TD Ameritrade

July 21, 2015

Via Electronic Mail and Regular Mail

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 N.W.
Washington, D.C. 20210

Office of Exemption Determinations
Employee Benefits Security Administration
Attn: D11712 and D-11713
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

RE: Proposed Conflict of Interest Rule and Related Proposals, RIN 1210-AB32 and ZRIN: 1210-ZA25

Ladies and Gentlemen:

TD Ameritrade, Inc. ("TD Ameritrade" or "the Firm") appreciates the opportunity to comment on the Department of Labor's ("Department") proposed regulations under the Employee Retirement Income Security Act of 1974, as amended ("ERISA") that will redefine the term "fiduciary" under Section 3(21) of ERISA and Section 4975(e) of the Internal Revenue Code of 1986, as amended, and will establish a best interest contract exemption (such proposals hereinafter referred to as the "Proposal"). The Firm hopes that our comments are helpful to the Department as it assesses the potential impact of the Proposal, particularly on retail retirement investors, and considers revisions.

I. Introduction

TD Ameritrade is a wholly owned broker-dealer subsidiary of TD Ameritrade Holding Corporation ("AMTD"). AMTD has a 40-year history of providing financial services to retail investors. AMTD, through its broker-dealer and investment advisor subsidiaries, provides brokerage and advisory services to over 6.6 million funded client accounts that total more than $702 billion in assets. The Firm also provides custodial services for more than 5,000 independent registered investment advisors ("RIAs"). During the quarter ended June 2015, TD Ameritrade's clients placed an average of 434,000 trades each day.

TD Ameritrade provides its services predominantly through the Internet, a national branch network and custodial relationships with independent RIAs. The Firm believes its services appeal to a broad market of independent, value-conscious retail investors, traders, investment advisers and institutions.

At its core, TD Ameritrade offers retail investors, including plan participants and IRA owners, a wide range of brokerage services. Such services are comprised in large part of state of the art trading platforms and tools, real-time streaming quotes, third party research and education for free or at low cost. TD Ameritrade structures its offerings to appeal to different types of investors – from active traders to long term investors, and from self-directed investors to those investors seeking more guidance and advice. Moreover, TD Ameritrade provides clients with a diverse set of investment products offered by independent third-parties, foregoing the creation and selling of proprietary products.

TD Ameritrade shares the Department's desire to help the retail retirement investor invest prudently. The Firm believes it is critically important to continue our approach of empowering individual retail investors through a wide array of investment choices, education, tools and support necessary to help them navigate and select the investments they believe are best for them and their long term financial goals.

For years, TD Ameritrade has supported adoption of the best interest standard when giving personalized investment advice about securities to retail investors as provided in Section 913 of the Dodd-Frank Act. The best interest standard would be enhanced by plain English disclosures, including conflicts of interest. For clarity for retail investors, and consistency among all brokerage services, there should be coordination of the standard for all investment products and services.

TD Ameritrade believes that, despite the best intentions of the Department, the Proposal would adversely impact the great strides the industry has made in many areas and our ability to satisfy the needs of retail investors. The Firm believes the Proposal may suffer from an incomplete understanding of today's retail investor and the evolution of the financial services industry in serving their needs. TD Ameritrade hopes that our comments will help enhance the Department's understanding in these areas.

Below, our comments will focus on our view that the Proposal, as currently drafted, could be harmful to and not in the best interest of all retail investors saving for retirement or trying to generate income in retirement.

II. <u>Negative Impact on the Retail Investor</u>

TD Ameritrade agrees with the Department's premise that the use of IRAs has evolved since the passage of ERISA. New financial services models have also evolved dramatically over the last 40 years. A plethora of free investment data, tools, research, education and support is now generally available to retail investors with the intent of making investors better informed, the extent of which would have been unimaginable to plan fiduciaries in the 1970s.

Yet, the Department's proposed broad definition of "fiduciary" would operate to diminish the ability of brokerage firms like TD Ameritrade to provide these free or low cost services to retail retirement investors. In fact, absent a best interest contract, a firm would only be able to deal with IRAs: (1) on an order-taker basis; or (2) pursuant to an advisory account with an asset-based fee. Under the first alternative, retail investors would experience the bare bones, self-directed brokerage account of the 1990s – having to complete transactions with little to no trading tools, no stock screeners and research, and little education. The second alternative would result in transitioning many IRAs from a transaction-based payment structure to an asset fee-based model. Both alternatives appear to be inconsistent with the result the Department is trying to achieve – serving the best interest of the retail retirement investor.

Retail investors need, and have become accustomed to, ready access to information, education and alternative solutions. The Department's proposed definition of fiduciary is so overly broad that even call center representatives would not be able to answer the simplest of questions about IRA rollovers without falling within the definition of fiduciary and triggering all of the best interest contract exemption ("BICE") implications. (In its current form, the BICE has severe implications, as discussed below.) TD Ameritrade believes the effect of the Proposal would be to severely limit information, education and choices that the retail retirement investor currently has a right to access on an affordable basis.

Our retail clients come to us online, by phone and in visits to our branches to discuss our products and services, the many investment options available to them, and financial investment education. The Department's Proposal would almost certainly result in extremely limited or non-existent support conversations (even those initiated at the request of self-directed retirement investors) at critical times of need. Such support currently is offered at very little or no cost. Absent that support, the Firm believes retail retirement clients would be required to either incur additional expense to meet their needs or choose to remain uncertain as to the risks of their decisions.

There also appears little doubt that, without any support, tools or education as to the benefits of keeping their assets in the retirement system (either in a plan or in a new IRA rollover), retail investors' leakage of assets from the retirement system would accelerate. This likely will result even though the best intentions of the Department are to enhance and improve the regulatory protections available to retail retirement investors and to encourage retirement savings. We note that an Oliver Wyman report was recently submitted to the Department titled "The Role of Financial Advisors in the U.S. Retirement Market." We share the concerns identified in that study of the Proposal's unintended consequences, such as potential limitations on the retail retirement investor's receipt of guidance, dearth of economically rational fee structures for smaller referral accounts, and potential retirement fund leakage.

III. Harmful Restriction of Investment Choices

The proposed BICE is a complex regulatory design that fails to achieve its essential purpose, which is to allow for continued availability of valuable and essential financial services to retail retirement investors. For example, for what appears to be the first time in its history, the Department is proposing a limited list of permitted assets.

TD Ameritrade retail clients currently have a wide choice of investments for their IRAs, many of which are not included in the BICE list. And those not included may be used for important risk mitigation and investment diversification purposes. One glaring exclusion is options. Retail investors understand that a tax advantaged account is the ideal place to generate income from a portfolio. In fact, the Firm strongly believes, that options, when coupled with sound education and investor qualification processes can be used for important risk mitigation strategies.[1] Without the ability to trade options our clients would lose the ability to protect a portfolio or a specific investment by using a commonly purchased put option for downside protection. Similarly, using a very common covered call, an IRA owner can have the benefit of maintaining a long held position in a stock and adding some downside protection, while generating income. In addition, investors can use cash-secured put strategies to generate income, or acquire stocks at a discount. Recognizing that clients must qualify to trade options and education support is made available, the Firm believes the Department should include options on the BICE list of permissible assets. We also believe that so-called "alternative investments," over the counter equities, and futures, none of which are on the BICE list, may be useful investment vehicles for diversification and volatility protection.

Also of import, the plan platform carve-out and other related aspects of the Proposal fail to include all retirement plan menu options that are currently permitted, including plan participant self-directed brokerage accounts ("SDBAs"). TD Ameritrade's experience has been that SDBAs can greatly benefit plan participants and generally are subject to certain investment restrictions, depending on the plan fiduciary. At a minimum, we believe SDBAs should be included in the platform, seller's and BICE carve-outs and exemptions.

Retail clients are smart. We see that all the time. Our Investor Movement Index or IMX, for instance, is a proprietary, behavior-based index we created to aggregate Main Street investor positions and activity to measure the activities of our retail investors and how they are positioned in the markets. Our experience is that they understand the market and certainly understand their own needs better than anyone. The Department should respect the intelligence of the retail investor as we do, and allow brokerage firms to continue to provide investment choices, education, tools, and assistance, and when making a specific recommendation, do so under a best interest standard. This is attainable and the industry is supportive.

IV. <u>Unnecessary Restriction of Access to Information</u>

TD Ameritrade believes the Department's Proposal to turn a retail retirement investor initiated conversation about potential rollover options into a fiduciary act would, in practice, deny such retail investor access to support during this critical financial event. Broker-dealer IRA rollover activities are already subject to FINRA regulations requiring any recommendations to sell, purchase or hold securities to be suitable for the customer and the information that investors receive must be fair, balanced and not misleading. The retail retirement investor's need for support in the rollover area should be viewed as paramount and not be discouraged by a need for a signed best interest contract before that conversation can even be initiated. TD Ameritrade would recommend that the definition of fiduciary be narrowed so as not to capture circumstances where both parties understand that specific recommendations are not being made.

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[1] TD Ameritrade also requests clarification that a brokerage firm's screening and approval of an IRA to trade options, absent other fiduciary conduct, would not constitute a recommendation as to the management of plan assets. The Firm believes it would be inappropriate to equate a broker's assessment of the investment knowledge and experience of an IRA owner to engage in options trading to the role of fiduciary recommending or making investment decisions for the IRA.

TD Ameritrade also sees a need for greater flexibility in regard to IRA rollover conversations for RIAs. For example, we understand some RIAs which manage retirement plans are concerned as to how to address a plan participant seeking their advice as to a rollover in the context of the Proposal. Even if the RIA is a discretionary investment manager which would not be eligible for the BICE in the conduct of its business, the RIA would run afoul under the Proposal by advising the plan participant about a rollover without a signed best interest contract (the need for which would end if the participant did a rollover managed by the RIA). It should be possible for the Department to establish conditions under which such activity could be conducted without a best interest contract. For example, the RIA could be exempted from having such a contract if there were a disclosure document signed by the participant acknowledging that the four basic options (leave the money in the plan, move the money to a plan with a new employer, roll the money into an IRA and take a taxable distribution) had been discussed.

TD Ameritrade agrees with many other commenters that the voluminous contract and disclosure requirements of the proposed BICE would be extremely onerous to implement, unnecessarily costly without serving clear investor needs, and likely to cause extensive interruptions in client service. There is a place for rational, understandable and relevant disclosures and we should be able to find common ground on what these disclosures should include and when they should be provided. Certainly, there are good reasons the Department could rely, at least partially, upon the existing ERISA Section 408(b)(2) disclosures that the industry spent much time and effort implementing in 2012.

Ultimately, the Firm believes the BICE in its current form would be viewed by retail retirement clients as a disservice and disruption to their needs for simplicity, speed and choice. Again, the Department's desired end is laudable, but its proposed means restrict important beneficial information flow, causing unnecessary harm to the retail retirement investor.

V. Hindrance To Helpful Services

TD Ameritrade believes that the Proposal should include a carve-out for the selling of services to retail retirement investors. Specifically, any market participant (broker, custodian, fiduciary, advisor, trustee, etc.) seeking to be hired or promote the use of its services (or affiliate services) should not be considered a fiduciary. Under the Proposal, the sale of services, such as the investment advisory services of our affiliate Amerivest Investment Management, LLC ("Amerivest") or a referral to an independent RIA through our AdvisorDirect service (both the Amerivest and AdvisorDirect services are provided under the Investment Advisers Act of 1940), or even of an IRA rollover, are not covered in any of the Department's exemptions or carve-outs. At a minimum, the Firm believes the selling of services to retail investors (both selling of a firm's own services, or affiliates or counterparties) should be included in both the seller's exception (based on the 2010 Department proposal) and the BICE.

Additionally, TD Ameritrade believes the proposed new education restrictions on providing specific examples of investments would dramatically limit retail retirement investors' access to valuable and informative online tools. These include investment screeners and strategy engines that allow for the investor's self-selection of specific investment criteria that result in specific lists of investment assets meeting the criteria. The Firm believes the use of specific examples is essential in cementing an investor's understanding in the educational process. In fact, TD Ameritrade believes that the proposed education carve-out would so limit the information that could be shared as to be virtually useless to an IRA owner who is not already well-versed in the basics of financial services, the range of investments available and investment strategies.

VI. Retail Investor Confusion

Currently, the same services and information can be provided to an individual for both their regular account and their IRA. As a practical matter, if the Proposal becomes effective in anything like its current form, there will need to be clear distinctions made between servicing the individual's regular account versus their IRA. It likely will confuse clients as to the rationale for this seemingly artificial distinction. For example, even if the BICE were in place, a retail client who had been using options in both their taxable account and IRA will no longer be able to do so in the latter as options are not included in the BICE definition of assets. Especially given the benefits afforded by the use of options, the distinction will not seem rational or fair to the retail investor.

Clients utilize the products, services, education and tools of their financial advisors for many varied reasons and they are accustomed to having all of them available from one provider. Moreover, it is customary for online brokerage firms to have this level of selection available for their clients. By eliminating the unnecessary distinction in what can be offered in a client's IRA from a client's other retail accounts while requiring a best interest standard apply to the recommendations, retail investors can retain the selection of products and services they expect and deserve in all of their accounts.

VII. Conclusion

TD Ameritrade prides itself on understanding and advocating for its clients. The Firm also prides itself on providing a wide range of helpful support services, education, tools and products to both retail investors and RIAs at little to no cost. The Firm is concerned that the Proposal as written would constrain the retail retirement investor's access to a number of these products and services on which they currently rely.

The Firm believes the Department's Proposal could be re-written in a way that respects the abilities of the retail retirement investor and understands their needs, and also respects the ability of the financial services industry to operate in ways that comply with existing regulations and are consistent with the best interest of their retail clients. TD Ameritrade hopes these comments will assist the Department in revising its Proposal so as to continue to allow retail retirement investor access to low cost brokerage services, trading tools, education and research.

The Firm believes a clearly defined best interest standard, appropriate conflict of interest disclosures, a considerably revised BICE and an enhanced sellers' exception would be constructive steps. The objective should be to establish a workable framework that would be simple and understandable to retail retirement investors, while, at the same time, achieving the Department's stated goals.

TD Ameritrade appreciates the opportunity to comment. Please feel free to contact me at 443-539-2125 with any questions regarding our comments.

Respectfully Submitted,

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TD Ameritrade Holding Corporation