A. L. Davis

September 15, 2015

Via Electronic Mail and www.regulations.gov

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
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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

Good Morning, Ladies and Gentlemen:

I appreciate the opportunity to comment on the United States Department of Labor's ("Department") Employee Benefits Security Administration's ("EBSA") proposed regulation(s) 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 further, will establish a best interest contract exemption (such proposals hereinafter individually as well as collective referred to as the "Proposal"). I trust that my comments are helpful to the Department as it assesses the potential impact of the Proposal, particularly on individual retail retirement investors such as myself, and considers the recommended revisions as more fully set forth below.

I.

INTRODUCTION

As an initial matter, I respectfully adopt the comments offered by the Small Business Administration's ("SBA") Office of Advocacy ("Advocacy") on July 17, 2015 (Available at: http://www.dol.gov/ebsa/pdf/1210-AB32-2-00403.pdf) (Last Visited on September 15, 2015), and wholly incorporate and integrate the same herein by reference thereto. Specifically, I share the concerns advanced by the SBA's Advocacy's Acting General Counsel, Ms. Claudia Rodgers, that the Proposal evinces a departure from the essential, threshold requirements of clearly-established law, namely, the Regulatory Flexibility Act, 5 U.S.C. Section 601, et seq. ("RFA"), because the Department's Initial Regulatory Flexibility Analysis ("IRFA") contained in the same is deficient. Id. at pp. 1-5. Accordingly, I concur with Advocacy's recommendation that the Department republish for public comment a Supplemental IRFA before proceeding with its Proposal.

Furthermore, I request the Department conduct another round of live hearings on a Supplemental IRFA so that it may proceed on the basis of a fully-developed rulemaking record.

II.

DISCUSSION

A.

Preliminary Statement.

Even if the Department has a legal basis upon which it can lawfully proceed with its Proposal by certifying that the public interest will not be advanced by a Supplemental IRFA, nevertheless, the Proposal is flawed because: (1) the Department's proposed broad definition of the term “fiduciary” would certainly operate to diminish the ability of retail brokerage firms like Charles Schwab, Fidelity, and TD Ameritrade to provide free or low cost investment data, tools, research, education and support services to retail retirement investors (“IRA Investor(s)”); and (2) the Department's proposed limited list of permitted assets which, notably, *excludes* exchange-listed call and put options, amounts to no more than a solution searching for a problem, and is, thus, very harmful to IRA investors, including, by way of specific example, but not necessarily limited to, those retirees who rely on premiums earned from selling call options fully secured by stock ownership to supplement their income. I will touch on each point, in turn.

B.

The Department's broad definition of the term “fiduciary” would pose a substantial harm to IRA investors.

The Department’s proposed broad definition of the term“fiduciary” would operate to diminish the ability of retail brokerage firms to provide free or low cost investment data, tools, research, education and support services to IRA investors. In fact, absent a so-called “best interest contract,” a firm would only be able to deal with IRAs: (1) on a strictly order-taker basis; or (2) pursuant to an advisory account with an asset-based fee. Under the first alternative, IRA investors would experience the bare bones, self-directed brokerage account of the 1990s – having to complete transactions with little to nothing in the way of trading tools, stock screeners, and education.The second alternative would, in all probability, result in transitioning many IRAs from a strictly transaction-based payment structure to an asset fee-based model. Clearly, both alternatives appear to be inconsistent with the result the Department is trying to achieve – serving the best interest of the IRA investor.

IRA investors need, and have become quite 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. The effect of the Proposal would be to severely limit information, education and affordable choices that such investors currently have.

To be sure, IRA investors come to brokerage firms online, by phone and in-person visits to branch offices to discuss various products and services, the many investment options available to them, and financial investment education. The Department's Proposal would certainly result in extremely limited, or worse, 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, I have reasonable cause to believe that future retirees such as myself would be required to either incur additional expense to meet their essential retirement-planning needs, or much worse, choose to remain ignorant about the risks of their investmenet decisions. This would not be good public policy.

Furthermore, without any support, tools or education as to the benefits of keeping their assets in the retirement system (either in a vehicle such as a defined-benefit retirement plan or in a new IRA rollover), IRA investors' leakage of assets from the retirement system would accelerate. This will result even though the best intentions of the Department are to enhance and improve the regulatory protections available to IRA investors and to encourage retirement savings. See, Wyman, Oliver, "The Role of Financial Advisors in the U.S. Retirement Market," dated July 10, 2015 (Available at:http://fsroundtable.org/wp-content/uploads/2015/07/The-role-of-financial-advisors-in-the-US-retirement-market-Oliver-Wyman.pdf) (Last Visited on September 15, 2015).

C.

The Department's proposed limited list of permitted assets which, notably, *excludes* options, amounts to a solution searching for a problem, and is, thus, very harmful to IRA investors including those retirees who rely on premiums earned from selling call options fully-secured by stock ownership to supplement their income.

In what appears to be the first time in its history, the Department is proposing a limited list of permitted assets. IRA investors such as myself currently have a wide choice of investments for their IRAs, many of which are not included in the Department's proposed list. And those not included may be used for important risk mitigation and investment diversification purposes. One glaring *exclusion* is exchange-trade call and put options. IRA investors understand that a tax-deferred investment account is the ideal place to generate income from a stock portfolio; options when coupled with sound education and brokerage firm investor qualification processes can be used to minimize the risks associated with investing in stocks. See, the comments offered by Ms. Ellen L. S. Koplow, Executive Vice President and General Counsel, TD Ameritrade Holding Corporation dated July 21, 2015 (Available at: http://www.dol.gov/ebsa/pdf/1210-AB32-2-00743.pdf) (Last Visited on September 15, 2015).

Moreover, without the ability to trade options in an IRA, current as well as future retirees would lose the ability to protect an overall stock portfolio, or for that matter, an investment in a particular company's stock by, for example, purchasing exchange-traded put options for downside protection. Viewed another way, this is is in the nature of "stock insurance."

EXAMPLE: IRA Investor owns 100 shares of Apple (AAPL: NYSE) which closed at $116.28 per share as of Tuesday, September 15, 2015 at 4:00 P.M. Eastern Time, and wishes to purchase "stock insurance" in the way of one (1) put contract for $110.00 per share for the next three (3) months, that is, until Friday, December 18, 2015, in exchange for paying a premium in the sum of $4.98 per share. As a result, the IRA Investor is

guaranteed to receive no less than $105.02 per share times 100 shares ($110.00 per share protection less the $4.98 per share premium paid) which equals $10, 502.00 through Friday, December 18, 2015, for each put contract purchased.

Similarly, by selling exchange-traded call options secured by stocks, an IRA investor can attain the benefit of maintaining an investment in stocks while generating income. This affords the investor some downside protection.

EXAMPLE: IRA Investor owns 100 shares of Apple (AAPL: NYSE) which closed at $116.28 per share as of Tuesday, September 15, 2015 at 4:00 P.M. Eastern Time, and wishes to sell one (1) call contract covered by the 100 shares owned which allows another investor the right but not the obligation to purchase the 100 shares for no more than $120.00 per share through Friday, December 18, 2015, in exchange for the other investor paying the IRA Investor a premium in the sum of $5.30 per share. If Apple is trading above $120.00 per share by Friday, December 18, 2015, the IRA Investor will have to deliver the 100 shares to the investor purchasing the call option contract, but the IRA Investor will get to keep the premium received. If Apple is trading below $120.00 per share as of Friday, December 18, 2015, it is likely that the IRA Investor will get to keep both the 100 shares of Apple stock as well as the premium received from having sold one (1) call option contract. In this example, the IRA investor generated income of $530.00 on the current market value of the 100 shares of Apple stock in the sum of $11, 628.00, for having committed to deliver such shares to another investor during a three (3) month period of time.

Furthermore, an IRA investor can sell exchange-traded put options secured by cash with the aims of generating income and purchasing a stock at a price lower than the current market price. Here again, the investor would attain downside protection.

EXAMPLE: IRA Investor wishes to generate income in exchange for committing to purchase 100 shares of Apple (AAPL:NYSE) for $110.00 per share, which is $6.28 per share less than Apple's closing price of $116.28 per share as of Tuesday, September 15, 2015 at 4:00 P.M. Eastern Time, through Friday, October 23, 2015, in exchange for receiving a premium in the sum of $2.69 per share. IRA Investor also wishes to buy 100 shares of Apple at a discount from its current market price. IRA Investor will need to secure the commitment with cash in the sum of $10,731.00 (Commitment to purchase at $110.00 per share, less premium received of $2.69 per share, equals $107.31 per share times 100 shares). If Apple is trading at or below $110.00 per share as of Friday, October 23, 2015, then IRA Investor will have to deliver cash in the sum of $10,731.00 out of the IRA in order to honor the obligation to purchase 100 shares of Apple stock but gets to keep the $2.69 per share in premium received totaling $269.00. If Apple is trading above $110.00 per share as of Friday, October 23, 2015, then in all probability IRA Investor will get to keep both the cash set aside to honor the commitment to purchase 100 shares of Apple stock through said date plus the premium already received.

NOTE: THE FOREGOING EXAMPLES DO NOT ACCOUNT FOR OR INCLUDE BROKERAGE COMMISSIONS/TRANSACTION COSTS.

III.

THE BOTTOM LINE

The bottom line is: quite apart from the Department's disturbing failure to comply with the requirements of the RFA because of a deficient IRFA in its current Proposal, the Department's broad definition of "fiduciary," coupled with its a rather extraordinary measure *excluding* exchange-traded call and put options from its proposed permitted list of assets would be harmful to IRA investors. This is so because it will surely result in increased costs to investors like myself, who have smaller investment accounts. Further, excluding options from the proposed list would lead to less tools to defend against market forces which undoubtedly impact stock portfolios, and substantially curb retirees' ability to supplement their income. This would not be good public policy; on the contrary, it would defeat the very purpose of protecting current as well as future retirees' savings.

IV.

RECOMMENDATIONS

For the reasons set forth above, I recommend the Department take the following action:

First, I respectfully renew my request that the Department prepare a Supplemental IRFA and conduct hearings thereon before proceeding with its Proposal. Here again, I concur with the position and recommendation advanced by the SBA's Advocacy General Counsel.

Secondly, assuming that the Department proceeds with its current Proposal with or without a Supplemental IRFA, it should substantially narrow its proposed definition of the term "fiduciary," in a manner that is reasonably-calculated to uphold, preserve, and protect IRA investors' current unrestricted access to, and enjoyment of, free or low cost investment data, tools, research, education and support services. Moreover, I concur with the position and recommendation advanced by Mr. Christopher Gilkerson, Senior Vice President and General Counsel, and Ms. Gail B. Mayland, Vice President and Associate General Counsel, Charles Schwab, in the filed comments dated July 20, 2015, at pp. 8-10 (Available at: http://www.dol.gov/ebsa/pdf/1210-AB32-2-00571.pdf) (Last Visited on September 15, 2015).

Finally, and most importantly, the Department should *include* exchanged-traded call and put options on the list of permitted assets contained in the final rule. Here again, I concur with Charles Schwab's recommendation as set forth in the a foregoing comments at Exhibit 1, id, at pp. 24-25. See also, comments of Mr. Craig S. Donohue, Executive Chairman, Options Clearing Corporation ("OCC") dated July 17, 2015, at pp. 2-3 (Available at: http://www.dol.gov/ebsa/pdf/1210-AB32-2-00420.pdf) (Last Visited on September 15, 2015).

Thank you, again, for the opportunity to comment on the Department's Proposal.

Yours truly,

A. L. Davis