August 2, 2017

The Office of Exemption Determinations (Attn: D-11933)
Employee Benefits Securities Administration
U.S. Department of Labor
Suite 400
200 Constitution Ave, N.W.
Washington, DC 20210

Sent via email: EBSA.FiduciaryRuleExamination@dol.gov

Re: RFI Regarding the Fiduciary Rule and PTEs; Questions 3 and 11

Ladies and Gentlemen:

The Department of Labor's Conflict of Interest Rule (Rule) is causing more harm than good. It's being *sold* to the public as a Pollyanna fiduciary standard. It's not; it's *just* a conflict of interest rule.

The Rule's singular focus on conflicts demonstrates that proponents are not familiar with a fiduciary standard. The Rule does nothing to highlight the importance and value of a prudent investment management process. It is causing harm because it minimizes the very fiduciary best practices that have materially improved investment outcomes for more than four decades.

Furthermore, because of the complexity of the Rule and its attendant risks financial services firms will have little option other than to offer retirement savers *Stepford* portfolios (as in the book and movie, ***Stepford Wives***). These will be robo-advised portfolios based on faux fiduciary standards, not on a procedurally prudent process. *Stepford* portfolios will be designed to minimize a firm's liability as opposed to maximizing the probability of a retirement saver being able to meet their goals and objectives.

Against the backdrop of these opening statements, we would like to submit answers to two of the questions from the Department's Request for Information:

Question 3: Does the fiduciary rule and PTEs "appropriately balance" consumer interest in broad-based investment advice while protecting them from conflicts of interest?

Question 11: If the Securities and Exchange Commission (SEC) or other regulators were to adopt updated standards of conduct applicable to the provision of investment advice to retail investors, could a streamlined exemption or other change be developed for advisers that comply with or are subject to those standards?

In response to Question 3: **Does the fiduciary rule and PTEs "appropriately balance" consumer interest in broad-based investment advice while protecting them from conflicts of interest?**

NO!

The Rule's presupposition – *that conflicts are eroding retirement savings* – is seriously flawed. The elimination of conflicts, in and of itself, will not translate to improved investment performance.

By way of background: I have been fully engaged with the fiduciary movement for three decades and have trained over 10,000 financial advisors (the term is intended to be inclusive of brokers and agents) and trustees. [1]

[1] **Donald B. Trone, *curriculum vitae* (abbreviated) for fiduciary expertise:**

- Author or coauthor of ten books on the subjects of fiduciary responsibility, portfolio management, leadership and stewardship.
- 1999-2007, Principal Founder and CEO of fi360; developed the curriculums for the industry's first fiduciary designations.
- 2000-2010, Founder and President of the Foundation for Fiduciary Studies; published the industry's first handbook on a uniform fiduciary code of conduct.
- 2002-2003, Advisor to the U.S. Department of Labor's ERISA Advisory Council; authored proposal that urged the Secretary to work with the SEC to develop a uniform fiduciary code of conduct.
- 2007, testified before the U.S. Senate Finance Committee on fiduciary best practices.
- 2007-Present, Co-founder and CEO of 3ethos; conducting original research on behavioral governance to identify the specific leadership and stewardship behaviors that amplify and infuse a uniform fiduciary code of conduct.
- 2015, named by **Investment Advisor** magazine as "*Father of Fiduciary.*"
- 2017, Selected by SS&C Learning Institute to be first Senior Fellow to develop courseware associated with a uniform fiduciary code of conduct.

The Department's construct should be restated as: ***How can we improve retirement outcomes?***

The answer to that question can be summed in two words – ***procedural prudence***. It is the bedrock of an ERISA fiduciary standard and has been for more than four decades.

In my role as a Senior Fellow at the SS&C Learning Institute, we have identified a procedurally prudent process consisting of five steps and ten dimensions – two dimensions are used to define the details for each step.

Of the ten dimensions, only one deals with scrutinizing for conflicts and self-dealing – the focus of the Rule. **It should be noted that there are nine additional dimensions; each will have a material and positive impact on long-term investment performance.**

A financial advisor who can demonstrate the details of a procedurally prudent process is going to provide far superior investment outcomes than the financial advisor who can merely demonstrate compliance with the Rule.

On a related note, the vast majority of financial advisors do not know the differences between a *general fiduciary best interest standard* and an *ERISA fiduciary standard*. Financial advisors are not aware that the Rule will make them subject to the more rigorous procedural prudence requirements of an ERISA standard. Proponents for the Rule have *sold* financial advisors on the false notion that they will meet the requirements of a fiduciary standard by simply complying with the Rule. The have told financial advisors that they're holding a firecracker when actually they're holding a stick of dynamite.

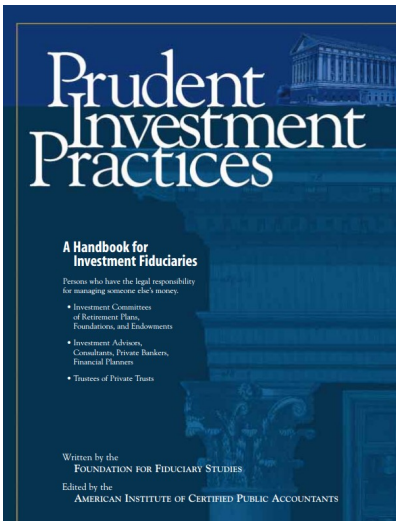
We need to level-set the industry's understanding of the specific practices associated with an ERISA fiduciary standard. Until we do, the industry will not be able to estimate the time and charges associated with providing a retirement saver a fiduciary standard of care.

Proponents for the Rule have testified that retirement savers with small account balances have been serviced by fiduciary advisors for years. I vigorously disagree. Retirement savers may have been serviced under a best interest standard, but not the more rigorous ERISA fiduciary standard. Under an ERISA standard I estimate that the minimum account size needs to be $360,000. If correct, then this account balance is more than fourteen times the median IRA account. In other words, the Rule is not workable.

An emphasis on procedural prudence will more "appropriately balance" the best interests of retirement savers. However, we first need to level-set the industry's understanding of a prudent process, and then calculate the associated fees and expenses. Only then can we assess the viability of the Rule.

In response to Question 11: **If the SEC or other regulators were to adopt updated standards of conduct applicable to the provision of investment advice to retail investors, could a streamlined exemption or other change be developed for advisers that comply with or are subject to those standards?**

YES!

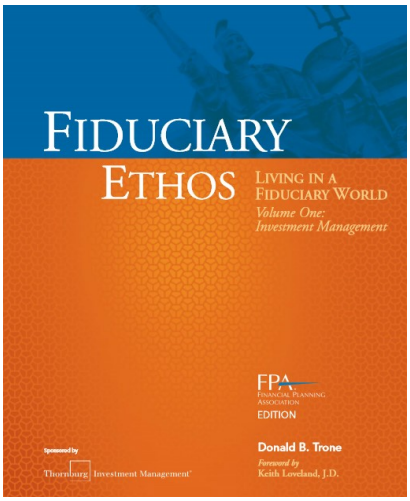


In 2000, I launched the Foundation for Fiduciary Studies with a group of like-minded fiduciary experts. We wanted to identify best practices that could be used to define the details of a uniform fiduciary code of conduct for the more than five million men and women in the U.S. who serve as investment fiduciaries.

Our vision was to define a single set of best practices that could be used to frame a fiduciary standard for pension plans, foundations, endowments, personal trusts, and wealth management clients.

We took a very disciplined approach and substantiated every best practice with existing fiduciary legislation, case law, and regulatory opinion letters from the Department and from the SEC.

Unfortunately, the Foundation no longer exists. In 2010, it was sued by a for-profit company that claimed it owned the Foundation's copyrighted material.



There was a second attempt to define a uniform fiduciary code of conduct. This initiative was undertaken with the Financial Planning Association (FPA).

We knew as early as 2006 that the Department wanted to apply a fiduciary standard to protect all retirement savings, not simply qualified retirement plans. We believed the most appropriate standard for protecting individual retirement savings would be the six-step financial planning process integrated with fiduciary best practices.

In 2010, we published our findings in the handbook, ***Fiduciary Ethos***.

Unfortunately, the FPA initiative was interfered with by the CFP Board of Standards and also by the same for-profit company that sued the Foundation. The tragic irony - these organizations have been two of the most ardent supporters of the Rule. They want a fiduciary standard, but only if they can politically or commercially exploit it.

The Department should take note that organizations that have caused the most harm to the fiduciary movement have been certain proponents of the Rule, not the Rule's opponents.

The fiduciary movement today is being fueled by politics, power, ego and greed – not the best interests of investors and savers. "Fiduciary" is becoming the camouflage of choice for those who wish to conceal conflicts or engage in self-dealing.

This then brings up a related question: *When the Department drafted the Rule; did it consult with fiduciary experts?*

No; I don't believe it did.

I am of the opinion that the former Secretary and his staff were more interested in advancing a political agenda than protecting the interests of retirement savers. Rather than working with fiduciary experts, the Secretary turned to politically like-minded consumer advocacy groups. This may help to explain why the Rule bears no resemblance to a fiduciary standard of care.

A final comment: Implicit to an understanding of an ERISA fiduciary standard of care *should be* the ability of the financial advisor to judge wisely and objectively. However, the Rule does not take into consideration the training or experience of the financial advisor. In an effort to maximize the number of financial advisors subject to a fiduciary standard, the Rule minimizes the importance of the financial advisor's capacity for discernment and prudent decision-making.

As a result, the Rule is going to become a prosthesis for financial advisors who lack the purpose, passion, and process to protect the long-term interests of retirement savers. The Rule's singular focus on conflicts is going to obfuscate investment management practices that could actually improve long-term investment performance.

The Rule is causing more harm than good because it's being *sold* as a fiduciary standard. It's not; it's *just* a complex rule.

Sincerely,

Donald B. Trone
Co-founder and CEO
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