



FINANCIAL PLANNING COALITION

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attention: Conflicts of Interest Rule
Room N-5655

Office of Exemption Determinations
Employee Benefits Security Administration
Attention: D-11712 and D-11713

United States Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

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

Ladies and Gentlemen:

The Financial Planning Coalition (Coalition),¹ which is comprised of the Certified Financial Planner Board of Standards (CFP Board), Financial Planning Association® (FPA®) and National Association of Personal Financial Advisors (NAPFA), submits the following comments to supplement those filed on July 21, 2015,² and our testimony presented on August 10, 2015³ on the re-proposal by the Department of Labor, Employee Benefits Security Administration (the Department) to expand the definition of the term “fiduciary” under the Employee Retirement Income Security Act (ERISA) (hereinafter “Re-Proposed Rule”).⁴ CFP Board is a non-profit certification and standard-setting organization, which sets competency and ethical standards for over 72,000 CERTIFIED FINANCIAL PLANNER™ professionals throughout the country.⁵ FPA® is the

¹ The Coalition is a collaboration of the leading national organizations representing the development and advancement of the financial planning profession. Together, the Coalition seeks to educate policymakers about the financial planning profession, to advocate for policy measures that ensure financial planning services are delivered with fiduciary accountability, and to enable the public to identify trustworthy financial planners.

² Letter from Kevin R. Keller, Chief Executive Officer, CFP Board, Lauren Schadle, Executive Director / Chief Executive Officer, FPA®, and Geoffrey Brown, Chief Executive Officer, NAPFA, to Office of Regulations and Interpretations, Employee Benefit Security Administration, U.S. Department of Labor (Jul. 21, 2015), available at <http://www.dol.gov/ebsa/pdf/1210-AB32-2-00702.pdf> [hereinafter “Original Comment Letter”].

³ Written Testimony of Marilyn Mohrman-Gillis, Esq. and V. Raymond Ferrara, CFP®, on behalf of the Coalition, before the Employee Benefit Security Administration, U.S. Department of Labor (Aug. 10, 2015), available at <http://www.dol.gov/ebsa/pdf/1210-AB32-2-WrittenTestimony5.pdf>.

⁴ Definition of the Term “Fiduciary,” 80 Fed. Reg. 21,928 (Apr. 20, 2015) (to be codified at 29 C.F.R. pt. 2510).

⁵ CFP Board’s mission is to benefit the public by granting the CFP® certification and upholding it as the recognized standard of excellence for the delivery of competent and ethical personal financial planning services. CFP® professionals voluntarily agree to comply with CFP Board’s rigorous standards including education, examination, experience and ethics and subject themselves to disciplinary oversight of CFP Board.

largest membership organization for CFP® professionals and those who support the financial planning process in the U.S. with over 24,500 members nationwide.⁶ NAPFA is the nation's leading organization of fee-only comprehensive financial planning professionals with more than 2,500 members.⁷

The additional comments focus on how the multiple industry alternative "best interest" proposals fall short of a true fiduciary standard.

Several industry commentators have provided the Department with alternative "best interest" standard proposals.⁸ Unfortunately, these proposals put forward by three industry organizations and a financial services firm will not result in a true fiduciary standard under ERISA. The alternative proposals all lack specificity regarding how to implement the standard and would undo many of the consumer protective provisions of the Re-Proposed Rule.

First, while each of the alternative proposals includes a "best interest" standard based upon the duty of prudence, they omit a key and essential component of the "best interest" standard. Under the Re-Proposed Rule, the Best Interest Contract Exemption provides:

"Best interest is defined to mean that the Adviser and Financial Institution act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and the needs of the Retirement Investor, when providing investment advice to them. Further, under the best interest standard, the Adviser and Financial Institution must act *without regard to the financial or other interests of the Adviser, Financial Institution or their Affiliates or any other party*. Under this standard, the Adviser and Financial Institution must put the interests of the Retirement Investor ahead of the financial interests of the Adviser, Financial Institution or their Affiliates, Related Entities or any other party."⁹

⁶ With a national network of over 90 chapters, FPA®'s 24,500 members represent tens of thousands of financial planners, educators and allied professionals involved in all facets of providing financial planning services. FPA® works in alliance with academic leaders, legislative and regulatory bodies, financial services firms and consumer interest organizations to represent its members.

⁷ NAPFA members adhere to some of the highest standards in the profession and annually each advisor must sign and renew a Fiduciary Oath and subscribe to the Association's Code of Ethics. NAPFA-affiliated advisors are committed to the organization's core values of competency, commitment to holistic financial planning, compensation under a model that facilitates objective advice, client-centered standard of care, complete disclosure of potential conflicts of interest and explanation of fees.

⁸ Letter from David Bellaire, Esq., General Counsel, Financial Services Institute, to Office of Regulations and Interpretations, Employee Benefit Security Administration, U.S. Department of Labor (Jul. 21, 2015), *available at* <http://www.dol.gov/ebsa/pdf/1210-AB32-2-00724.pdf> (FSI Proposal); Letter from Richard Foster, Senior Vice President, Financial Services Roundtable, to Office of Regulations and Interpretations, Employee Benefit Security Administration, U.S. Department of Labor (Jul. 21, 2015), *available at* <http://www.dol.gov/ebsa/pdf/1210-AB32-2-00665.pdf> (FSR Proposal); Letter from Ralph Derbyshire, Senior Vice President, Fidelity Investments, to Office of Regulations and Interpretations, Employee Benefit Security Administration, U.S. Department of Labor (Jul. 21, 2015), *available at* <http://www.dol.gov/ebsa/pdf/1210-AB32-2-00658.pdf> (Fidelity Proposal); Securities Industry and Financial Markets Association, "Proposed Best Interests of the Customer Standard for Broker-Dealers," Jun. 3, 2015, *available at* <http://www.sifma.org/issues/item.aspx?id=8589954937> (SIFMA Proposal).

⁹ 80 Fed. Reg. at 21,970 (emphasis added).

None of the alternative proposals include the requirement that the advice be provided “without regard to the financial or other interests of the Adviser, Financial Institution, any Affiliate, Related Entity, or other party.”¹⁰ Without this central component of a fiduciary obligation, there is no requirement to take into account the effect of an Adviser’s¹¹ variable compensation or conflicts of interest on the investment advice. Under the alternative proposals, Advisers can still recommend products that, due to higher commissions for the Adviser, are less favorable to the client than available alternatives.

Significantly, Congress recognized the requirement that the advice be provided “without regard to the financial or other interests of the Adviser” as a fundamental component of the fiduciary standard in Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act). The Dodd-Frank Act requires Advisers, when providing personalized investment advice about securities to retail customers, to “act in the best interest of the customer without regard to the financial or other interest of the broker, dealer, or investment adviser providing the advice.”¹² By excluding this fundamental component of the “best interest” standard, the alternative proposals are in direct opposition to a true fiduciary standard as defined under both ERISA and securities laws.

Second, there is no requirement for a written contract under any of the alternative proposals. The alternative proposals all rely on a written statement that the firm and Adviser will work in the “best interest” of the client. This would leave the IRA owner without meaningful legal recourse to enforce a “best interest” obligation against a firm or an Adviser. Under current law, there is no private right of action under ERISA for IRA owners. Without a requirement for a binding contract, there would be no mechanism for IRA owners to enforce an Adviser’s statement that he or she provides “best interest” advice.¹³ The alternative proposals would allow firms and Advisers to avoid fiduciary

¹⁰ 80 Fed Reg. at 21,970.

¹¹ Consistent with the Department’s naming convention, by using the term “Adviser” the Coalition does not intend to limit its use to investment advisers registered under the Investment Advisers Act of 1940 or under state law. As used herein, an Adviser can be an individual or entity who can be, among other things, a representative of a registered investment adviser, a bank or similar financial institution, an insurance representative and company, or a registered representative of a broker-dealer and broker-dealer.

¹² 15 U.S.C. § 80b-11(g)(1) (2012). Contrary to opponents’ arguments that they will be unable to receive any compensation under this language, ERISA has long recognized that a fiduciary does not necessarily breach her duty by taking an action that incidentally benefits the fiduciary herself, as long as the fiduciary conducted a careful and impartial investigation, and reasonably concluded that the action was in the beneficiaries’ best interest. *See e.g.*, *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982) (“Although officers of a corporation who are trustees of its pension plan do not violate their duties as trustees by taking action which, after careful and impartial investigation, they reasonably conclude best to promote the interests of participants and beneficiaries simply because it incidentally benefits the corporation or, indeed, themselves, their decisions must be made with an eye single to the interests of the participants and beneficiaries.”).

¹³ Under the alternative proposals, clients would have no enforceable obligation and would be left with the difficult task of relying on the equitable doctrine of promissory estoppel. For retirement investors to bring a claim based upon promissory estoppel, the investor must show that a promise or representation is made; the client’s reliance on this promise is detrimental and reasonable; and the firm or Adviser reasonably should have expected the detrimental reliance. *See e.g.*, *Ascom Hasler Mailing Systems, Inc. v. U.S. Postal Service*, 885 F. Supp. 2d 156 (D.D.C. 2012) (Promissory estoppel is an equitable doctrine and may be invoked only when injustice otherwise would not be avoidable).

liability, thereby undermining the intent of the Department to provide for an enforceable fiduciary obligation for investment advice provided to IRA owners.

Third, the alternative proposals rely primarily on disclosure to meet their proposed “best interest” standards. For example, under the FSI Proposal, Advisers are allowed to obtain the consent of prospective clients for conflicts at account opening and can meet the “best interest” standard by simply disclosing conflicts to their clients¹⁴ and under the Fidelity Proposal, there is no requirement to mitigate conflicts of interest.¹⁵ This type of disclosure-based standard fails to meet the fundamental requirements of a “best interest” standard under both ERISA and securities laws. To meet a true “best interest” standard, an Adviser must not only disclose conflicts, but must have in place policies and procedures that are reasonably designed to mitigate the impact of conflicts on the Adviser’s recommendations. Notwithstanding any disclosures the Adviser may make, the Adviser must still provide advice with the care, skill, prudence, and diligence that a prudent person would exercise and do so without regard to the Adviser’s financial interests. A disclosure-based regime, which does not mitigate compensation practices and incentives that give rise to conflicts of interest among Advisers, does not meet the basic requirements of a true fiduciary standard.

In addition, specific proposals contain additional problematic provisions that are inconsistent with a “best interest” standard. For example, under the SIFMA Proposal, the recommendation of only proprietary products “shall not” be considered a violation of the best interest standard.¹⁶ This proposal is fundamentally at odds with a true “best interest” standard under ERISA. It is also inconsistent with Congress’ guidance to the SEC in section 913(g) of the Dodd-Frank Act, which authorized the SEC to establish a fiduciary standard for brokers and dealers. Congress provided that “[t]he sale of only proprietary or other limited range of products by a broker or dealer shall not, *in and of itself*, be considered a violation of the [fiduciary standard as established by the SEC].”¹⁷ A recommendation from a limited menu of products must still meet the fundamental requirement that it be in the best interest of the client.

In addition, under the SIFMA Proposal, Advisers are not required to recommend the least expensive alternative.¹⁸ While the Coalition agrees that the cost of a product is just one factor of many to be considered and that the lowest cost product may not always be in the best interest of the client, cost is an important factor in a recommendation. We believe that this blanket absolution from an obligation to recommend the least expensive alternative may be abused. For example, under this proposal, an Adviser would be free to recommend a mutual fund with a six percent commission, even though the Adviser has access to a similarly performing mutual fund with a four percent commission. Under the proposal, as long as the Adviser discloses that he is recommending the higher-cost fund, the recommendation would be deemed to be in the client’s best interest.

¹⁴ FSI Proposal, *supra* note 8.

¹⁵ Fidelity Proposal, *supra* note 8.

¹⁶ SIFMA Proposal, *supra* note 8.

¹⁷ 15 U.S.C. § 78o(k)(2) (2012) (emphasis added).

¹⁸ SIFMA Proposal, *supra* note 8.

Fidelity's proposed alternative fails to meet a number of fundamental requirements of the "best interest" standard under ERISA. In addition to proposing a disclosure-only regime with no requirements to mitigate conflicts, it specifically allows for the Adviser to disclaim or otherwise limit his fiduciary liability and allows for compensation levels that may exceed reasonable compensation for products and services, because the Adviser would only be required to look at the specific products he offers.

Under the Fidelity Proposal, firms and Advisers would be permitted to establish the scope and terms of the relationship through a pre-engagement contract negotiated outside the fiduciary standard.¹⁹ Under this proposal, Advisers could simply state, as part of the contract, that the advice is biased. This proposal would permit a continuation of current Fidelity procedures, in which the firm informs prospective clients that "[a]lthough consultations are one-on-one, guidance provided by Fidelity is educational in nature, is not individualized and is not intended to serve as the primary or sole basis for your investment or tax-planning decisions."²⁰

Taken as a whole, the combination of provisions in the Fidelity Proposal would permit an Adviser to recommend any of its proprietary mutual funds or annuities, regardless of conflicts, the cost of the products or whether the recommended products are in the best interest of the client, as long as the Adviser discloses that he can only sell Fidelity products. Under the proposal, each of the recommended proprietary mutual funds or annuities would automatically meet the reasonable compensation prong even if the cost of the products exceeded pricing of similar products available in the marketplace.

Under the FSR Proposal, Advisers are allowed to receive any compensation that is currently allowed under applicable SEC or FINRA regulations.²¹ Compensation practices that are permitted under SEC or FINRA²² regulations do not necessarily meet the reasonable compensation requirement under ERISA.²³ As noted by Professor Mercer Bullard, under current securities laws, "broker-dealers have developed a wide variety of compensation structures that incentivize financial advisers to make recommendations that pay them the highest compensation" and that "[d]ifferences in compensation often bear no relationship to the services provided."²⁴ It is precisely

¹⁹ Fidelity Proposal, *supra* note 8.

²⁰ Fidelity Investments, "Saving for Retirement," <https://communications.fidelity.com/tem/2013/saveforretirement/>.

²¹ FSR Proposal, *supra* note 8.

²² FINRA Rule 2121 requires Advisers to "buy or sell [a product] at a price that is fair;" however, when the Adviser recommends proprietary products, "in the absence of other bona fide evidence of the prevailing market, a member's own contemporaneous cost is the best indication of the prevailing market price of a security." So in practice, any product that has no marketplace comparable may be deemed to be sold at a "fair" price. FINRA Rule 2121, "Fair Prices and Commissions," http://finra.complinet.com/en/display/display.html?rbid=2403&element_id=11539.

²³ Proposed Best Interest Contract Exemption, 80 Fed. Reg. 21,928, 21,976 (Apr. 20, 2015) (to be codified at 29 C.F.R. pt. 2510) ("Any compensation received in connection with a purchase, sale or holding of the Asset by a Plan, participant or beneficiary account, or an IRA, is reasonable in relation to the value of the specific services provided to the Retirement Investor in exchange for the payments and not in excess of the services' fair market value."); 29 C.F.R. § 2550.408c-2 (2014) ("Generally, whether compensation is 'reasonable' under [ERISA] depends on the particular facts and circumstances of each case.").

²⁴ Written Testimony of Mercer Bullard, MDLA Distinguished Lecturer and Professor of Law, University of Mississippi School of Law, before the Subcommittees on Capital Markets and Government Sponsored Enterprises, and Oversight and Investigations, Committee on Financial Services, United States House of Representatives (Sept. 10,

these compensation structures, which are permitted under SEC or FINRA regulations that the Department is attempting to rectify in its Re-Proposed Rule.

In addition, under the FSR Proposal, existing accounts would be exempt from the proposed “best interest” standard, regardless of whether the Adviser provides a recommendation to acquire, hold or dispose of assets in that account.²⁵ This provision is written broadly enough that it would render the strengthened fiduciary standard under the Re-Proposed Rule inapplicable to any current client. Under this proposal, firms and Advisers would be permitted to provide current clients a lower standard of care and less protection than new clients – a result that would undermine the Department’s goal of requiring fiduciary-level advice for all retirement assets under ERISA.

In sum, all of the alternative proposals fall short of a true “best interest” standard. They do not meet the basic requirements of a fiduciary standard under either ERISA or the BIC Exemption and they significantly fall short of the Department’s policy goals to more closely align the incentives of firms and Advisers with the interests of our nation’s Retirement Investors.

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The Coalition appreciates the opportunity to file supplemental comments on the Department’s re-proposed changes to the definition of the term “fiduciary.” If you have any questions regarding this comment letter or the Coalition, please contact Marilyn Mohrman-Gillis, Managing Director, Public Policy and Communications, CFP Board, at (202) 379-2235 or MMohrman-Gillis@CFPBoard.org.

Sincerely,



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2015), available at <http://financialservices.house.gov/uploadedfiles/hhrg-114-ba16-ba09-wstate-mbullard-20150910.pdf>.

²⁵ FSR Proposal, *supra* note 8.