



## PUBLIC INVESTORS ADVOCATE BAR ASSOCIATION

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January 2, 2024

### Via Federal eRulemaking Portal

Assistant Secretary Gomez Lisa M. Gomez  
Office of Regulations and Interpretations  
Employee Benefits Security Administration  
Room N-5655  
U.S. Department of Labor  
200 Constitution Ave. NW  
Washington, D.C. 20210

Re: Retirement Security Rule; Definition of an Investment Advice Fiduciary  
RIN 1210-AC02

Dear Assistant Secretary Gomez:

I write on behalf of the Public Investors Advocate Bar Association ("PIABA"), an international bar association comprised of attorneys who represent investors in disputes with the securities industry. Since its formation in 1990, PIABA has promoted the interests of the public investor in all securities and commodities arbitration forums, while also advocating for public education regarding investment fraud and industry misconduct. Our members and their clients have a strong interest in rules promulgated by the Department of Labor relating to investor protection and fiduciaries.

PIABA submits this comment to the above-referenced Department of Labor's rule proposal concerning the definition of investment advice fiduciary. PIABA generally supports this rule proposal and it believes the proposed rule changes would improve investor protection.

A prevailing theme of the financial services industry when they are soliciting the business of public investors is "trust us with your financial future." For example, Morgan Stanley advertises its "core values" to include "do the right thing" and "put clients first."<sup>1</sup> Merrill Lynch claims that "[Y]our advisor is someone who can be there for you for years to come, **providing more than**

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<sup>1</sup> Morgan Stanley, *About Us; Core Values*, at <https://www.morganstanley.com/articles/why-you-may-need-a-trust> (last visited December 22, 2023).

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**just stock recommendations** and who will focus on your short- and long-term goals.”<sup>2</sup> Edward Jones says that “[O]ur financial advisors know their clients best: what they need, what they value, and what it will take to help them achieve financially what is most important.”<sup>3</sup> Many clients believe these claims, and entrust irreplaceable life savings and retirement accounts with financial services firms.

Unfortunately, when those accounts are mismanaged, these same firms have very different beliefs about their relationships with these clients. They claim that “putting clients first” does not mean they are held to the legal standard of fiduciaries. They argue that non-security investment products, such as equity indexed and fixed annuities, are not securities and therefore the brokers were “merely” acting as an insurance agent with a minimal duty of care, not even subject to a suitability rule. They insist that pervasive conflicts of interest between various related issuer companies and the sales force are not problems, even when the firms make recommendations which result in drastically larger commission payments to the broker.

PIABA believes that the proposed rule would reduce, if not necessarily eliminate, some of this double-talk between how firms market themselves to investors before the onset of a customer relationship compared to what they claim their duties are later. Clients are never told that certain investments or financial decisions that their broker is advising them on are subject to differing standards of care. As far as a public investor knows, they have one broker, and all of the conversations and recommendations from that broker have the same value and importance. Changing the rule to eliminate firms’ purported legal defenses that different investment recommendations are subject to different legal rules, moves the industry towards what public investors already reasonably believe is true.

Unfortunately, the payment structure of the financial services industry is still largely transactional, commission-based. That means that some brokers will say or do anything they have to convince a public investor to roll over the client’s retirement savings, which is often the vast majority of the client’s entire life savings, to that broker’s “management.” But when the broker gets paid his commission from the assets moving over, suddenly he disappears. Having a different standard of care for a single transaction is counterintuitive. Public investors simply do not expect that to be the case, and there is no legitimate reason that it should be.

Additionally, recommendations to a plan sponsor should not be governed by a different standard of care. A small business owner having a discussion with his advisor about which funds to invest in his personal savings account in the corporate plan should not carry a different standard than that same business owner having a conversation with that same advisor about whether or not he should make changes to the plan itself. These rules and regulations should match what the reasonable expectations of the investing public are, rather than creating a patchwork system where there are hidden traps left for consumers who are unaware that certain types of advice they receive

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<sup>2</sup> Merrill Lynch, *Our Advisors*, at <https://www.ml.com/working-with-merrill-lynch-financial-advisor/our-advisors.html> (last visited December 22, 2023) (emphasis added).

<sup>3</sup> Edward Jones, *Benefits of working with a financial advisor*, <https://www.edwardjones.com/us-en/working-financial-advisor/benefits-working-financial-advisor> (last visited December 22, 2023).

from their broker are not held to same strict standard of care as other advice they receive from the same broker.

PIABA thanks the Department for the opportunity to comment on this proposal.

Very Truly Yours,



Joseph C. Peiffer  
President, Public Investors Advocate  
Bar Association