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Definition of the Term ''Fiduciary''; Conflict of Interest Rule—Retirement Investment Advice; Notice of proposed rulemaking and withdrawal of previous proposed rule.

Comment On: EBSA-2010-0050-0205
Definition of Fiduciary; Conflict of Interest Rule-Retirement Investment Advice and Related Proposed Prohibited Transaction Exemptions; Hearing and Comment Period Extension

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General Comment

The EBSA proposed rule seeks to redress alleged harms to consumers due to the sale, by commissioned advisors, of "broker-sold" mutual funds and other instruments. Regrettably, it seems to proceed from the unspoken assumption that advisors ought to work for free. In noting that commissionable "broker-sold" funds have been far more expensive to consumers than "no load" index funds, it ignores the fact that fee-compensated advisors using such index funds must charge for their services. I was unable to find any indication that the FEES that those fee-compensated advisors charge were taken into account in the reckoning of how "expensive" each type of fund is.

Moreover, the "Best Interest Contract" requirements are very poorly thought out. What advisor will, or even should, WARRANT that his compensation is "reasonable", without any indication of what that term will be held to mean? "Reasonable" according to whom?

This "contract" appears to mean that an advisor is committing to the consumer that he will recommend only "the best" product. What does that mean? Who will judge what "the best" product for a particular consumer, in a particular situation, is or would be? Is an advisor to be held accountable for reviewing EVERY SINGLE PRODUCT AVAILABLE IN THE MARKETPLACE before making a recommendation? What if that advisor CANNOT recommend a particular product because she is not, and cannot become, appointed with the company issuing that product?

What factors will regulators and those exercising jurisdiction over product sales take into account in determining "the best" product? Premium level, for an insurance product, cannot be such a metric. Often, the lowest premium will produce a product that has little chance of persisting for the time required. Will the cost of certain options be judged "unnecessary"?

The current "suitability" standard applicable to insurance agents and registered representatives offering products to qualified plans and IRAs already provides strong protections for consumers. As one who does considerable work as an Expert Witness in litigation involving insurance and investment products, I can state with confidence that the "suitability" standard DOES NOT permit an advisor subject to that standard to ignore the client's best interest and sell anything he or she wishes, regardless of its suitability for the client.

Many advisors who now offer needed and valuable advice to consumers with modest portfolios will not do so if they are held to an expensive-to-observe and dangerously vague standard of care. Those consumers will lose access to professional advice that they need, arguably much more than those with large portfolios.

The EBSA needs to work with the SEC in crafting a standard of care that is both equitable (for ALL concerned) and WORKABLE!