

December 28, 2023

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

Attention: Definition of Fiduciary—RIN 1210–AC02;
Application No. D–12057; Application No. D–12060

Assistant Secretary Gomez:

I write to express strong support for the Department of Labor’s Retirement Security Proposal because it will significantly improve the current market for investment and financial advice and the outcomes for individuals who obtain financial advice about retirement assets. I have spent much of my career researching and writing about the law and markets for investment advice. Many of my law review articles focus on these issues.¹ I have also had direct experience representing investors who have been harmed by self-serving and conflicted financial advice. I offer my comments on the proposal from this perspective.

I. American Retirement Savers Are Not Well-Positioned To Protect Themselves from Conflicted Financial Advice

At the outset, a series of factors make American retirement savers particularly vulnerable to exploitation through conflicted and self-serving investment advice.

A. American Savers Generally Lack Significant Financial Literacy

For decades, it has been well-known that the American public generally lacks financial literacy.² This makes them ill-equipped to evaluate and monitor financial advice. Leaving the quality of financial advice to the market in this environment means that the market will contain significant exploitation and self-dealing because consumers struggle to detect low-quality advice.

Financial advice differs from other ordinary sales relationships. If a person visits a restaurant, their mouth tells them whether the food tastes good or bad. You cannot learn anything about an annuity contract’s quality by putting it in your mouth and chewing it. Moreover, an annuity contract generally costs significantly more and will have a larger impact on a person’s financial situation. Similarly, consumers have more capability to readily discern whether a used

¹ See Benjamin P. Edwards, *The Rise of Automated Investment Advice: Can Robo-Advisers Rescue the Retail Market?*, 93 CHI.-KENT L. REV. 97 (2018) (discussing automated investment advice); Benjamin P. Edwards, *The Professional Prospectus: A Call for Effective Professional Disclosure*, 74 WASH. & LEE L. REV. 1457 (2017) (discussing professional disclosure); Benjamin P. Edwards, *Conflicts & Capital Allocation*, 78 Ohio St. L.J. 181 (2017) (discussing how conflicts skew capital allocation decisions).

² OFFICE OF INV’R EDUC. & ADVOCACY, U.S. SEC. & EXCH. COMM’N, STUDY REGARDING FINANCIAL LITERACY AMONG INVESTORS iii (2012) [hereinafter SEC, FINANCIAL LITERACY STUDY], <http://www.sec.gov/news/studies/2012/917-financial-literacy-study-part1.pdf>.

automobile meets their need than they do an insurance contract. If you want to buy a sedan, any person of ordinary intelligence with functioning eyes will immediately be able to tell the difference between a pickup truck, sedan, or cargo van. In contrast, financial products may require significant education and time to understand and compare.

Moreover, Americans should not need to protect themselves from bad financial advice because requiring self-protection destroys the purpose of financial advice. People seek and rely upon financial advice because they know that they do not understand enough to decide on their own and desire assistance from someone better informed.

B. Americans Operate Under a Mistaken Assumption that Persons Giving Advice Already Owe a Fiduciary Duty

Americans also currently operate under an assumption that the persons giving them financial advice do so under an obligation to give advice in their best interest.³ Both significant evidence and common sense support the conclusion that investors and savers now believe that people giving them advice do so in their best interest. Indeed, financial services firms have long advertised their services and stressed that consumers should come to them for advice.⁴ The SEC's research confirms this as well.⁵

It should not be surprising that the public expects financial advice to be given in a saver's best interest because people act on recommendations from financial advisers. If the public did not trust financial advisers, they would not act on the advice.

C. Cognitive Decline Often Inhibits Investor Self-Protection

Adding to the need for protection, many retirement savers access markets for financial advice at times during their lives when they may have begun to experience cognitive decline. A vast body of medical literature confirms that cognitive decline affects a large percentage of the population.⁶

³ To be clear, I use the term best interest here in the ordinary sense of the word, not in the strained and technical way some regulators have defined it.

⁴ Arthur B. Laby, *Selling Advice and Creating Expectations: Why Brokers Should Be Fiduciaries*, 87 WASH. L. REV. 707, 756 (2012) (documenting that brokerage firms have long advertised that they provide personalized advice); Joseph C. Peiffer & Christine Lazaro, *Major Investor Losses Due to Conflicted Advice: Brokerage Industry Advertising Creates the Illusion of a Fiduciary Duty: Misleading Ads Fuel Confusion, Underscore Need for Fiduciary Standard*, 22 PIABA B.J. 1, 1 (2015) (contrasting advertisements purporting to put client interests first with arbitration defenses from the same institutions arguing that they do not owe a duty to put client interests before their own).

⁵ U.S. SEC. & EXCH. COMM'N, STUDY ON INVESTMENT ADVISERS AND BROKER-DEALERS i (2011).

⁶ Hale JM, Schneider DC, Mehta NK, Myrskylä M. Cognitive impairment in the U.S.: Lifetime risk, age at onset, and years impaired. *SSM Popul Health*. 2020 Mar 31;11:100577. doi: 10.1016/j.ssmph.2020.100577. Erratum in: *SSM Popul Health*. 2020 Dec 10;12:100715. PMID: 32300635; PMCID: PMC7153285.

Rates of cognitive decline increase with age.⁷ Between age 65 and 90, dementia rates double approximately every five years.⁸

Many persons begin to focus on retirement as they approach retirement age and their risk for cognitive decline increases. Persons approaching retirement often have significant savings and need assistance to navigate a complex financial landscape. Imposing meaningful obligations on persons giving advice in this market makes sense because many persons may be uniquely vulnerable to exploitation.

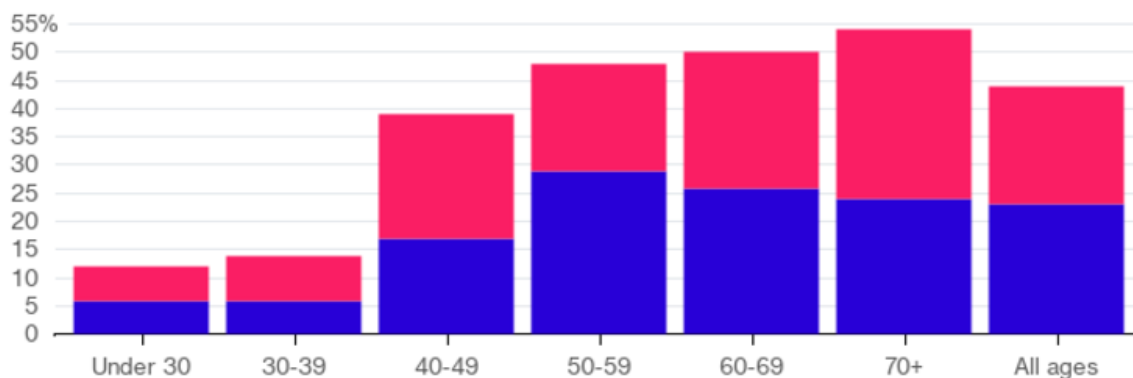
D. Investors Often Do Not Understand How Financial Advisers Are Paid

Although some may contend that investors should be able to distinguish fiduciary advice from mere sales relationships, existing evidence shows that the public frequently struggles to understand how financial advisers actually get paid. One study found that about a quarter of older Americans incorrectly believe that advice is free.⁹ The same study found that about another quarter do not understand how their adviser gets paid.¹⁰ These findings cohere with my personal experiences talking to investors. They often lack any understanding about how their adviser was paid.

No Free Lunch

Young people are far more aware of what investment advisers cost than older Americans.

■ Incorrectly believe advice is free ■ Not sure what fees they pay



Cerulli Associates survey released Feb. 2017

Bloomberg 

⁷ *Id.*

⁸ Corrada MM, Brookmeyer R, Paganini-Hill A, Berlau D, Kawas CH. Dementia incidence continues to increase with age in the oldest old: the 90+ study. *Ann Neurol*. 2010 Jan;67(1):114-21. doi: 10.1002/ana.21915. PMID: 20186856; PMCID: PMC3385995.

⁹ The study was cited in: Ben Steverman, *Fiduciary Rule Fight Brews While Bad Financial Advisors Multiply* (2017) <https://www.fa-mag.com/news/fiduciary-rule-fight-brews-while-bad-financial-advisors-multiply-33122.html>.

¹⁰ If you want your own copy of Cerulli Associates research, you'll need to ask them yourselves. Most of their reports list a sticker price between \$10,000 and \$20,000, far more than my modest budget.

The findings should also not surprise because persons selling products on commission have no incentive to highlight this fact for savers and make it more salient to them. Nothing would spoil a fixed-indexed annuity sale faster than making sure the saver understood the size of the insurance producer’s kickback for securing the sale. Bafflingly, the current model “best interest” regulation excludes compensation from material conflicts of interest.¹¹ As compensation is not “material” under the regulation, insurance producers do not encourage customers to focus on it.¹² At most, insurance producers give a disclosure about the kind of compensation to be received and the consumer’s right to request additional information about the insurance producer’s compensation.¹³ The addition of an additional scrap of paper leaving a breadcrumb trail to information about how much an insurance producer might receive does not produce improved comprehension.

Despite the insurance industry decision to definitionally exclude compensation from materiality, it remains highly material. Even if a saver understood that an advice-giver would receive compensation upon completing a transaction, the saver will likely not understand the massive differentials available depending on the product sold. Differential compensation means that insurance producers and stockbrokers will receive different amounts depending on the product sold. This gives them an undeniably material incentive to favor certain products over others. For example, insurance industry materials indicate that selling fixed-indexed annuities over other annuity products will *quadruple* an insurance producer’s commissions.¹⁴ Curiously, compensation appears material for insurance producers deciding what to push onto clients but not material for the clients purchasing them under the model “best interest” regulation.

II. Focusing on Conduct Instead of Product Reduces Regulatory Arbitrage Toward Insurance

Current laws for investment advice create significant opportunities for regulatory arbitrage. Our current system creates different standards for advice whether the person giving the advice is a registered investment adviser, a stockbroker, or an insurance producer.¹⁵ Different rules apply to each even though they all do essentially the same thing—give people advice about how to manage their money to ensure that they will have enough for retirement and be able to achieve their financial goals.

Imposing a uniform standard for advice given to retirement savers about their retirement accounts will reduce needless complexity and create an even playing field and generally reduce misconduct.

¹¹ See NAIC, Suitability in Annuity Transactions Model Regulation, <https://content.naic.org/sites/default/files/model-law-275.pdf> (“Material conflict of interest’ does not include cash compensation or non-cash compensation.”)

¹² It is material under ordinary understandings of the term.

¹³ *Id.*

¹⁴ See e.g., New Horizons Insurance Marketing, A Beginner’s Guide to Selling Fixed Indexed Annuities (FIAs), <https://blog.newhorizonsmktg.com/a-beginners-guide-to-selling-fixed-index-annuities-fias1544> (last visited Dec. 27, 2023) (“FIAs give about 4 times the commission of a MYGA”).

¹⁵ See Christine Lazaro & Benjamin P. Edwards, *The Fragmented Regulation of Investment Advice: A Call for Harmonization*, 4 MICH. BUS. & ENTREPRENEURIAL L. REV. 47, 52 (2014).

As it stands today, the insurance industry now collects billions of dollars annually from the sale of fixed-indexed annuity products. By one recent report, fixed-annuity sales may exceed \$300 Billion in 2024.¹⁶ The assets funding these purchases often come from retirement savings accounts.

In reality, many indexed-annuity sales seemingly occur alongside violations of the securities laws. The money used to purchase a fixed-indexed annuity needs to come from somewhere. If the funds are not currently in cash, many insurance producers likely direct their clients to sell their securities and use the proceeds to purchase an annuity. The recommendation to sell the securities is a recommendation about securities and should be better policed than it is.

Although some state securities regulators have enforced the laws governing acting as unregistered investment advisers, regulators currently lack adequate resources to police this issue across the market.¹⁷

III. The Insurance Market Teems with Misconduct Targeting Retirement Assets

The Department should know that the current market for indexed annuities now teems with readily apparent misconduct. Motivated by large commissions, insurance producers may easily be observed making overt plays for retirement assets. Simply typing search terms like “old 401k annuity” or others into my Instagram search brought me numerous examples.¹⁸ Consider the following screenshot.

¹⁶ LIMRA: U.S. Individual Annuity Sales to Exceed \$300 Billion in 2024 and 2025, [https://www.limra.com/en/newsroom/industry-trends/2023/limra-u.s.-individual-annuity-sales-to-exceed-\\$300-billion-in-2024-and-2025/](https://www.limra.com/en/newsroom/industry-trends/2023/limra-u.s.-individual-annuity-sales-to-exceed-$300-billion-in-2024-and-2025/).

¹⁷ See *Simpkins*, Case No. AP-08-11 (State of Mo. Office of Sec'y of State, Dec. 11, 2009); *Hum*, File No. 0800543 (State of Ill. Sec'y of State Sec. Dep't, Aug. 23, 2010)

¹⁸ Although I encourage you to do this to see what is out there, I must also warn you that doing so may subject you to more of this content.



The example appears misleading for many reasons, including but not limited to:

- It indicates that there are no advisor fees with an annuity transaction even though the person selling the annuity will be paid.
- It lists tax deferral as an advantage to annuities when retirement accounts also offer tax deferral.
- It omits the limited participation in market gains generally offered by fixed-indexed annuity contracts and exclusively emphasizes market risk.

I have included other examples in an appendix to this letter so that you will have them available for your consideration. You should know that these types of advertisements and misleading pitches are widespread and that I did not spend significant time collecting examples.

IV. The Department Should Remain Appropriately Skeptical As The Financial Services Industry Floods The Comment Process With Dubious Arguments

As the Department continues to review comment letters, it should remain appropriately skeptical about many of the arguments it will hear in opposition to the current rulemaking. Past efforts to stall fiduciary rulemakings have generated floods of comments making dubious and misleading arguments.¹⁹ Consider, for example, the comments submitted in opposition to Nevada’s fiduciary rulemaking. Many commenters misleadingly quoted federal statutes to argue that states could not make any rules because it might require brokerage firms to keep records.

¹⁹ See Benjamin P. Edwards, *The Fate of State Investor Protection*, 21 TRANSACTIONS: TENN. J. BUS. L. 213 (2020), <https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=2332&context=facpub>.

Commenters quoted this provision from the National Securities Markets Improvement Act (“NSMIA”):

No law, rule, regulation, or order, or other administrative action of any State or political subdivision thereof shall establish capital, custody, margin, financial responsibility, making and keeping records, bonding, or financial or operational reporting requirements for brokers, dealers, municipal securities dealers, government securities brokers, or government securities dealers *that differ from, or are in addition to, the requirements in those areas established under [the Exchange Act]* (emphasis added).²⁰

Curiously, the commenters omitted the following sentence from the same provision which provides that “the Commission shall consult periodically the securities commissions (or any agency or office performing like functions) of the States concerning the adequacy of such requirements as established under this chapter.”²¹

In this example, industry representatives attempted to fool regulators into believing that they could not make any substantive regulation because brokerage firms might decide to keep records to show compliance. To make the argument appear to make sense, the comment letters omitted the portion of the statutory provision directing the SEC to periodically consult with the states about the adequacy of its uniform recordkeeping rules.

The lesson the Department should take from this quick history is that it should remain appropriately skeptical as well-paid industry lawyers make dubious arguments to convince the Department not to raise standards.

The Department will likely hear that raising standards will reduce access to advice or that demographic groups will lose access to advice if the regulatory change goes into effect. The Department should remain skeptical as this position appears designed to deter intervention.

As other commenters will likely explain, many of the advocates opposing this regulation previously argued to courts that commission-compensated product distributors act as mere salespeople and not as reliable advice givers. To the extent that these same industry actors now argue to the Department that raising standards will reduce advice, the Department should understand that the term “advice” may be used in this context in the loosest possible sense and as referring simply to one-sided sales pitches.

²⁰ Letter from Kevin M. Carroll, Managing Director & Associate General Counsel, SIFMA, to Diana Foley, Nevada Secretary of State's Office, Securities Division (Mar. 1, 2019) (quoting 15 U.S.C. § 780(i)(1) (emphasis added by SIFMA)).

²¹ 15 U.S.C. § 780(i)(1).

In reality, the proposal will make advice reliable and allow people to trust financial advice.

I strongly support this proposal and urge the Department to finalize it without undue delay.

Respectfully submitted,

/s Benjamin P. Edwards

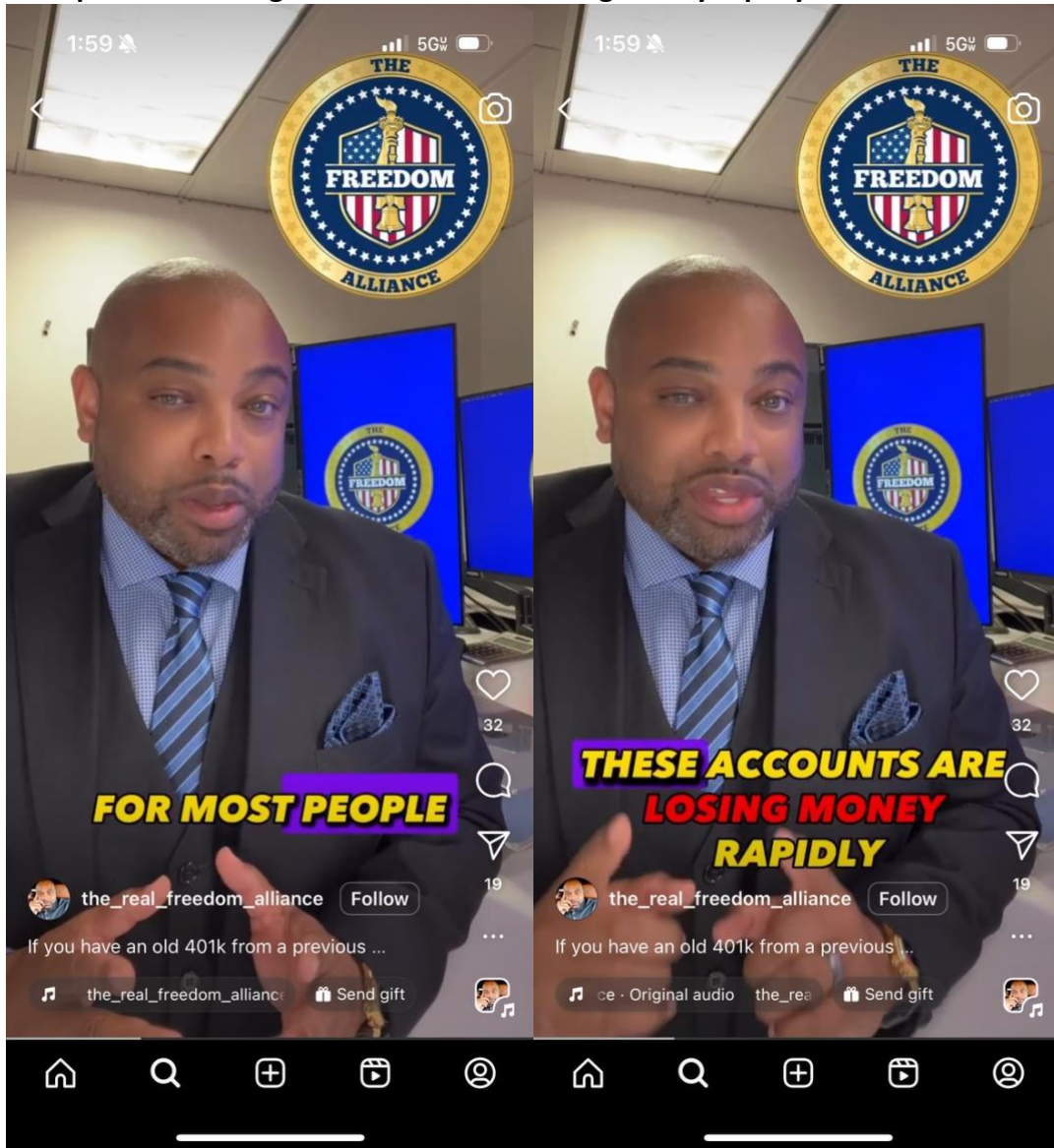
Benjamin P. Edwards

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William S. Boyd School of Law
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*I provide these comments in my personal capacity and list my institutional affiliation for identification purposes.

Appendix A

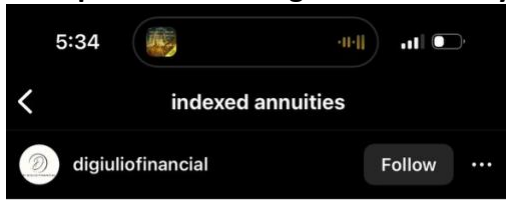
Example 1 Describing 401k Accounts as “losing money rapidly”




Example 2: Targeting Retirement Savings Accounts



Example 3: Describing “Index Annuity” as Best Option on little information

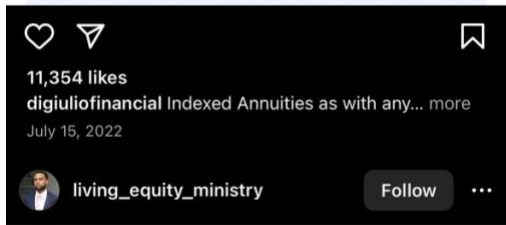


	NAME Hallie	AGE 65	LOOKING TO INVEST \$100,000
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- Hallie is looking for a way to generate guaranteed income to supplement her Social Security checks
- She has considered purchasing bonds, but with low interest rates, a large bond investment won't keep pace with inflation

BEST OPTION
Index Annuity

Index annuities offer a low-risk way to generate predictable income.

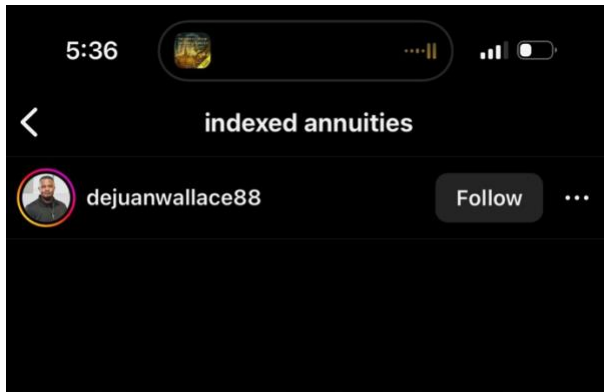


How An Indexed Annuity Works

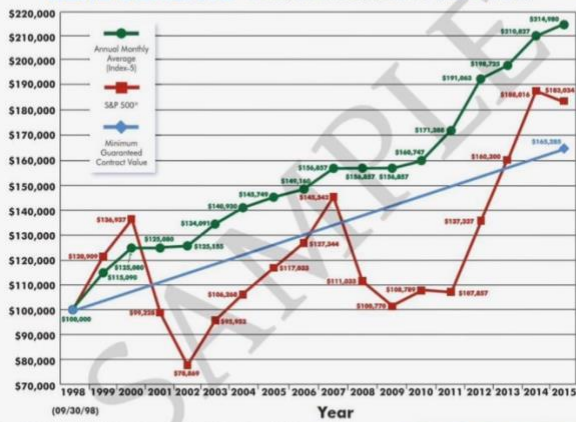
<p>You would choose an index like the S&P 500 or a combination. Your money is not IN the stock market</p>	<p>Your money grows however the index performs up to a limit or cap</p>
<p>Just like you have a cap, you have a floor of zero, so the worst thing that could happen is you get zero interest in market downturns</p>	<p>All state gross payments will be made to the annuitant, and the amount of those payments depend on how long the insurance company has to invest the premiums before income payments begin</p>



Example 4: Misleading Return Projections



The **"REAL BENEFITS"** of Indexed Annuities with the Annual Reset Design
A history of American Equity's Index-5* (9/30/98 - 9/30/15)



*This graph is based on actual realized rates for the period shown on this Index-5 product which is no longer available for sale. Past performance is not an indication of future results. These are not guaranteed. Equity Agent for new product information. Review product literature for specific information. Page 1 of 2

