CFA Consumer Federation of America

DOL Fiduciary Questions and Answers

Policymakers at both the Securities and Exchange Commission (SEC) and the Department of Labor (DOL) are currently considering whether to strengthen the protections that apply when individuals receive advice about their retirement and other investments. The question they are considering is whether to expand the circumstances in which financial professionals have a fiduciary duty to their customers, a change long sought by investor advocates. While the SEC and DOL rulemakings are related, each agency has its own areas of jurisdiction and responsibility and the two efforts have received very different responses from industry. Most industry groups have at least nominally supported SEC rulemaking in this area, but many of those same groups have strongly opposed the DOL effort. Questions have been raised about whether the proposed change in standards is needed, how it would affect investors, and, assuming rulemaking moves forward, how the two agencies should work together to achieve the goal of enhanced investor protections. The following question and answer, which focuses in particular on the DOL rulemaking, is designed to answer those questions and dispel the misinformation that has been used to undermine agency efforts to provide this much needed improvement in protections for workplace savers, IRA investors, and retirees.

What is a fiduciary standard?

Fiduciary duty is simply the legal term for the obligations that someone in a position of trust has to those who are relying on him or her in good faith. As such, it is the standard that has traditionally applied when financial professionals provide money management or advisory services to clients. Although different specific duties apply in different circumstances, a fiduciary duty generally includes an obligation to act with professional care and in the best interests of the client or, in some cases, solely in the interest of the client. In keeping with that standard, fiduciaries are generally required to avoid, minimize or otherwise appropriately manage conflicts of interest in order to ensure that the client's interests come first.

Who has jurisdiction over financial advisers?

Both the Department of Labor (DOL) and the Securities and Exchange Commission (SEC) have jurisdiction over financial advisers, but regulate in different contexts.

- The DOL enforces the Employee Retirement Income Security Act (ERISA), which governs both traditional pension plans and employer-sponsored defined contribution plans (such as 401(k)s and 403(b)s). In addition, the IRS uses DOL's definition of investment advice and fiduciary duty in its oversight of tax-advantaged individual retirement accounts (IRAs). DOL authority applies to any investments offered through such accounts, regardless of whether they are securities, insurance or other types of financial products.

- The SEC enforces the securities laws, including the laws that apply to broker-dealers, investment advisers, and the securities investments (such as mutual funds and variable annuities) that they sell and recommend. Its authority extends to all retail accounts, which can include individual retirement accounts.

As a result, each agency has areas where it has exclusive jurisdiction, but in other areas both agencies' authority may overlap. In particular, recommendations about securities within individual retirement accounts would arguably be subject to both agencies' authority.

Why does the current DOL fiduciary standard need to be updated?

ERISA became law in 1974 and the rules promulgated pursuant to ERISA were enacted in 1975, at a time when defined benefit (traditional pension) plans were the norm and workers didn't often require personalized investment advice. IRAs had just been created and 401(k)s didn't yet exist. As such, the rules adopted at that time were designed with traditional pension plans in mind – setting a very high standard with regard to the types of conflicts of interest that would be permitted, but also assuming a high level of expertise on the part of the pension fund manager. In defining the all-important term "investment advice," which triggers the fiduciary duty under ERISA, the regulators therefore did not take into account how the rule would affect unsophisticated individual workers and retirees seeking advice about their retirement investments.

Such a restrictive application of a fiduciary standard may have seemed appropriate forty years ago, but it is entirely inappropriate now. Two changes in particular have rendered it obsolete. The first is the growing complexity of financial products and financial markets. The second is the growing reliance on defined contribution retirement accounts, where individuals are responsible for making their own investment decisions. As the recent financial crisis clearly demonstrated, even some of the most sophisticated institutional investors lack the financial acumen necessary to accurately assess the risks of the investments they make. Further, they may be ill-equipped to defend themselves against aggressive sales practices that often come at their expense. If even some sophisticated pension managers are unable to protect themselves from unscrupulous sales tactics, ordinary investors don't stand a chance without the protections afforded by a fiduciary duty.

At the same time, changes in the retirement plan landscape have made investors far more personally responsible for their own retirement investments. The number of active participants in private-sector defined contribution plans increased from 11.2 million in 1975 to 73.4 million in 2010, while the number of active participants in private-sector defined benefit plans declined from 27.2 million to 17.1 million during the same time period.[1] According to the Investment Company Institute (ICI), 68 percent (or 82 million) of U.S. households reported that they had

[1] U.S. Department of Labor. Employee Benefits Security Administration, Private Pension Plan Bulletin Historical Tables and Graphs (June 2013) http://1.usa.gov/Rp8Bwu.

employer-sponsored retirement plans, IRAs, or both in May 2012.[2] Of the $19.5 trillion in total retirement market assets, $5.1 trillion is held in employer-sponsored defined contribution plans and another $5.4 trillion is held in IRAs.[3] In short, the investment choices they make within various types of individual retirement account play a central role in many Americans' retirement preparedness.

Furthermore, workplace retirement plans, IRAs, and other tax-deferred accounts constitute the vast majority of Americans' mutual fund ownership. According to ICI, for example, 92 percent of households that owned mutual funds held shares inside workplace retirement plans, IRAs, and other tax-deferred accounts.[4] For those Americans that owned mutual funds *outside* workplace retirement plans, 82 percent made their purchases with the help of an investment professional, including investment advisers, full-service brokers, independent financial planners, bank and savings institution representatives, insurance agents, and accountants.[5] Some of those professionals offer advice subject to a fiduciary standard, but others do not. With so many people depending on professional advice to make their investment decisions, it is critical that they are protected from unscrupulous tactics.

While these dynamics have arguably given investors more choice, they have also created a situation in which many Americans are confused and ill-prepared for retirement. Ironically, when they seek financial advice, they are most at risk of being preyed upon. To help remedy this situation, American investors must receive advice that puts their interests first and is based on sound investment principles, and financial professionals must be accountable for the advice that they provide to their clients. Otherwise, financial professionals who do not already owe their clients a fiduciary duty will continue to be allowed to recommend to their clients investments that offer lucrative remuneration to the financial professional but with high costs, excessive risks, or poor performance that make them inferior to other alternatives for the investor.

What is wrong with the existing DOL definition?

When the DOL adopted its current definition of investment advice, it included several conditions that had to be met before the fiduciary duty that governs such advice would apply. Of particular concern for today's retirement savers, the term "investment advice" under ERISA was construed to apply only to advice: 1) that was provided on an ongoing basis; and 2) that was mutually understood by the adviser and client to form the primary basis for the client's investment decision. This is far narrower than the definition of investment advice under the securities laws, which doesn't include either of these restrictions. While pension fund managers may understand these restrictions, they are inappropriate for the unsophisticated investors who expect recommendations from a financial adviser to be selected with their best interests in mind.

First, there is simply no justification for excluding advice offered on a one-time basis from the definition of investment advice. After all, even if investment advice is provided solely

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[2] Investment Company Institute, 2013 Investment Company Fact Book, A Review of Trends and Activities in the U.S. Investment Company Industry, at 115, http://bit.ly/1jKM4U0.
[3] *Id*. at 114.
[4] *Id*. at 92.
[5] *Id*. at 96.

on a one-time basis (see discussion on rollovers, below, for example), it can have a significant impact on a client's investment decision and financial situation. Moreover, individual investors are unlikely to understand this distinction, particularly when broker-dealers market their services as "retirement planning" and imply through multi-million dollar ad campaigns that they are in the business of providing on-going services to the customer. To alleviate this misunderstanding and to bring the ERISA definition into line with the definition under the securities laws, the ERISA definition of investment advice needs to be amended to eliminate this provision.

Second, research has shown that investors are heavily reliant on the recommendations they receive from financial professionals. A 2006 CFA survey found, for example, that among those mutual fund investors who purchased most of their funds from a financial services professional, nearly three in ten said they relied totally on that professional's recommendation without doing any independent evaluation of the fund.[6] Another 36 percent said they relied a great deal on the professional's recommendation but reviewed some written material about the fund before the purchase.[7] Those investors may nonetheless find it difficult to prove that the recommendation was the primary basis for the investment decision. It is likely to be even more difficult to prove that there was a mutually understood arrangement between the parties to this effect. Unless there is a written contract between the parties memorializing such an agreement – which often does not exist and which brokers will have little incentive to provide – it is extremely difficult if not impossible to prove that any such mutual understanding exists. A better approach would be to adopt a definition of investment advice that is closer to the securities law definition of investment advice and require that any personalized advice that a financial adviser provides to a client be included within the definition of "investment advice."

How specifically are people being harmed?

Workers and retirees can be harmed by non-fiduciary advice about 401(k) investments, IRA investments, or both if they are placed in suboptimum investments that profit the financial adviser at their expense. IRA rollovers provide perhaps the clearest illustration of investor harm from non-fiduciary advice. However, the issues described below in the context of the IRA rollover process are also reflected to a greater or lesser degree in other retirement-plan related contexts.

When a worker leaves a job, he or she must decide what to do with an employer-sponsored retirement plan. The departing worker typically has four basic options: 1) keep the money in the former employer's plan, 2) roll the money over into the new employer's plan, 3) roll the money over into an IRA, or 4) cash out, which can trigger penalties and taxable events. The key considerations for a worker who leaves a job should be: to continue to be covered by the fiduciary standard that an employer-sponsored retirement provides; to preserve the tax benefit of an employer-sponsored account; to have adequate investment options; and to minimize expenses. In many, if not most cases, workers would be best served by keeping their money with their former employer or transferring it to their new employer, as employers are required by law to manage their plans in the best interest of their plan participants. Because IRAs are not

[6] Press Release, Consumer Federation of America, "Investors' Mutual Fund Purchase Practices at Odds with Those Recommended by Investor Educators, Survey Finds," June 12, 2006 http://bit.ly/1j3fqyh.
[7] *Id*.

employer-sponsored plans, they are not subject to that same fiduciary standard. And, while the available investment selection may be larger in an IRA, the expenses are often higher. Despite these dynamics, financial services firms with a strong incentive to capture these assets often encourage workers to roll over their accounts into IRAs.

Rollovers into IRAs are becoming more and more prevalent as employees transition between jobs with more frequency. As of May 2012, of the 39 million households that own traditional IRAs, 51 percent (or 20 million U.S. households) report that their IRA accounts include rollover assets from another retirement plan.[8] Among traditional IRA-owning households with rollovers, 27 percent had undertaken a rollover since 2010.[9] When workers perform a rollover, they often transfer their entire work-place account balance, which can be a sizeable sum. According to the ICI, 80 percent of households undertaking a rollover since 2010 transferred their entire retirement plan balances into traditional IRAs.[10] And thirteen times as many assets were rolled over into IRAs as was directly contributed in 2011, according to the Employee Benefits Research Institute.[11] Cerulli Associates, a research firm based in Boston, estimates that workers rolled over nearly $358 billion from 401(k)s into IRAs in 2013—and that between 2014 and 2018, another $2.1 trillion will follow.[12]

Simply put, IRA rollovers create a potentially dangerous situation for investors and a prime opportunity for unscrupulous or self-interested investment professionals. First, investors' best interests are not protected by a fiduciary standard because rollovers are considered one-time transactions, and consequently, advice that is provided in connection with rollovers is excluded from the DOL definition of "investment advice." This affects not only the decision about whether to roll over the account assets into an IRA (discussed above), but also recommendations about what investments to purchase if a rollover into an IRA is selected. With significant numbers of people seeking professional guidance about what to do with their employer-sponsored retirement accounts, and significant amounts of money at stake, investment professionals have both an opportunity and an incentive to steer their clients into investment vehicles that generate the highest compensation for the professional even if they have higher costs, higher risks, or poorer performance than other available options. However, that advice comes at the expense of the client and can have a significant impact on the client's long-term retirement savings.

A 2013 report by the Government Accountability Office (GAO) provides alarming evidence of the tactics that financial services firms engaged in through the IRA rollover process to secure workers' assets.[13] For example, financial firms aggressively encouraged rolling 401(k) plan savings into an IRA, and with only minimal knowledge of a caller's financial situation. They also often claimed that 401(k) plans had extra fees and that IRA's "were free or had no

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[8] Investment Company Institute, 2013 Investment Company Fact Book, A Review of Trends and Activities in the U.S. Investment Company Industry, at 126-127, http://bit.ly/1jKM4U0.
[9] *Id*. at 127.
[10] *Id*. at 128.
[11] Mark Shoeff Jr., *Navigating 401(k) rollovers*, INVESTMENT NEWS, Mar 2, 2014, http://bit.ly/1j0F3LI.
[12] Jason Zweig, *Who's Training Your Retirement Navigator?,* THE WALL STREET JOURNAL, February 14, 2014, http://on.wsj.com/1hLJxKJ.
[13] 401(K) PLANS: Labor and IRS Could Improve the Rollover Process for Participants, GOVERNMENT ACCOUNTABILITY, OFFICE, March 7, 2013, http://1.usa.gov/1iQFeOR.

fees," or argued that IRAs were always less expensive, notwithstanding that the opposite is generally true. IRAs are more expensive for investors, on average, than 401(k) plans. The firms made it more convenient to roll over into an IRA, offering to fill out IRA paperwork on behalf of customers, and provided cash bonuses for opening an IRA. The report also found that investment firms sometimes offer financial or other incentives to financial advisers who persuade workers to perform a rollover. While some of these practices and the abuses that naturally flow from them could be addressed through better enforcement of existing standards, others are precisely the types of abuses best addressed through application of the ERISA fiduciary standard to rollover transactions.

Financial advisers can be bombarded with incentives to pitch certain products over others, and sometimes those products are extremely harmful to investors. A recent *Wall Street Journal* article described how one company, Table Bay, offers enticements to financial advisers for selling clients their preferred annuities and other insurance products, and in turn earns a share of revenue from the products that the advisers sell.[14] According to the *Journal* article, Table Bay offered a Maserati to advisers who sell at least $7.5 million in annuities in 2014 and a BMW, Range Rover, or Porsche to those with at least $6 million in sales. Table Bay also offered a seminar featuring an index annuity paying a 9 percent commission which, according to a flier describing the seminar, would result in "HUGE commissions" by helping to convert "shoppers" and "plate-lickers" (investors who attend seminars for the free food) into customers. When asked for comment, the president and chief distribution officer of the company, a self-proclaimed IRA expert, said, "We're not the only one with offers like that. What this does is steer some of the business to us that would have been written anyway with those products."[15]

These forces might help to explain why so many investors have IRAs that are invested in annuities. After all, one of the primary selling points of annuities is the opportunity they offer for tax-free gains. But since IRAs are already tax-advantaged accounts, it rarely makes sense to hold annuities in such accounts, particularly if the annuities carry higher expenses than other available alternatives. According to the ICI, however, 35 percent of households with IRAs hold annuities in those IRAs, and 22 percent have variable annuities.[16] Variable annuities are notorious for having excessive fees that typically cost over a full percentage point more than the average open-ended mutual fund. These and other added costs associated with the products can seriously erode investors' returns over time.

Given the importance of the rollover decision, and the significant harm that can result from bad rollover advice, it should come as no surprise that public opinion strongly supports broadening the applicability of the DOL's fiduciary standard to cover IRA rollovers. According to a recent AARP survey on the topic of rollover IRAs, 91 percent of respondents "strongly favor" or "somewhat favor" requiring IRA providers to manage IRAs in the best interest of account holders.[17]

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[14] Jason Zweig, *Who's Training Your Retirement Navigator?,* THE WALL STREET JOURNAL, February 14, 2014, http://on.wsj.com/1hLJxKJ.
[15] *Id*.
[16] Investment Company Institute, 2013 Investment Company Fact Book, A Review of Trends and Activities in the U.S. Investment Company Industry, at 128, http://bit.ly/1jKM4U0.
[17] S. Kathi Brown, AARP, Fiduciary Duty and Investment Advice: Attitudes of 401(k) and 403(b) Participants, September 2013, http://bit.ly/1q7yH6m.

Shouldn't the DOL wait for the SEC to act first? Shouldn't the agencies coordinate a rule together? Otherwise, won't they conflict?

When Congress adopted ERISA, it gave the DOL clear authority and responsibility to implement the law, just as it gave the SEC clear authority to implement the securities laws. Moreover, ERISA establishes different, higher standards for retirement accounts than those that apply under federal securities laws. Congress clearly expressed its intent to treat retirement accounts differently from retail accounts by providing greater legal protections for retirement investments and by subsidizing retirement assets through preferential treatment in the tax code. The U.S. Supreme Court has confirmed the different legal treatment under ERISA, saying, "ERISA imposes higher-than-marketplace quality standards…, requiring a plan administrator to 'discharge [its] duties' in respect to discretionary claims processing 'solely in the interests of the [plan's] participants and beneficiaries.'"[18] For example, fiduciaries under ERISA are explicitly prohibited from engaging in a certain transactions that are permitted, with proper disclosure, for fiduciaries under securities law.[19] In light of the fact that Congress established separate jurisdiction and different standards, it is unreasonable to expect that the DOL would cede jurisdiction or water down its standard in the name of regulatory uniformity.

It is entirely appropriate, moreover, for retirement accounts to be provided greater legal protections than retail investment accounts. Considering the shortfall in our nation's retirement savings, Americans need all of the protections afforded to them, and more, to gain retirement security. The retirement income deficit—the difference between what people have saved and what they should have saved—is estimated by The Center for Retirement Research at Boston College to be $6.6 trillion.[20] Half of all Americans have less than $10,000 in savings.[21] But instead of being afforded further protections, Americans are too often encouraged by financial institutions and financial professionals to invest their retirement savings in inappropriate or high-cost investments, including even high-risk hedge funds.[22]

Timing is also a factor. If the DOL were to wait for the SEC before acting, it would take much longer than is necessary to close the loopholes in its fiduciary standard. The DOL is expected to propose a rule updating its fiduciary standard as early as this summer. However, the SEC is on a much slower timeline. The SEC has been promising rulemaking to establish a fiduciary duty for broker-dealers for years, but has not yet issued a proposed rule or even clearly committed to doing so. Nearly four years after a provision in Dodd-Frank became law requiring a study of the issue, and more than two years after the staff study was published with an unambiguous finding that a fiduciary duty should apply to broker-dealers, the SEC still has not acted. We are encouraged that SEC Chair Mary Jo White has pledged that the Commission will make a decision this year regarding whether to move forward with rulemaking. But that is simply a decision over whether to set the regulatory process in motion. It does not guarantee that

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[18] *Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105, 106 (2008).

[19] Exemptions from those strict prohibitions are handled through prohibited transaction exemptions (PTEs) that impose additional protections as a condition of relying on the exemption.

[20] Retirement USA, The Retirement Income Deficit (2011), http://bit.ly/1hsvBAE.

[21] Employee Benefit Research Institute, Retirement Confidence Survey (2012), http://bit.ly/RhEoz6.

[22] *See, e.g.*, Arleen Jacobius, *Carlyle brass: It's 'Unfair' to Deprive DC Investors of Private Equity Investments,* PENSION & INVESTMENTS, September 26, 2013, http://bit.ly/RhEpmI.

a final rule will be adopted soon, if ever. Given the SEC's delay on this issue and the uncertainty of the outcome, it is not reasonable to expect the DOL to postpone its fiduciary rulemaking any longer. Moreover, any further delay by the DOL would mean that retirement plan investors remain exposed to harmful practices by those in the financial services industry who seek to profit at their expense. Any such delay risks further undermining Americans' already shaky retirement security.

Despite the fact that the DOL's and the SEC's legislative mandates are distinct, the agencies have confirmed that they are still in close and frequent contact and consultation on the fiduciary issue. They have provided repeated assurances that their regulations will not conflict. In light of that fact, the DOL should not be prevented from moving forward with rulemaking based on a hypothetical concern that the two standards (assuming the SEC eventually gets around to rulemaking) might be in conflict.

Wouldn't improved disclosure and investor education fix the problem?

Improved disclosure and increased investor education are necessary to ensure that Americans are better able to understand their respective financial situations and make informed decisions to address their situations. However, improved disclosure and education alone are not sufficient to surmount the many barriers in our current financial marketplace, including conflicted advice, complexity and diversity of investments, costs, asset allocation, diversification, risk, tax considerations, etc.

A recent literature review by the Library of Congress on behalf of the SEC supports the contention that a regulatory approach based on improved disclosure and increased education has severe limitations. Despite decades of focus on improving disclosure and investor education, these efforts have not resulted in any meaningful improvement for investors. According to the literature review's findings, many investors "do not understand the most elementary financial concepts, such as compound interest and inflation." They also do not understand basic ideas, such as diversification or the differences between stocks and bonds, and are not fully aware of investment costs and their impact on investment returns. Additionally, investors lack critical knowledge about investment fraud. Moreover, certain subgroups, including women, African-Americans, Hispanics, the oldest segment of the elderly population, and those who are poorly educated, have an even greater lack of investment knowledge than the average general population.[23]

Not only do many investors lack the knowledge necessary to make informed investment decisions, many also lack the information necessary to make informed choices about the financial professionals they rely on for advice and recommendations. Research has shown, for example, that investors do not understand the differences between various types of financial professionals.[24] They expect that all those who provide investment advice are and should be

[23] Study Regarding Financial Literacy Among Investors, As Required by Section 917 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Staff of the Office of Investor Education and Advocacy of the U.S. Securities and Exchange Commission, at vii-viii, August 2012, http://1.usa.gov/1fMABVZ.

[24] U.S. Investors & The Fiduciary Standard: A National Opinion Survey, ORC/Infogroup, September 15, 2010, http://bit.ly/1fMAERB.

required to act in their best interests. And their confusion about the different roles of various types of financial professional is not dispelled even after they read fact sheets explaining those differences.[25] Because Americans are ill-equipped to fend for themselves when making financial decisions, including the decision of who to rely on for recommendations, and have not been significantly better served by improved disclosure and investor education, there is no reason to believe that continuing such a regime will cure the many and varied risks in the market that too often create investor harm.

Would a fiduciary standard prohibit commissions or other forms of compensation, effectively destroying the current broker business model?

Until the rule is actually proposed, we will not know for certain what its impact on current business practices will be. And we do recognize that the general prohibited transaction rules of ERISA, especially as applied to small, retail accounts, could raise legitimate concerns for financial services professionals if they were not addressed through prohibited transaction exemptions (PTEs) to accompany the proposed rule. However, this has been true for many years in a wide range of circumstances that the Department has successfully addressed by granting appropriate exemptions. Moreover, Assistant Secretary Borzi has repeatedly made it clear that there will be PTEs in the proposal that will be designed to accommodate many existing business practices. For example, she has specifically said a new proposal will not outlaw commissions and has suggested that it will accommodate other forms of transaction-based compensation as well. In discussing this approach, she has specifically noted that such exemptions require a finding that they are in the best interests of investors, and has stated unambiguously that "[w]e think that there are types of compensation that would otherwise be prohibited under a flat prohibition that we will be able to make that finding for."[26]

What about what happened in Great Britain? I've heard that they implemented a fiduciary standard and brokers no longer provide moderate-income individuals with advice.

What happened in Great Britain under the Retail Distribution Review (RDR) is not what's being contemplated here. Under the RDR, financial advisors were no longer allowed to charge commissions. Most moved from a commission-based model to a fee-based model. In some cases, the change has resulted in increased costs and decreased services for certain investors. However, no one is claiming that under a DOL rule, commissions will be outlawed. Rather, as Assistant Secretary Borzi has explained, they will be handled through carefully tailored PTEs.

RDR also imposed on advisers new regulatory requirements of the sort that have never been considered by DOL. For example, RDR's new regulatory regime includes increased professional certifications and continuing education obligations, enhanced reporting and recordkeeping requirements, and compliance with new prudential rules affecting each advisory

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[25] Angela A. Hung, et al., Investor and Industry Perspectives on Investment Advisers and Broker-Dealers, Rand Corporation, Sponsored by the United States Securities and Exchange Commission, January 2008, http://1.usa.gov/1nePF0L.

[26] Diana Britton, *Borzi Hints at Exemptions to DOL Fiduciary Rule*, WEALTHMANAGEMENT.COM , April 29, 2013, http://bit.ly/1fKfmUp.

firm's capital adequacy.[27] Therefore, any concerns about a fiduciary standard having the same effect as it has in Great Britain do not appear to translate to the U.S. context or be factually-based.

I've been hearing financial advisers will never be able to meet a fiduciary standard and be at risk of constantly being sued for breach of their fiduciary duties. Is that true?

Insurance agents, broker-dealers, and registered investment advisers who are currently ERISA fiduciaries have been able to comply with ERISA's higher standards for years. There is no reason to believe others can't follow similar business practices.

Will investors lose access to investor education because of a fiduciary standard?

A fiduciary standard should have no impact on true investor education. Investor education is already explicitly excluded from the definition of investment advice under ERISA. Moreover, it has been DOL's position that general financial education is fundamentally different from personalized advice, and that there should be no impediment to offering investor education if loopholes in the definition of investment advice are eliminated.

Will moderate-income and small dollar investors lose access to valued products and services because of a fiduciary standard?

Moderate income investors who need to make every dollar count have the most to gain from enhanced fiduciary protections. After all, it is these investors with limited financial resources who can least afford to pay the excess costs often associated with the less than optimum investment recommendations a best interest standard is designed to address. The DOL rulemaking is particularly relevant for these investors, moreover, since they are most likely to be investing primarily or even exclusively through the various types of workplace or individual retirement accounts affected by the DOL standard. Ironically, some industry members have invoked concern over these moderate-income investors to justify their opposition to DOL rulemaking.

The argument that investors would be harmed by rulemaking is based on a mischaracterization of the DOL's expected rulemaking approach, a misconception about the relative costs of fees and commissions for investors, and a slightly more plausible but greatly overblown concern about the potential for increased compliance costs under a fiduciary standard.

- The mischaracterization: Even after the DOL has provided repeated assurances that its revised rule will include PTEs designed to permit the receipt of commissions and other forms of transaction based compensation, some industry opponents continue to argue that middle income investors would lose access to valued products and services under a rule that fails to allow such compensation practices.

[27] Deloitte, Responding to the Retail Distribution Review, Professionalism: Looking Beyond Qualification, 2011, http://bit.ly/1nJBWPs; Laura Miller, *How Firms Are Preparing for the Change in Prudential Rules*, PROFESSIONAL ADVISER, March 21, 2013, http://bit.ly/Q6OCB4.

- The misconception: Fiduciary opponents have conflated the fact that advisers are more likely than brokers to serve high net worth clients with the notion that paying commissions is inherently more affordable than paying fees. While this may sometimes be the case, the apparent affordability of transaction-based compensation can quickly evaporate if the investments recommended carry higher imbedded costs that erode investor returns over the lifetime of the investment. A well designed fiduciary standard would preserve the option of paying for services through transaction-based compensation while protecting investors against the potential risks of receiving recommendations to purchase higher cost or otherwise sub-optimum investments.

- The potential for increased compliance costs: The third prong of this anti-fiduciary argument – that imposition of a fiduciary standard could increase compliance costs and thus decrease services to small dollar investors – has at least some factual basis, but the concern appears to have been greatly exaggerated. While advisers may see some increase in compliance costs, any such increase in cost is likely to be small. A recent study by the Aité Group comparing fiduciary and non-fiduciary advisers and brokers found, for example, that financial advisers who deliver services under a fiduciary standard do not spend any more of their time on compliance or other back-office tasks. It also found that there may be financial rewards to offering services under a fiduciary standard. According to the study, those financial advisers who operate under a fiduciary standard experience stronger asset growth, stronger revenue growth, and obtain a greater share of client assets than those who provide services primarily under a non-fiduciary standard.

There is a final misconception at the foundation of this argument: recommendations that are not designed to serve the best interests of the customer are not advice, they are sales pitches. A best-interest standard is what differentiates advice from mere sales recommendations. By permitting financial professionals to call themselves advisers, our regulations allow investors to be deceived about the nature of the services they are receiving and to do so in ways that put them and their retirement security at risk. A well-designed fiduciary standard will not only preserve access to valued products and services, it will help to ensure that the "advice" retirement investors receive is truly advice and not just a sales pitch dressed up to look like advice.