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January 2, 2024

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attention: Definition of Fiduciary – RIN 1210-AC02
U.S. Department of Labor
200 Constitution Avenue, NW, Room N-5655
Washington, DC 20210

SUBMITTED VIA www.regulations.gov

Re: Comments on defining who is a "fiduciary" under the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code of 1986

To Whom It May Concern:

Founded in 1896, the Independent Insurance Agents & Brokers of America (IIABA or Big "I") is the nation's oldest and largest insurance trade association and represents a nationwide network of approximately a quarter of a million agents, brokers, and employees under the Trusted Choice brand. These Trusted Choice insurance agents and brokers offer customers a choice of policies from a variety of insurance companies across all lines of insurance—property, casualty, life, health, employee benefit plans and retirement products. These broad offerings allow IIABA members to assess the financial needs of their customers on a holistic basis.

IIABA members are for the most part small businesses or "main street" advisors and therefore work at small firms with limited administrative support. Annuities, both fixed and variable, are the most common retirement product offered by IIABA members, though many IIABA members also offer non-insurance financial services products such as mutual funds. Many IIABA members work through independent marketing organizations (IMOs) to be able to deliver annuities to consumers.[1] Some IIABA members also work as registered representatives of independent broker-dealers or are dually registered as investment advisors and broker-dealers to provide retirement products to consumers.

Introduction

It is a well-known fact that there is a retirement crisis looming in America. Put simply, Americans are not saving enough money to keep up with the cost of living. This has been exacerbated by the sudden and recent rise in the cost of goods and services. While the current inflationary environment shows signs of receding, many economists predict that increased costs are here to stay.

[1] For more information see, IIABA Comment Letter to DOL on the Best Interest Exemption for Insurance Intermediaries RIN 1210-ZA26 (Feb 17, 2017).

According to the U.S. Census,[2] the population of individuals age 65 and over grew at a record pace the past decade. There are now approximately fifty-six million individuals, or 16.8% of the total population of the United States, above the age of 65 and many are easing into retirement. This retirement group is set to accelerate even more as Generation X, those individuals born between 1965 and 1980, begin their transition away from the workforce over the next two decades. Generation X represents almost 64 million Americans, or nearly 20% of the total population.

According to the National Institute on Retirement Security,[3] when "looking at the median retirement savings levels for Generation X, the bottom half of earners have only a few thousand dollars saved for retirement, and the typical household has only $40,000 in retirement savings."

According to the Federal Reserve's[4] most recent report on the economic well-being of U.S. households, about 28% of non-retired adults report that they have no retirement savings. This is up from 25% in 2021. Only 31% of non-retirees thought their retirement saving was on track, down from 40% in 2021. Among these non-retirees with self-directed retirement savings, 61% expressed low levels of comfort in making investment decisions with their accounts. As such, IIABA believes public policy should promote making retirement advice more readily available. Americans' need affordable and reasonable options, and personalized assistance in navigating the complex factors that are involved in adequately funding one's retirement.

The goal of the federal government should be to stimulate retirement savings by encouraging individuals to set aside funds and work with trusted advisors to maximize those funds. This proposed revision to the definition of "fiduciary" does exactly the opposite by limiting access to trusted financial advisors, increasing administrative costs and burdens on the financial advisor community, and opening the system to legal abuse which is already out of control in this country. It would do all of this while ignoring recent consumer protections that have been put into place by federal and state regulators over the past few years, which have dramatically strengthened the financial planning playing field.

The proposed rule will reduce access to trusted financial advisors by placing unnecessary burdens upon that community.

IIABA is concerned that some main street insurance agencies will curtail or simply cease their annuities-related operations given the uncertainty associated with such an amorphous and subjective standard, higher compliance and insurance costs, and well-founded fears about increased liability exposure. A sizable number of IIABA's members are able to review and service the insurance and other financial needs of their customers on a holistic basis today, but a change in the standard of care will force many to narrow their emphasis and instead operate in limited niches or sector-specific silos. With fewer

[2] See, "U.S. Older Population Grew From 2010 to 2020 at Fastest Rate Since 1880 to 1890," U.S. Census (May 2023). Available at: https://www.census.gov/library/stories/2023/05/2020-census-united-states-older-population-grew.html.
[3] See report on "The Forgotten Generation: Generation X Approaches Retirement," NIRS (July 2023). Available here: https://www.nirsonline.org/reports/genx/.
[4] "Report on the Economic Well-Being of U.S. Households in 2022 – May 2023," Federal Reserve (May 2023). Available here: https://www.federalreserve.gov/publications/2023-economic-well-being-of-us-households-in-2022-executive-summary.htm.

advisers serving the financial needs of the public, far fewer consumers will have the opportunity to access the variety of financial products and quality of personalized financial assistance available to affluent Americans.

The quality of annuity recommendations will not improve because of a change in the standard of care, but its adoption would add subjectivity and uncertainty to the annuity purchasing process. This drastic step will reduce competition and have severe consequences for countless main street businesses and the consumers who rely on these qualified and accountable providers for their financial needs. Some firms, particularly smaller firms, will no longer service smaller sized plans or individuals with lower balance accounts and may leave the market entirely.

A study conducted by CoreData Research after the 2016 fiduciary rule was finalized found that 71% of financial advisors would stop servicing at least some retirement savers due to the rule. These advisors estimated they would no longer work with a quarter of investors with less than $300,000 in net investable assets, effectively creating an advice gap for low and middle-income investors. This is particularly troubling because annuities provide defined benefits and are an attractive option to many lower and middle-income individuals who have not accumulated large amounts of retirement savings and want guaranteed retirement income.

Less product options impact all retirement savers, but especially hit low-income and minority communities. A study by the Hispanic Leadership Fund[5] shows that "reinstatement of the fiduciary regulation would reduce the accumulated retirement savings of 2.7 million individuals with incomes below $100,000 by approximately $140 billion over 10 years. The impact of reinstatement would be even more dire for Black and Hispanic Americans, contributing to a roughly 20% increase in the wealth gap when looking at accumulated IRA savings alone."

Finally, the proposed rule would impose a multitude of new fiduciary obligations which bring with them new administrative costs and burdens. Specifically related to IIABA members, it is anticipated that the costs associated with errors and omission insurance (i.e. professional liability insurance) will increase substantially. These costs will ultimately be passed down to consumers in the form of more expensive financial advice and products.

The proposed rule will exacerbate abuse of the legal system which is already out of control.

The proposed rule imposes a multitude of new fiduciary obligations which bring with it new costs and burdens, as well as increased exposure to litigation. In 2017, Morningstar[6] estimated that the fiduciary rule could lead to an annual $70 million to $150 million of class action lawsuit settlements. This estimate is sure to be much larger by today's standards given that class action settlements in general have increased steadily each year since 2017, with 2022 seeing a record settlement of $63 billion. Looking more specifically at litigation over excessive plan fees, the number of settlements has increased six-fold from 2016 to 2022, going from five settlements to twenty-nine in that period.

[5] See, "New Research Shows Damaging Effect of "Fiduciary Rule" on Retirement Savings and Wealth Gap," Hispanic Leadership Fund (November 2021). Available at: https://hispanicleadershipfund.org/new-research-shows-damaging-effect-of-fiduciary-rule-on-retirement-savings-and-wealth-gap/.

[6] See, "Financial Services: Weighing the Strategic Tradeoffs of the Fiduciary Rule," Morningstar (March 2017). Available at: https://www.morningstar.com/stocks/financial-services-weighing-strategic-tradeoffs-fiduciary-rule.

The cost of settling these class action lawsuits is only half the story. Defense costs, regardless of merits or outcome of a case continue to rise as the number of lawsuits do. According to Woodruff Sawyer,[7] "excessive fee class action lawsuits continued to harass plan fiduciaries and the fiduciary liability insurance market in 2022, with eighty-eight new suits filed. This was the second highest historical amount behind the ninety-seven suits filed in 2020 and nearly twice the number of filings in 2021." The increased costs and legal exposure are already working to limit access to financial advice for those consumers who need it the most, specifically low and middle-income consumers with small balance retirement accounts.

This increased threat of litigation will directly impact advisor errors and omissions insurance and make the cost of providing retirement advice higher. It will also substantially change the relationship between the advisor and the advisee, due to the threat of class action lawsuits. The rule effectively shifts policing the market from regulators to private litigation, including class action. As such, IIABA recommends that the Department consider the litigation burdens that would be imposed by this rule and ensure that regulators continue to be the foremost enforcement authority.

The proposal ignores consumer protections already being put in place by federal and state regulators.

Federal and state regulators have implemented consumer protections and dramatically shifted the playing field since the Department of Labor last attempted to redefine a fiduciary under ERISA in 2016. In addition, the U.S. Congress has repeatedly affirmed the primary role of state regulators over the business of insurance, including with the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010.

Section 913(f) of Dodd-Frank empowered the U.S. Securities and Exchange Commission (SEC) to "commence a rulemaking, as necessary or appropriate to the public interest and for the protection of retail customers (and such other customers as the Commission may by rule provide), to address the legal or regulatory standards of care for brokers, dealers … [and] persons associated with brokers or dealers … for providing personalized investment advice about securities to such retail customers." Out of that came the SEC Regulation Best Interest, which established a new standard of conduct under the Securities Exchange Act of 1934. The SEC acted pursuant to the clear and unambiguous approval of Congress.

Additionally, the National Association of Insurance Commissioner's Suitability in Annuity Transactions Model Regulation[8] for annuities has been adopted by forty states and counting. This model regulation addresses insurance agent conduct in annuity transactions and establishes a wide range of new requirements for producers who recommend an annuity to a consumer. The new obligations are comprehensive and robust, and require any agent recommending an annuity transaction to do all of the following:

[7] See, "Excessive Fee Litigation: A New Hope," Woodruff Sawyer (April 2023). Available here: https://woodruffsawyer.com/do-notebook/excessive-fee-litigation/.

[8] NAIC Model Regulation #275 available here: https://content.naic.org/model-laws.

- Exercise reasonable diligence, care, and skill to know a consumer's financial situation, insurance needs, and financial objectives and to collect a more extensive universe of consumer profile information than is required.
- Believe that the product ultimately recommended effectively addresses the consumer's situation, needs, and objectives over the life of the product and in light of that individual's consumer profile information.
- Understand the recommendation options available to the producer and consider the types of products that address the consumer's financial situation, insurance needs, and financial objectives.
- Consider and evaluate an additional series of factors when recommending a transaction involving the exchange or replacement of an annuity.
- Provide a description of the scope and terms of the producer's relationship with the consumer and the role of the producer in the transaction.
- Disclose the types of relevant products the producer is authorized to sell and whether the producer offers the products of one insurer or multiple insurance companies.
- Describe the sources and types of compensation the producer would receive from the purchase of a particular annuity and describe how the customer can obtain additional and more detailed information about that compensation.
- Ensure that the consumer has received important information about the key features of the recommended annuity.
- Satisfy new annuity-specific continuing education requirements; and
- Perhaps most notably, make a written record of any annuity recommendation (including the basis for the recommendation) and communicate the basis for the recommendation to the consumer.

These provisions are objective and straightforward, identify what must be done to comply, and do not expose agents to new and unwarranted litigation exposure. Any changes to the regulatory framework must be clear and comprehensible and identify the rules of road, and these requirements generally accomplish this goal. The adoption of these provisions alone dramatically raises the level of regulatory scrutiny that applies to annuity sales and establish an array of consumer protections.

Conclusion

We would like to thank you for the opportunity to express the views of independent insurance agents and brokers on this issue. As noted above, IIABA is concerned about the fiduciary rule's overly broad and complex requirements. Those who propose the establishment of a one-size-fits-all fiduciary standard presume that the interests of financial providers and customers regularly conflict and that providers act in their own self-interest to the detriment of customers as a matter of practice, but there is no evidence to support such a conclusion. The truth is that consumers have unprecedented access to a wide array of financial products and are extremely well-served in the current environment. In nearly every aspect of the securities marketplace and certainly in main street America, the existence of effective competition deters improper conduct and self-interested behavior. The bottom line is that the proposed rule makes retirement advice more costly and complicated—the exact opposite of what is needed with a looming retirement crisis on the horizon.

Please contact our office at (202) 863-7000 should you wish to have additional information regarding our comments.

Sincerely,

Nathan Riedel
IIABA SVP, Federal Government Affairs