convoluted regulation is not needed or helpful in accomplishing that purpose.

- II. **The Investment Advice Fiduciary Rule, as currently written, would result in dislocations or disruptions within the retirement services industry that may adversely affect investors or retirees.** The Investment Advice Fiduciary Rule has become a catalyst to many advisors in the industry that have decided that it is time for them to get out. We have seen several of our own financial advisers that have identified this as a reason for deciding to sell their practice, and we very much anticipate that increasing regulation and liability to accelerate the process should the Rule come into effect. Additionally, many smaller broker/dealers or investment advisers may not have the resources needed to fully comply with the requirements of the Fiduciary Rule, and they will be left with the option of continuing in business without complying with this new regulation (and bearing all of the risks associated with this), or getting out of the industry, through a merger/acquisition or through a straight exiting of the industry. When a financial adviser leaves the business, their

clients are left in a position of either having their accounts assigned to a financial adviser that they do not know, being left as a house account, or forcing a client to go through the process of finding another financial adviser. When a BD or IA goes out of business, this process is only magnified as there are more clients affected by such a move. It is in the wake of many of these events, where a trusted adviser can no longer provide advice or even discussion related to investments to their (former) clients, that these investors are in particular risk. This is a challenging process, and one that often leaves investors disenfranchised.

Of course, it is not an uncommon occurrence that a financial adviser retires or otherwise leaves the industry. Additionally, though less common, it is still not rare that a broker/dealer or investment adviser goes out of business or merges (or is acquired by) another broker/dealer or investment adviser. That said, this Regulation is expected to be a catalyst for change in this industry, and will likely drive a great deal of shaking up in that regard. We have already begun to see this change, and would anticipate that implementation of the Rule will accelerate this shift in the industry. Though one can debate whether or not the change will ultimately be good or bad for the industry, in the short-term to mid-term, this change will undoubtedly be harmful to individual retirement investors, causing them to lose access to their trusted financial advisers, perhaps at a critical time in the implementation of their financial and retirement income planning process.

- III. **The Investment Advice Fiduciary Rule, as currently written, would cause an increase in litigation, and an increase in the pieces that investors and retirees must pay to gain access to retirement services.** That's right, the costs in the financial services industry will go up significantly as a result of the Rule, and the creation of the private right of action, through a class-action structure, will become a significant part of that increased cost. When the costs go up in industry, those increased costs will need to be paid, and that will be accomplished through higher fees charged to retirement investors. That is simply an economic reality. As stated above, the current SEC Chairman identified that the Investment Advice Fiduciary Rule is not about protecting investors, but instead is "about enabling trial lawyers to increase profits". The creation of a new private right of action is all about that. It will not reduce fees, but instead will increase fees.

Civil litigation as a regulatory enforcement mechanism is inherently flawed. It empowers trial attorneys, which are often more interested in their own revenues than any other single factor, to be developing, through litigated decisions, public policy. Again, their concern is not for the industry, or to safeguard the best interests of an individual client, or even a class of clients, but instead, they will threaten litigation any time that they think there will be the potential for a significant payout at the end of the day.

As a former securities regulator, I understand that when an agency determines what public policy should be on a particular issue, based on the will of the elected official(s) that have empowered that agency, we can have some degree of comfort that it will be enforced consistent with the stated public policy that was underlying the administrative rule. The agency has the expertise to understand the policy behind its own rule, and is in a good position to safeguard that public policy

consideration. When the enforcement mechanism is through private litigation, however, the courts, which are not experts in the labor regulations or the financial services industry, are placed in the position to make policy, one case at a time, and this runs the very significant risk that the public policy at the end of the day would appear very different from the policy established by the regulator. This creates less certainty in the industry, and creates more costs, much spent in litigation costs. We would anticipate that the Rule would increase litigation, and possibly create a plethora of nuisance suits, which firms may decide to settle, not because they believe that they are in the wrong, but because there is too much cost involved in defending the suits, and because there is uncertainty as to how the public policy will be interpreted by an individual court.

Again, however, the focus here is not on the broker/dealer or investment adviser involved, but instead that the increase in these costs, like all other costs in the industry, are ultimately paid for through fees or commissions charged to customers. I'd strongly suspect that the industry will respond to these increased costs in that way, and this will ultimately result in a harm to customers.

We appreciate the opportunity to respond to the concerns of the Department, and the investigation that has been requested through the Presidential Memorandum. If you need any further information or assistance, please don't hesitate to contact me at (765) 553-3030, or by email at matthew.bahrenburg@cfdinvestments.com.

Sincerely,

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