"No thinking man can believe that an economy built upon a business foundation ... can permanently endure without some loyalty to that (fiduciary) principle."

Justice Harlan Fiske Stone
Harvard Law Review, 1934

January 2, 2024

Office of Regulations and Interpretations
Employee Benefit Security Administration
U.S. Department of Labor 200 Constitution Ave.
NW Washington, DC 20210

Re: RIN 1210-AC02 Retirement Security Rule: Definition of an Investment Advice Fiduciary

Dear Assistant Secretary Gomez:

Thank you for proposing this rule and holding a hearing on the Definition of an Investment Advice Fiduciary for interested parties to express their support or opposition. The Institute for the Fiduciary Standard strongly supports the rule.

In this letter, the Institute for the Fiduciary Standard provides an overview of historic developments which shape fiduciary advice today and evaluates rule opponents on their apparent awareness of fiduciary tenets. We then comment on why the proposal is essential to fill a regulatory gap and the issues of titles and holding out. We conclude with comments on what it means when groups that oppose this rule do so with no apparent regard for the relevance of fiduciary law and principles.[*]

Contents

Introduction 2

Background 2

Rule Opponents Firmly Reject Basic Tenets Of Fiduciary Advice 7

The Rule Is Essential To Fill The Gap In Investor Protection Left By The Sec's Reg BI 10

The Department's Intent To Examine The Ways Investment Advice Providers Market Themselves.... 11

Summary Conclusion 13

[*] The Institute is a non-profit that exists to advance the fiduciary standard through research, education and advocacy. For more information see www.thefiduciaryinstitute.org.

Introduction

The Department sets the appropriate stage for the hearings and a meaningful discussion for defining fiduciary. You clearly state at the outset the objective of the proposed Retirement Security Rule: [1]

> *[A]dvice fiduciaries should uniformly adhere to a few basic principles. Their advice should be prudent, meaning that they should adhere to an expert standard of care.*
>
> *. . . "[R]ecommendations should be based on what's in the financial interest of the investor, not the competing financial interests of the professional making the recommendations . . . [and] should be free from misleading statements or misinformation about the investments, their services, fees and other relevant information, and investors should not be overcharged for the advice provider services.*
>
> *At bottom, this proposed regulatory package simply requires that people who hold themselves out as fiduciaries adhere to these basic fiduciary principles. (pgs. 6 - 7)*

Later in the hearing, Tim Hauser reiterates the point in an exchange with a speaker: [2]

> *[A]t bottom, this rule requires that if an investment professional holds themself out as somebody who is providing individualized advice that's in the customer's best interest, that they can rely upon to get their best interest, that they be prudent, they be loyal, that they not overcharge them, that they not make material misstatements. That's at bottom what this rule is. (p. 129)*

The Department's framing of the rule's fiduciary principles and objective is clear and straightforward. This framing describes what is required for a relationship of trust and confidence.

Background

The Department's framing is also consistent with and reflects prior policy, legislative, regulatory, legal and judicial discussions on what fiduciary means and why it matters. These writings over 90 years provide a profound backdrop of guidance. They inform the underlying meaning of the principles of loyalty, due care and utmost good faith.

Franklin Roosevelt . 1932, 1933 [3]

Securities attorney John H. Walsh writes that in 1932 and 1933, Franklin Roosevelt often spoke of the recent misconduct on Wall Street and what was required of a future regulatory regime. Roosevelt

[1] U.S. DOL EBSA (December 12, 2023) "Public Comment Hearing Retirement Security Rule: Definition of an Investment Advice Fiduciary." *Transcript* at [Link]

[2] Ibid, at p. 129.

[3] Walsh, John (2001) "A Simple Code of Ethics: A History of the Moral Purpose Inspiring Federal Regulation of the Securities Industry" *Hofstra Law Review* Vol. 29, No. 4, Article 2 at [Link]

advocated for a "Simple Code of Ethics" reflecting a "moral purpose" and fiduciary principles. Walsh notes, "FDR told the press in 1933 that his principal objective was to restore the idea that dealers in securities … are fiduciaries."

The Investment Advisers Act (IAA) of 1940

Law professor Arthur Laby wrote in 2012 about an SEC report in 1940 of a survey of advisory firms. [4] This report provided an impetus for the IAA. Laby here describes one of two concerns of the firms:

> *There were two concerns bedeviling advisory firms. The first was that so-called "tipster" organizations were disguising themselves as legitimate advisory organizations. Certain firms providing advice were affiliated with investment banks or brokerage firms and, therefore, had a vested interest in recommending particular securities. Investment banks were securities merchants; they were paid based on the spread between their purchase price and the sale price to the customer. Such institutions were unable to provide objective advice.*
>
> *. . . The report emphasized that an adviser cannot provide unbiased advice unless conflicts of interest were removed. This concern over biased advice presages the current debate over whether to place a fiduciary duty on brokers . . . (pgs. 720-1)*

The key rationale for the IAA was differentiating "professional investment counsel" – the term for fee-only investment adviser firms – from conflicted commission-based firms selling products.

In the Matter of Arleen W. Hughes. 1948 [5]

In 1948 the SEC discussed in detail in 'The Matter of Arleen W. Hughes' what it believed acting as a fiduciary with clients' trust and confidence means. In this case Hughes, in her capacity as a broker, and furnishing investment counsel . . . "cultivates a confidential and intimate relationship." As such, the SEC found Hughes to have been obliged to act as a fiduciary. In this case she was found to have not upheld this duty. The key points of the Hughes case and the principles stressed by the SEC are highlighted in a 2013 Fiduciary Institute paper.[6] The SEC's opinion reads, in part:

> *… [R]egistrant's clients have implicit trust and confidence in her. They rely on her for investment advice and consistently follow her recommendations as to the purchase and sale of securities. Registrant herself testified that her clients follow her advice "in almost every instance." This reliance and repose of trust and confidence, of course, stem from the relationship created by registrant's position as an investment adviser.*

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[4] Laby, Arthur (2012) "Selling Advice and Creating Expectations: Why Brokers Should Be Fiduciaries" *Washington Law Review*, Vol. 87, No. 3 at [Link]

[5] SEC (February 1948) "In the Matter of: Arleen W. Hughes dba E.W. Hughes & Company" *Securities Exchange Act of 1934 Release No. 4048* at [Link]

[6] Rostad, Knut (September 2013) "Six Core Fiduciary Duties for Financial Advisors" *The Institute for the Fiduciary Standard* at [Link]

The very function of furnishing investment counsel on a fee basis -- learning the personal and intimate details of the financial affairs of clients and making recommendations as to purchases and sales of securities -- cultivates a confidential and intimate relationship and imposes a duty upon the registrant to act in the best interests of her clients and to make only such recommend-dations as will best serve such interests. In brief, it is her duty to act in behalf of her clients. Under these circumstances, as registrant concedes, she is a fiduciary; she has asked for and received the highest degree of trust and confidence on the representation that she will act in the best interests of her clients. (p. 6)

The language used to describe both the basis for and the implications of Hughes' fiduciary duty is vividly clear. Fiduciary care is the basis on which Hughes gained a client's trust and confidence and learned the intimate details of a client's financial affairs. Such trust and confidence in Hughes inevitably became a reliance on Hughes. The client's reliance is based on trust and confidence that Hughes will only act in the client's best interest. This strong reliance further underscores her solemn duty to do so.

The Supreme Court in SEC v. Capital Gains Research Bureau . 1963 [7]

The Supreme Court first interpreted the IAA in SEC v Capital Gains Research Bureau in 1963. Significantly, the Court affirmed investment advisers' fiduciary duty.

The Court also stressed three points. First, eliminating conflicts was key to investment advice. Second, that investment advisers should only engage in investment advice and, third, that investment advisers should only be compensated from fees disclosed in advance. On conflicts, the Court states:

The report reflects the attitude – shared by investment advisers and the Commission – that investment advisers could not 'completely perform their basic function – furnishing to clients on a personal basis competent, unbiased, and continuous advice regarding the sound management of their investments – unless all conflicts of interest between the investment counsel were removed.

Third, on solely rendering investment advice and only receiving fees, the Court stated:

The president of the Investment Counsel Association of America, the leading investment counsel association, testified that the "two fundamental principles upon which the pioneers in this new profession undertook to meet the growing need for unbiased investment information and guidance were, first, that they would limit their efforts and activities to the study of investment problems from the investor's standpoint, not engaging in any other activity, such as security selling or brokerage, which might directly or indirectly bias their investment judgment; and, second, that their remuneration for this work would consist solely of definite, professional fees fully disclosed in advance.

[7] *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963) at [Link]

The Tully Report . 1995

SEC Chairman Arthur Levitt (1993-2001) formed a group of industry leaders in 1994 led by Merrill Lynch CEO, Dan Tully, to review broker-dealer compensation practices. Levitt writes in his book, *Take on the Street,* "The panel's orders were to recommend ways to reduce conflicts between investors and brokers by changing the broker compensation system."[8]

Chairman Levitt delivered a detailed speech to announce the panel.[9] He outlined the state of broker-dealers, their benefits, challenges and problems he saw in some compensation practices. In this excerpt, Levitt raises questions regarding incentives, commissions and the "inherent conflicts of interest in any sales business."

> *Compensation is a far more difficult and complex issue. I am concerned that some compensation practices may exaggerate conflicts of interest -- that is, encourage brokers in some cases to make trades, rather than to do what's in the client's best long-term interests.*
>
> *. . . Is it appropriate for a firm to pay its sales force more for principal transactions than for agency transactions? Is it appropriate to differentiate compensation by product? Again, can the process be managed to be consistent with the client's best interest?*
>
> *. . . The fact is, there are inherent conflicts in any sales business. The question is, how do we handle them? There is a need to think about compensation structures that harmonize the interests of the broker with those of his client and his firm.*

Tamar Frankel, Professor of Law Emerita, Boston University School of Law . 2020
An interview on trust, honesty and the vital role of fiduciary duties. [10]

Professor Frankel has researched fiduciary relationships for over fifty years. Her research brought her back to Hammurabi and Roman law and England in the Middle Ages. My first question to Frankel: Why does this history matter? Frankel's answer is simple and powerful:

> *The most effective way to destroy any healthy and lasting economy and financial system is to relieve intermediaries – whether advisers, brokers, bankers, or others – of a duty to be trustworthy.*

To be trustworthy means that others could trust the individual or they could be *trusting* of that individual. Trusting, according to Frankel, comes down to the most basic moral lessons. It means "believing that others tell the truth and will keep their promises."[11]

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[8] Levitt, Arthur and Dwyer, Paula (November 2003) "Take on the Street: How to Fight for Your Financial Future" *Vintage* at p. 27-28

[9] Levitt, Arthur (May 1994) "Remarks by Arthur Levitt, Chairman, U.S. SEC at the National Association of Securities Dealers" at [Link]

[10] Rostad, Knut (August 2020) "Tamar Frankel: The Regulators Do Not Understand Conflicts." *Advisor Perspectives* at [Link]

[11] Frankel, Tamar" (2006) "Trust And Honesty: America's Business Culture At A Crossroad" p. 49 at [Link]

Frankel's scholarship and commentary embody the decades long discussion of fiduciary. In discussing trust and honesty she contributes to the present dialogue on the importance and meaning of a "relationship of trust and confidence," "holding out," and otherwise as communicating fiduciary status.

From FDR's vision of a 'Simple Code of Ethics' in 1933 to Tamar Frankel's writings on "trusting," key themes are emphasized.

What are the themes that dominate and we can take away from these significant (or landmark) cases, writings or expressions? Here is a summary of the themes:

- *FDR* provided a moral purpose and foundation in advocating for a "Simple Code of Ethics."

- *The IAA* sought to differentiate 'professional investment counsel' compensated from a fee disclosed upfront from "Tipster organizations disguising themselves as legitimate advisory organizations."

- *The SEC* found Arlene Hughes breeched her fiduciary duty by failing to disclose her conflict so her customers understood she sold them her own securities.

- *The Supreme Court* affirmed in SEC v Capital Gains advisers' fiduciary duty and noted that "eliminating" conflicts was crucial, advisers should only engage in advice and should only be compensated from transparent fees disclosed in advance.

- *The Tully* panel sought to offer, "Ways to reduce conflicts between investors and brokers."

- *Tamar Frankel* articulation of what trust requires and *trusting* is telling the truth and keeping promises.

The key themes are eliminating conflicts, charging transparent fees and not (opaque) commissions, reducing conflicts, and increasing trustworthy advice.

Rule Opponents Firmly Reject Basic Tenets of Fiduciary Advice; They set a New Standard for Hypocrisy, Cynicism in Opposing the Rule

This background highlights the meaning of fiduciary in the words of experts over decades and summarizes the special nature of fiduciary relationships. With this backdrop, we sought to determine whether groups opposing the DOL Rule understood and agreed with basic fiduciary tenets transmitted in papers, court cases and rules. To do so the Fiduciary Institute reviewed and analyzed the testimony of these groups.

In their own words: word searches of what eight groups say reveal what they don't say. Rule opponents appear to support conflicts of interest. They express no concern with the corrosive nature of conflicts on fiduciary advice or the harms to retirement investors.

On December 12, nineteen groups (or individuals) testified. We identified the testimony of representatives from eight groups who opposed the rule or expressed major misgivings. Eleven groups we deemed as supportive of or neutral on the rule.

We conducted several word searches of the testimony to better understand what rule opponents support. To start we searched the transcripts for the word *conflict* (or conflicts or conflicted). We found 67 mentions. Among the eight groups testifying against the rule:

- *Conflict* was mentioned nine times by five groups. Three groups made no mention.
- In none of these nine instances were conflicts mentioned or discussed as being harmful to retirement investors or fiduciary advice. The word was mentioned in neutral terms.
- Four of the nine mentions were in FSI's testimony. The first mention (page 120), FSI claimed that DOL offered "no evidence" of "adverse outcomes" in 2023 from conflicts. The second and third mentions (page 123) regard disclosure requirements. In follow up (page 129) FSI refused to agree with the principles Mr. Hauser set out (noted above).

The groups and mentions: SIFMA (one, page 50), American Council of Life Insurers (two, pages 86,87), FSI (four), NAIFA (one, page 150), Chamber of Commerce (one, page 165), Davis & Harmon (0), Committee of Annuity Insurers (0) and Insured Retirement Institute (0).

Additional searches of other language associated with fiduciary advice were also conducted. These included various forms of the words: *eliminate, avoid, mitigate, prudence, loyalty and care.* These searches found no language suggesting they oppose conflicts or support fiduciary advice principles. Searches for the *Advisers Act of 1940* and *SEC v Capital Gains Research Bureau* also found nothing. Meanwhile, *fiduciary* was mentioned 206 times.

The primary takeaway? Against the backdrop of history and law where conflicts of interest are deemed inherently harmful to fiduciary advice, silence on conflicts' harms scream loudly. The message? 'We are unwilling to grapple seriously with the harm conflicts create, and therefore support conflicts of interest in fiduciary advice.'

Finally, rule opponents often claim Reg BI provides adequate investor protection and that the DOL rule is unnecessary. They are correct that Reg BI requires a best interest standard. (The term "best interest" search reveals 128 mentions on December 12.) They are incorrect that Reg BI has yet delivered on this promise. So, their argument is bogus. This proposed rule covers products Reg BI does not cover. This is a point of fact. Further, it is still unclear how Reg BI will be enforced as a best interest standard. (See below.) It is also a point of fact that the NAIC model rule excludes compensation in its best interest determination.

In their own words: what the Securities Industry and Financial Markets Association (SIFMA) say is important to their members.

Opponents' testimonies are rich with objections to the proposal, objections often based on perceived burdens and risks or just false information. Perhaps the most often cited reason for not needing a DOL rule is that the SEC's Reg BI has it covered. As a point of fact, Reg BI does not. Yet the claim continues to be repeated. Here, we have reviewed the illustrative testimony of SIFMA and highlight just a few dubious statements. Many more could be included.

The Securities Industry and Financial Markets Association ("SIFMA") may be the leader of the brokerage industry on standards of care. SIFMA was quick to mobilize after the June 2009 Treasury Department paper on financial reform.[12] SIFMA's chairman, John Taft, testified in Congress and was the architect of SIFMA's position articulated in its July 2011 comment letter.[13] In SIFMA's December 12 testimony, we find:

- SIFMA claims the scheduling of the hearing and that the 60-day comment period made it "Challenging to provide robust analysis" needed to help the department to provide investor protection that "Can also be operationalized." Despite not having to time to analyze the proposal, the next sentence declares, "We question why the Department is undertaking a rulemaking of such breadth at all." *Comment: SIFMA says simultaneously that the proposal has not been fully analyzed and the proposal is not needed*.

- SIFMA claims the SEC's Reg BI makes some changes unnecessary. "Our member firms made substantial changes in 2019 and 2020 to implement Regulation Best Interest." *Comment*: *Wrong. Reg BI leaves gaps and does not cover insurance products. NASAA research (referenced below) suggests that Reg BI has not yet caused broker-dealers to make substantial changes and "Firms are still relying heavily on suitability policies."*

- SIFMA claims the proposal makes "All conversations between a financial professional and an investor risk (being) a fiduciary conversation." *Comment: This statement speaks for itself.*

- SIFMA claims "The proposal also seems to preclude any education in the rollover area. The Department will simply deem any conversation about a rollover as a fiduciary conversation.

[12] U.S. Treasury (June 2009) "U.S. Treasury Department Releases Financial Regulatory Reform" *Press Releases* at [Link]

[13] SIFMA (July 2011) "Comments for SEC Consideration Re: Framework for Rulemaking Under Section 913 (Fiduciary Duty) of the Dodd-Frank Act; File No. 4-604 at [Link]

There is no basis for this approach." *Comment: Wrong. There is every basis for an approach that deems rollover conversations to be presumptively sales conversations.*

- SIFMA claims in conclusion, "The Department has not made its case for why any of these changes are necessary." *Comment: This statement speaks for itself.*

The Rule is essential to fill the gap in federal regulation in investor protection left by the SEC's Regulation BI.

The first Reg BI enforcement case in June 2022 was wrongly championed as Reg BI enforcing a best interest standard. This case could have been brought under the prior suitability standard, according to Ropes & Gray and other securities attorneys.[14]

The North American Securities Administrators Association, (NASAA), has monitored Reg BI in the states. NASAA identified how often BDs recommended "Costly, complex and risky" ("CCR") products. The bottom line: Reg BI has failed to raise the BD sales "suitability" standard.

In November 2021, NASAA reports that 76% of BDs (FINRA Retail 2021) and only 14% of RIAs (IA only 2018) recommended at least one CCR product.[15] Also, NASAA reports 66% of BDs and 5% of RIAs recommended VAs. (Appendix B) In September 2023, NASAA reports, "Firms are still relying heavily on suitability policies …. Efforts to address the standard of care concepts established by Reg BI remain perfunctory."[16]

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[14] Longo, Amy and Rail, Brynn (June 2022) "SEC Files First Enforcement Action Alleging Violations of Best Interest Rule's Care and Compliance Standards" *Ropes & Gray Alerts* at [Link] *("The facts as alleged by the SEC do not appear to be a reach for the application of Reg BI; based on the conduct set forth in the SEC's Complaint, it is possible a regulator might have brought a similar case under a preexisting suitability regime.")*

[15] NASAA (November 2021) "NASAA Report Finds that Many Broker-Dealer Firms Still Place Their Financial Interests Ahead of Their Customers Despite Implementation of Regulation Best Interest" at [Link]

[16] NASAA (September 2023) "Report and Findings of NASAA's Broker-Dealer Section Committee: National Examination Initiative Phase II (B), p. 3 at [Link]

"The Department intends to examine the ways investment advice providers market themselves … (and) requests comment on whether other types of conduct, communication, representation, and terms of engagement" merit review.

The Department rightly embeds "holding out" and broader marketing and representations into the criteria for ERISA fiduciary status. Ron Rhoades points out in his testimony that state common law has held brokers as fiduciaries in relationships of trust and confidence.[17]

Law professor Arthur Laby argues that holding brokers to fiduciary obligations flows from "The reasonable expectations of investors. Reasonable expectations arise from brokers marketing their services as advisory and using titles, such as financial advisor and financial consultant."[18]

Holding broker-dealers accountable for 'holding out'

Holding broker-dealers accountable for 'holding out' and their representations means the Department assesses 'How would a typical retirement investor reasonably understand' broker-dealer claims and representations. I.E: messages. Here are a few observations on how the Department can aid in furthering fiduciary advice for retirement investors.

Background. Broker-dealers have held out with various titles connoting trusted advice for four decades. Laby (noted above) references this phenomenon. Titles suggesting such advice from broker-dealers whose business is distributing products and compensation is commissions is clearly misleading.
This context matters to assessing how to best address in 2024 attitudes and views of retirement investors that have developed over 40 years.

This generational context should have been part of assessing consumer attitudes over the past 20 years. It was not. If it were, the "news" would have not been 'investors confused'. It would have been the research suggests 'investors understand IAs and BDs are alike.' The commentary should have been this view is wrong because IAs and BDs businesses and duties are very different.

Fast forward to today. This generational context should be part of assessing conventional wisdom today. As such, the conventional wisdom should not be retail investors are confused. The Fiduciary Institute believes that the core challenge is not "investor confusion", as set out by the SEC's 2008 Rand Report.[19]

Alternatively, we argued that the core challenge is not investor confusion but "information confusion". That is confusing information that is driven by industry messages that are unclear or ambiguous or just plainly misleading. Our 2021 paper explains how we come to this conclusion based on analysis of

[17] *Supra*, **Note 1** beginning at p. 200 of the transcript.

[18] *Supra*, **Note 4** at p. 707.

[19] Hung et al. (2008) "Investor and Industry Perspectives on Investment Advisers and Broker-Dealers" *RAND Corporation* at [Link]

publicly available research following the 2008 Rand Report.[20] Much of this research is from the SEC as Reg BI and Form CRS were developed.

Among other things this analysis suggests that retail investors can understand disclosure that is not misleading or unclear. They can understand clear and concrete plain language messages and disclosure.

Recommendations. This background informs our views about appropriate regulatory measures to guide advisor and firm representations to communicate responsibly with retirement investors.

Titles. The importance of titles, in and of themselves, should not be overstated. Titles, per se, have been baked into the BD cake for 40 years. Our sense is they are all viewed as connoting trusted advice and all suggest a relationship of trust and confidence. As such, the question of titles should be framed differently. After 40 years of 'title abuse' allowing any sales broker to proclaim her/her-self a "consultant", "advisor," or "planner," all sales brokers now identify under such misleading titles. In this sea of sameness, current titles have lost their significance.

Kleimann Communications research (referenced in the 2021 Fiduciary Institute paper) suggests what has not lost its significance are messages and representations that sales brokers business *is* selling. This finding suggests that in lieu of focusing on the misleading titles broker-dealer use, focus on accurate representations connoting sales that broker-dealers do not use.[21]

For sales brokers who do not provide regular advice and do not have custody, and seek to not be deemed a fiduciary, there is a better way. Require prominent plain language written disclosure, reproduce in various places and acknowledged in writing from the customer, of the sales brokers status as a sale broker that differentiates his / her duties, business practices and legal obligation from a fiduciary.

Roles, duties. Comparing how BDs and insurance agents hold our publicly and how they hold out in legal proceedings is revealing. The language brokers and insurance agents' member organizations use in their legal filings offers a template for brokers or agents seeking to avoid fiduciary status. This is chronicled in the Consumer Federation report of 2017.[22] In legal proceedings, they hold out as "salespeople."

> *"[I]n legal filings challenging the (2016) DOL rule . . . the U.S. Chamber of Commerce and several of its Texas affiliates, the Securities Industry and Financial Markets Association (SIFMA), the Financial Services Institute (FSI), the Financial Services Roundtable (FSR), the Insured Retirement Institute (IRI), the American Council of Life Insurers (ACLI), and the National Association of Insurance and Financial Advisors (NAIFA) have claimed, for example, that broker-dealer reps and insurance agents are not*

[20] Rostad et al. (June 2021) ""Investor Confusion" Over How Advisers Differ From Brokers Stymies Regulatory Disclosure, Experts Say" *The Institute for the Fiduciary Standard* at [Link]

[21] Kleimann Communications Group (September 2018) Final Report on Testing of Proposed Customer Relationship Summary Disclosures at [Link]; and Kleimann Communications Group (December 2018) Report on Development and Testing of Model Client Relationship Summary at [Link]

[22] Hauptman, Micah and Roper, Barbara (January 2017) "Financial Advisor or Investment Salesperson? Brokers and Insurers Want to Have it Both Ways" *Consumer Federation of America* at [Link]

> *true advisors because they do not actually provide unbiased advice and are not engaged in relationships of trust and confidence with their clients . . .*
>
> *Instead, they claimed that broker-dealer reps are just "salespeople" engaging in activity "whose essence is sales" that is no different from other commercial sales relationships in which "both parties understand that they are acting at arms' length." They therefore claim that it is more appropriate that they be held to a sales-based "suitability" standard rather than an advice based fiduciary standard. (pgs. 3 - 4)*

This report captures the 'information confusion' perpetuated by industry lobbyists, some of whom testified on December 12 & 13. There is little question that the overriding purpose is for brokers and insurance agents to be regulated as "salespeople" and viewed by the public as fiduciary advisors.

Summary Conclusion

In his testimony, law professor Benjamin P. Edwards offers good advice to the Department.[23] It is:

> *You are likely to face a flood of dubious arguments. . . The lesson I would take . . . just because you are presented with something that reads a particular way, don't assume that it is actually correct. (p. 90)*

What fiduciary means is articulated by scholars, regulators and jurists.

We offer the views of jurists, legal experts and policy leaders over the past 90 years on the meaning and importance of fiduciary advice. From FDR and the Investment Advisers Act to SEC Chair Arthur Levitt and law professor Tamar Frankel, key themes and issues are discussed. DOL Assistant Secretary Gomez and Deputy Assistant Hauser articulate how the proposed rulemaking aims to ensure that ERISA fiduciary advice reflects longstanding fiduciary principles.

Testimony evaluated. It is against this background that the views and recommendations of commenters should be evaluated. This is not a matter of "agreeing" with the DOL. It is considering the underlying principles and recommendation espoused and the questions asked. Testimony from the American Benefits Counsel and American Retirement Association raise worthy questions. The exchange between Tim Hauser and Thomas Roberts illuminates different views on what is advice and sales.

Groups that oppose the proposal reject more than the proposal. **By their own omissions in their comments at the hearing, they implicitly reject the existence or relevance of the fiduciary standard. Opponents' testimonies reveal a contempt for fiduciary advice.**

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[23] *Supra*, **Note 1** at p. 90.

Their omissions speak loudly. There is no mention from opponents that costly, complex and opaque products, as NASAA research identifies, continue to thrive and harm investors. There is also no mention from opponents that a fiduciary standard benefits retirement investors over the lower standard in Reg BI or the NAIC model rule. Instead, rule opponents repeatedly claim there is no need for a DOL rule and a fiduciary standard that puts the interests of the retirement investor first.

The most revealing testimony among rule opponents was that of Davis & Harmon (page 177). Davis & Harmon should be credited for their candor. Their testimony came closest to saying explicitly what other rule opponents suggest implicitly. The intensity and sharpness of the critique of the DOL proposal stands out.

> *I know that all the hardworking folks at the Department of Labor truly believe that this proposal will enhance retirement security. Unfortunately, that is not the case, in fact it will be the opposite . . . I'm just asking you, look at the facts, look at the harm, look at where this is going, and please reconsider, please withdraw this proposal. And thank you again for allowing me to testify.*

The implicit criticism is a sharp rebuke of fiduciary advice. Implicitly, by not mentioning the existence or considerations of fiduciary advice, rule opponents ignore its legal significance. Fiduciary advice is relegated to irrelevance.

In this manner, the backdrop of history and law where conflicts of interest are widely viewed as harmful to fiduciary advice, opponents of the DOL proposal remain silent on conflicts' harms. This silence demonstrates 'support' for conflicts of interest.

The Department has rendered investors, advisors, brokerage firms and the capital markets a huge public service by articulating and advancing fiduciary principles. The Department is, indeed taking to heart the wisdom of professor Frankel:

> *The most effective way to destroy any healthy and lasting economy and financial system is to relieve intermediaries – whether advisers, brokers, bankers, or others – of a duty to be trustworthy.*

Thank you for your proposal and consideration of these comments. We welcome addressing any further questions.

Sincerely,

Knut A Rostad

President