

FSI BRIEFING – April 25, 2011

## Department of Labor Proposal Would Unnecessarily Limit Access to Advice for those Planning for Retirement

### Introduction

On October 22, 2010, the Department of Labor's (DOL) Employee Benefits Security Administration (EBSA) proposed a rule to amend the definition of "fiduciary" for purposes of the Employee Retirement Income Security Act of 1974 (ERISA) and section 4975 of the Internal Revenue Code of 1986 (Code). The proposal would broadly define the term as a person who provides investment advice to plans for a fee or other compensation.

The DOL's proposal would reverse 35 years of case law and enforcement policy by eliminating the existing bright line regulatory test and replacing it with a regulatory structure that presumes persons to be an ERISA fiduciary. The DOL proposal does so in an effort to ensure that Individual Retirement Account (IRA) investors and participants in ERISA retirement plans (Covered Plans) receive advice based on reliable information that protects their interests. Unfortunately, the DOL's proposal will have significant unintended consequences by limiting access to retirement advice and service for the 19 million IRA account holders and participants in the more than 600,000 Covered Plans who are responsibly planning for their retirement.

### Proposal Will Limit Access to Retirement Advice and Service

The independent broker-dealers and independent financial advisors represented by the Financial Services Institute (FSI) provide highly regulated, professional investment services to investors in accordance with standards of conduct specified by the Securities and Exchange Commission, the Financial Industry Regulatory Authority, state insurance and securities commissioners and other regulators. Most often, they are lawfully compensated for their services through commissions. Commissions are a form of compensation allowed service providers under ERISA but not investment advice fiduciaries.

Regrettably, the DOL's proposal would re-categorize broker-dealers and financial advisors as fiduciaries if they provide advice to an IRA account or Covered Plan and receive compensation for the advice. Status as a Covered Plan or IRA fiduciary has significant consequences including increased liability exposure and the elimination of commissions as a viable form of compensation for those that provide advice and support services. If the DOL's proposal were adopted, many broker-dealers and financial advisors would be forced to withdraw from the market of advising Covered Plans, their participants and IRA investors, thereby reducing access to these valuable services.

At a time when many Americans are struggling to ensure themselves of a secure retirement, the proposal could severely limit access to low cost investment advice. With more and more investors responsible for their own retirement planning and in need of advice and service, the DOL should be adopting policies that expand access. Unfortunately, this proposal would have the opposite effect thereby disadvantaging those it aims to help.

### Conclusion

FSI believes that any attempt to change the existing regulatory structure governing investment relationships in the retirement planning marketplace must be done carefully and prudently to avoid uncertainty and disruption. The DOL's proposal fails this test. As

a result, FSI is calling on members of Congress to urge the EBSA to suspend its rulemaking process until questions concerning the full impact of the proposal on access to advice service for investors planning for retirement have been fully resolved.

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About the Financial Services Institute

FSI is an advocacy organization for independent broker-dealers and independent financial advisors. Established in January 2004, FSI has 126 broker-dealer members and more than 16,000 financial advisor members. FSI's mission is to create a healthier regulatory environment for independent broker-dealers and their affiliated independent financial advisors through aggressive and effective advocacy, education, and public awareness. Its strategy includes involvement in FINRA governance, constructive engagement in the regulatory process, and effective influence on the legislative process. FSI is headquartered in Atlanta, GA with an office in Washington, DC. For more information, visit [financialservices.org](http://financialservices.org).