



July 20, 2015

Phyllis C. Borzi  
US Department of Labor  
Assistant Secretary of Labor  
Employee Benefits Security Administration  
200 Constitution Ave, NW  
Washington, DC 20210

**RE: Department of Labor, Employee Benefits Security Administration  
RIN 1210-AB32**

Dear Assistant Secretary Borzi:

Thank for you for the opportunity to submit comments regarding the proposed rules about conflicts of interest in retirement advice and establishing a fiduciary standard for those who provide this advice. The Savings Coalition of America (Savings Coalition) believes that Americans should have access to financial education and advice and that any changes to the current regulations overseeing the advice on IRA investments must be done carefully and with that objective in mind. Any final rule should provide investor protection without reducing investor access to affordable retirement advice, products and services.

The proposed rule applies a "best interest standard" more widely than what is currently being used. If adopted, the proposal would treat persons who provide investment advice or recommendations to an employee benefit plan, plan fiduciary, plan participant or beneficiary, IRA, or IRA owner as fiduciaries under ERISA. This would significantly increase the number of fiduciary relationships than what exists today.

The Savings Coalition supports the principle that financial advisors act in best interest of their clients and feels that the implementation of a proposed rule should be practical and easily understood by all involved; especially the saver. The Savings Coalition believes that an expanded fiduciary standard should not adversely affect American retirement savers by being more confusing and costly. The Savings Coalition is commenting on the fiduciary standard as it applies to Individual Retirement Accounts (IRAs). IRAs have a key role in retirement savings and rollovers from employer plans.

### **Best Interest Contract Exemption (BICE)**

The proposed rules include a Best Interest Contract Exemption that *“would apply when prohibited compensation is received as a result of advice to retail `retirement investors” including plan participants and beneficiaries, IRA owners, and plan sponsors (or their employees, officers or directors) of plans with fewer than 100 participants making investment decisions on behalf of the plans and IRAs.”*

### **Pre-Advice Contract:**

The BICE would require a financial advisor to have a potential client sign a contract prior to any significant conversation about their finances take place in order to ensure they do not inadvertently offer retirement advice. The proposed rule, if implemented, would have this presented to a potential client before making any recommendations.

Usually, when a prospective client first meets with an advisor, it is an introductory conversation between the client and advisor where the advisor provides information, generally describes available options and basically the advisor and client get to know one another. The requirement of having a pre-advice contract makes this initial meeting confusing for the saver as he/she may feel like they have already signed up to an advisor/firm instead of just an initial informational meeting.

### **Approved Investments:**

A requirement of the BICE is that in order to qualify for its protections, an advisor may only provide retirement advice regarding investments that are contained within BICE’s list of approved investment options available to plans and IRAs.

There are a number of other assets in which a client could invest that are not included in the list. Financial advisors are in the unique position to know their clients’ interests, risk tolerance and goals. At the very least, the requirement should allow investments in all options that can be used today.

### **Disclosure of Information:**

The BICE requires that firms maintain a publically-accessible website that is updated on at least a quarterly basis. In addition, that website must have detailed information “about all direct and indirect compensation payable to the adviser, his company, and all company affiliates with respect to ***every single asset*** purchased, sold, or held by a retirement customer during the last 365 days (excluding only certain assets not commonly purchased). In addition, the webpage must include the same information about ***all assets that a retirement customer could possibly purchase (subject to the same exclusion).***<sup>1</sup> In addition, “Before a recommended purchase of an asset is made, the advisor must provide a chart to the customer with the “Total Cost” of the

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<sup>1</sup> Statement of Kent Mason, Davis & Harman, LLP, before the Subcommittee on Health, Employment, Labor and Pensions, Committee on Education and Workforce, US House of Representatives, June 17, 2015, page 10

asset over 1, 5 and 10 year periods, as a dollar amount, **which requires the advisor to make assumption about future investment performance.**"<sup>2</sup>

Meeting this requirement is complex and burdensome. Financial Advisors can recommend a broad range of investment products with each having its own compensation model. This is a massive undertaking and costly to all firms that provide financial advice – both large and small. In turn, these costs will probably be passed on to the client. In addition, the information provided can be complicated resulting in the ironic situation that a client may have to ask the advisor for assistance just to understand this provision.

#### **Exposure to Lawsuits:**

There is concern that, inadvertently, requirements under BICE will make financial advisors vulnerable to class action lawsuits. This liability is not included under ERISA or other related statute today. This is a result of the contract that a financial advisor and firm will have to enter into with a client and other requirements of BICE.

Based on other provisions of BICE, there is a concern that advisors and firms, inadvertently may make an error (in the transposing information for the disclosure requirements, for example) that would result in an increase in lawsuits against the advisors and firms. This would also reflect in an increase in the costs of insurance premiums to protect against this liability. All of this resulting in more cost to provide advice therefore more cost to the clients.

#### **401(k) Rollovers are Complicated:**

When finalizing the proposed rules for a fiduciary standard, the Savings Coalition would like to ensure that all American retirement savers have access to important financial advice. There is concern that the proposed rules will negatively impact Americans as they make major decisions about when and how to take distributions from their retirement accounts. While one of the 401(k) distribution options is a rollover into an IRA, some plans do not allow the retiree to remain in the plan thereby requiring that the funds be rolled over to an IRA or annuity. This is a critical time for Americans who are about to retire and retirees to seek financial advice as it is complicated. When American workers leave their jobs, either voluntary (including retirement) or involuntary, there are 4 options that individual can take:

- ***Cash Out the 401(k)***

When someone cashes out of his/her 401(k), he/she is taxed on the withdrawal and potentially penalized. Any amount withdrawn is subject to federal, and possibly state and local, taxes and could be subject to a 10% early withdrawal penalty if younger than age 59 ½.

- ***Keep Money in Current Plan***

The worker would have to check with the administrator to see if this is an available option. Then that person would need to ask if there are extra fees for keeping his/her

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<sup>2</sup> Ibid

money in the plan, and if he/she can roll the plan over down the road if he/she changes his/her mind.

- **Rollover to New 401(k) Plan**

If the worker has access to the new employer's plan right away and it offers good low-cost investments.

- **Rollover to an IRA**

A rollover to an IRA is another option. The worker/retiree would have to check to see if he/she can lower his/her investment expenses as well as gain access to a wider variety of investment options.

This illustrates how complicated the decision making process can be for the individual worker/retiree in America and the importance of having a trusted advisor who can navigate the maze of options available and assist the client in making the decision that is right for him/her.

“Under the DOL proposal, financial institutions would be prohibited from providing any specific assistance to individuals seeking help with the rollover and distribution process. This is the case in large part because any financial institution providing IRA services would have a conflict of interest with respect to the advice regarding the rollover decision, thus creating a prohibited transaction. Most read the BIC exemption in the re-proposal as not covering this type of assistance thus rendering the assistance categorically prohibited. Others read the BIC exemption as technically applicable to this assistance, but effectively unavailable because of the exemption's unworkable conditions. Either interpretation denies assistance to many in need of help in navigating the retirement savings options that exist after termination of employment. Among many unfortunate consequences, this would cause a drastic curtailment of call center, brokerage and other assistance to those terminating employment, leading to greatly increased leakage of assets from the retirement system.”<sup>3</sup>

### **Will Financial Advisors Continue to Provide Advice Under the Proposed Rule?:**

The proposed rule assumes that advisors will continue to offer advice under the BICE. According to testimony given by Brian Reid, Chief Economist of the Investment Company Institute at a hearing before the House Subcommittee on Health, Education and Employment, “the DOL argues that IRA investors currently pay between 26 and 28 basis points per year in front-end loads, in addition to fund expenses. A recent study by Cerulli Associates finds that fee-based accounts – the most likely alternative to brokerage accounts – cost investors 111 basis points per year on average, in addition to fund expenses.”<sup>4</sup> Reid goes on further to state, “. . . the Best Interest Contract Exemption is prohibitively costly, in addition to being convoluted and unworkable. Brokers subject to the Exemption's many new limitations, burdens, and costs, as

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<sup>3</sup> Ibid, page 7

<sup>4</sup> Statement of the Investment Company Institute, Brian Reid, Chief Economist, Hearing on “Restricting Access to Financial Advice: Evaluating the Costs and Consequences for Working Families and Retirees,” Subcommittee on Health, Education, Labor and Pensions, Committee on Education and the Workforce, US House of Representatives, June 17, 2015, page 4

well as increased exposure to liability, are not likely to work for *less* compensation, as the DOL presumes.”<sup>5</sup>

### **What is Education and What is Advice?:**

What is currently considered to be education, under the proposed rule, will be advice. Currently, allowable investments for IRAs are considered to be financial education. There must be a clear designation about the difference between advice and education. For example, an advisor should be able to tell clients within a certain asset classes about the funds that are there. Currently, this is considered education and under the proposed rule, it would be considered advice.

“ . . . Fidelity offers best in class operational support, including contribution calculations, participant notifications, plan testing and reporting, as well as assistance with plan amendments. Employees receive employee education and financial planning advice through a variety of channels including Net Benefits, employee meetings, digital and mobile access, and one-on-one assistance with guidance representatives skilled in the client’s specific design plan. Unfortunately the Department of Labor’s proposal would put a stop to these offering. The Labor proposal would classify the assistance we provide to small businesses (which today is education) as fiduciary investment advice.”<sup>6</sup>

### **Unintended Consequences:**

BICE creates a new set of requirements that are currently not covered by ERISA today. There is a concern that there will be an increase in class action lawsuits based on this, thereby increasing the costs of providing the advice. The Savings Coalition believes that *all* financial advisors should be held to a “best interest of the client” standard. However, it should not be so cumbersome and costly that advisors decide not to serve lower and moderate income savers or leave the already highly regulated business entirely. This is particularly important for financial advisors who work in small firms throughout the country.

### **Conclusion:**

The Savings Coalition believes that the current law requiring the SEC to act on a fiduciary standard should be implemented and there needs to be coordination among federal agencies on a uniform standard. Retirement savings are an important part of every American’s financial future and it is critical that Americans have access to financial advice to ensure they have financially secure retirements. It is critical that Americans retirements not be adversely affected by the proposed rules.

There are key components to providing advice and the relationship between the advisor and client that need to be clearly understood by all involved in the process and the final rule needs to address that. If the Best Interest Contract Exemption is to be useful, it should allow savers to

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<sup>5</sup> *ibid*

<sup>6</sup> Statement of John F. Haley Jr., Fidelity Investments, before the Subcommittee on Health, Employment, Labor and Pensions, Committee on Education and the Workforce, US House of Representatives, June 17, 2015, pp 5-6

talk with financial advisors prior to signing a contract before they talk; allow for all investments currently allowed in IRAs; have workable internet disclosures and data production requirements that are not so cumbersome that they could lead to inadvertent mistakes (when transcribing data for example) which could cause advisors to be sued; and have reasonable, easily understood data requirements that are not prohibitively costly. It is especially important that it not be so cumbersome for financial advisors that compliance greatly increases the cost of providing advice, thereby significantly increasing costs to American savers.

The Savings Coalition has long been a supporter of improving financial literacy in America. Twenty-two states require students to take an economics course as a high school graduation requirement. The lack of financial education is often cited as a problem among Americans from not understanding student loans, to understanding how saving early helps to lead to a more secure retirement. Understandably, all of us want advisors to work in the best interests of their clients. We should also make sure that savers understand all of the financial products and opportunities available to them by making sure they have access to financial education.

Sincerely,

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