



VOICE OF INDEPENDENT FINANCIAL SERVICES FIRMS
AND INDEPENDENT FINANCIAL ADVISORS

**Testimony of
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President & CEO
Financial Services Institute**

and

**W. Mark Smith
Partner
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**Before the
Employee Benefits Security Administration
Department of Labor**

On

**“Definition of the Term ‘Fiduciary’; Conflict of Interest Rule – Retirement Investment Advice
and Related Proposed Prohibited Transaction Exemptions”**

August 12, 2015

Dale Brown:

Good afternoon, my name is Dale Brown, and I am the President & CEO of the Financial Services Institute. With me representing FSI is Mark Smith, Partner at Sutherland Asbill & Brennan. We are grateful for this opportunity to share some of our thoughts regarding the Department's fiduciary proposal.

The White House said when announcing the proposal that if you are willing to accept a best interest standard and give a few basic disclosures, firms could set their own compensation practices, thereby preserving choice for retirement investors. We agree with this objective.

I want to be clear. Since 2009, we have consistently supported a uniform fiduciary standard for all financial advisors that requires them to act in their clients' best interest. We share the Department's investor protection goals and believe that a well-crafted fiduciary standard will help investors. It is also vitally important that any final rule preserves investor choice and access to quality, professional retirement advice. Unfortunately, as currently written, the proposal is too complex and costly for firms and advisors to operationalize. It fails to achieve the White House's vision because it is unworkable; it creates barriers to professional advice; and it limits investor choice. We are ready to collaborate with the Department so that the final rule creates a workable fiduciary standard that preserves investor choice and access.

FSI member firms license more than 160,000 independent financial advisors, under both broker-dealer and RIA rules, representing more than sixty percent of all producing registered representatives. These financial advisors are small business owners in communities across the country, often in small towns where larger firms do not have a presence.

Due to their unique business model, FSI members are especially well positioned to provide middle-class Americans with the financial advice, products, and services necessary to achieve their investment goals. Our members have strong ties to their communities and know their clients personally. They help their Main Street clients make good decisions when the market is volatile and navigate major financial decisions about retirement, college funding and purchasing a home. They are there when clients face significant life events such as medical concerns, deaths in the family, and caring for aging parents. They educate their clients about the importance of

participating in employer sponsored and individual retirement savings programs. It is critical that investors retain access to a financial advisor they trust because no “robo-advisor” can hold their hand through life’s difficult situations and decisions.

As written, the proposed rule will make retirement advice too expensive for investors that typically utilize commission-based accounts. Research from a variety of sources has shown that investors who work with financial advisors save more and are better prepared for retirement. For example, an April 2014 study by Quantria Strategies found that retirement savings balances are 33 percent higher for individuals who have access to financial advice. The same study also found that limiting access to retirement advice leads to more investors cashing out their retirement plans and could reduce the accumulated retirement savings of these affected investors by up to 40 percent.

Mark will dive into more detail about the barriers raised by the proposal and our proposed solutions for how to develop a workable, uniform fiduciary standard that protects all investors.

Mark Smith:

In the interest of time, my comments today will focus on the proposed BIC exemption, but we’d be happy to answer any questions you might have about other aspects of our comment letter.

Since the enactment of ERISA in 1974, the Department has recognized that broker-dealers provide investment services essential to retirement savers. Consequently, the Department has over the years provided ERISA compliance structures that accommodate the commission-based broker-dealer business model. In our experience, this regulatory regime, coupled with the heavy federal and state regulation to which this industry is otherwise subject, has substantially succeeded in protecting the interests of retirement savers. In the proposal, the Department largely agrees with us; in more than one instance, the Department observes that in the main, retirement investors are well served by their financial advisers. And this industry can testify from long experience that, if a bad actor does disserve a retirement investor, there are effective remedies available today. As we see it, the Department has been presiding over a success story here.

The Department, of course, proposes to remake this regulatory regime in the service of enhancing investment protections for participants and IRA owners. The expanded fiduciary definition purposefully puts real pressure on the broker-dealer business model, and we appreciate the Department's effort to preserve the availability of commission-based accounts and thus investor choice through the proposed BIC exemption. The difficulty is that the BIC exemption as proposed simply is unworkable, for participants and IRA owners as well as for our members. Let me give you four high-level examples of that.

1. The proposed conditions governing compensation practices are not business model neutral. While commission-based compensation models remain available in form, there is no clear path through the exemption that our members can rely on with confidence. The proposal leaves even good actors substantially exposed on this point. On a related point, the constraints on certain types of investments is neither neutral nor principles-based.
2. The written contract requirement is operationally challenging, and inconsistent with industry practice and investor expectations. Simply put, no one will understand being asked to sign a contract before any concrete discussion of investment possibilities has taken place or any hiring decision has been made.
3. The series of disclosures required by BIC – the point of sale disclosure, the annual disclosure, the website disclosure and, functionally, the data request requirement -- are complex, overwhelming for retail investors, and/or duplicative with existing disclosures. The BIC disclosures would also come at a real cost, which ultimately falls on participants and IRA owners. And to the extent the BIC disclosures implicitly require projections of future investment experience, they are also incompatible with other laws to which this industry is subject.
4. Finally, we like many others are greatly troubled by the prospect of a federal agency creating a private right of action under disuniform state law for violation of a federal legal standard that itself is not even created by statute. And at least in the circumstances of our industry, we can testify with certainty that ERISA fiduciary status and the best interest standard will be cited against our members in FINRA arbitrations and the other forums in which remedies exist today.

We should note that these consequences will fall more heavily on our smaller members than our larger members; the resource requirements to take on these conditions and exposures do not all scale. We had not thought that the Department intended to take retirement business away from smaller firms and give it to larger firms, but it may be that the proposal would do just that, which is a particular problem in smaller communities.

The BIC proposal becomes unworkable, and impairs investor choice and access, when it goes beyond the core White House concept of best interest and essential disclosures. In our comment letter, we suggested for your consideration alternative conditions that are closer to that core concept, consisting of:

- A prudential standard to act in the client's best interest; to provide skillful, careful and diligent advice based on the client's needs; and to disclose, avoid where possible, and otherwise obtain consent for material conflicts of interest;
- The adoption of written policies and procedures to manage material conflicts in reasonable and specified ways; and
- A more streamlined and focused set of disclosures at account opening, on the web and at the point of sale that conceptually have much in common with the Department's judgments underlying the 404a-5 disclosures.

And this is a key point, as well as my final point; these conditions could serve not only as a solution under ERISA but also for non-retirement retail accounts, under other bodies of law. The Department itself argues that retail investors can find it confusing if different rules and legal standards apply to different accounts. It is also harder and more expensive for our members to serve clients if the Department, the SEC, FINRA, and the various other federal and state regulators with jurisdiction approach their common objective of investor protection in different ways. In the commentary, the Department heard from a number of these other authorities about the importance of coordination with respect to the proposal, and we cannot reiterate in strong enough terms that the proposal will fail in its objective of assisting retirement investors, at the least possible cost to the retirement system, if functional coordination does not take place.

Dale Brown:

Thank you, again, for this opportunity to share some of our thoughts regarding the Department's fiduciary proposal and provide some of our suggested alternatives. We are committed to working with you to improve the proposal in order to preserve access to professional retirement advice for all investors. And, we encourage the Department to coordinate with the SEC and FINRA on a uniform proposal.

Thank you for your time, and we would be happy to answer any questions.