April 17, 2017

Submitted via: e-ORI@dol.gov

Hon. Alexander Acosta, Secretary of Labor Nominee
Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Comments on Proposed Conflict of Interest Rule [RIN-1210-AB79]

Dear Secretary Nominee Acosta:

Secured Financial Solutions, LLC, submits this comment letter in support of the United States Department of Labor's (DOL) final rule to define the term "fiduciary" and end conflicts of interest in providing retirement advice, commonly known as the "Fiduciary Rule." The Fiduciary Rule as drafted significantly advances investor protection, particularly for some of our most vulnerable investors – seniors. In fact, further delay to implementation of the Rule or modification of the Rule, misunderstood in the Presidential Memorandum, will continue to affect adversely the ability of Americans to gain access to retirement information and financial advice material to their retirement investment decision-making. Facts and experience warrant allowing the Fiduciary Rule to take effect, as drafted and pending implementation on June 9, 2017, unimpeded by unnecessary and detrimental further examination or delay.

- **Background and Industry Experience as Relevant to Comment Submission**

The undersigned, President and Chief Executive Officer of Secured Financial Solutions, LLC, has more than 20 years of relevant securities and insurance industry experience and more than 1,000 clients across the United States. I take great pride in my firm being one of the leading financial service firms in Arizona, specializing in offering high-quality and reliable financial planning advice to retirees and people planning for retirement. The nature of my work and experience requires me to work regularly and closely with several of the largest independent marketing organizations (IMOs) and insurance companies to provide services to my clients. My firms offer a blend of fee-based active money managers and high-quality Fixed Indexed Annuities (FIAs) for income and retirement planning. I hold a Series 65 investment advisor license, as well as health and life insurance licenses. To be direct and unequivocal, the Fiduciary Rule directly impacts and falls squarely within what I have been doing for the past 20 years and the services that I provide every day.

- **Integrity of the Insurance Industry is at Stake**

Fundamental to the Fiduciary Rule is what it will achieve for some of America's most vulnerable investors at their most vulnerable time – frequently unsophisticated investors taking their hard-earned limited savings to plan for their retirement. The effect of the rule will be that <u>all</u> financial professionals, including brokers and insurance agents, who work with retirement plans or provide retirement planning advice are treated as <u>fiduciaries</u> – legally and ethically bound to act in the best interests of their clients, and to put first their clients' interests above their own. There should be no more basic premise than a financial professional acting in the best interests of his or her client. In fact, one should wonder why anyone, or any organization, would challenge a concept of acting first in a client's interest. Viewed differently, it is curious why certain factions of the fixed annuities industry and its trade group, the National Association for Fixed Annuities (NAFA), favor the absence of a rule to provide enhanced protection for investors, thereby appearing to countenance misleading investors. This warrants further exploration and attention.

Trade groups and others in the fixed annuities industry appear to have engaged in a practice of misleading America's retirees and elderly systematically by preying on their fears and forcing fee-laden, complex indexed annuity products on them. IMOs and the insurance companies that back them offer "complex," "proprietary," and "restricted distribution model" (FIAs) that, in essence, have the characteristics of variable annuities. The Securities and Exchange Commission (SEC) and the Financial Industry National Regulatory Agency (FINRA) regulate variable annuities as securities when offered by securities-licensed advisors. In other words, if there is no change, then insurance agents will continue offering the complex products beyond the regulatory reach of the SEC and FINRA. Meanwhile, insurance agents are pitching FIAs like securities products by discussing exotic indices with limited track records and by giving investment advice without an investment license and without the consumer protections afforded by regulations promulgated by the SEC, DOL, and FINRA. What many lawmakers and regulators – and certainly the lay investing American public – do not realize is that most IMOs and their insurance-licensed agents have <u>no</u> fiduciary responsibility to their clients.

For these reasons, the integrity of the entire insurance industry is at stake. I embrace the heightened obligations that the Fiduciary Rule brings and refuse to be silent as certain individuals and IMOs that are part of NAFA and other organizations use their power, influence, and money to mislead consumers and skirt regulations. In this Comment, you will find illustrative examples of how certain IMOs have designed instruments and vehicles to market those instruments which, by their presentation and method of delivery, operate to mislead the American public, lawmakers, and regulators.

Having worked in this industry for decades, I am well-acquainted with those in the industry whose presentations and instruments have a propensity to mislead, and I have voiced my opinion about this to appropriate federal and state Departments and Agencies. I remain willing to continue to assist and participate actively in the discourse, as well as offer my help by providing substantive inculpatory communications by individuals and organizations that support my contentions. As my contribution to and in support of this effort, I submit respectfully this Comment letter in support of DOL's Fiduciary Rule to protect consumers, advisors, and financial institutions (win-win-win) as DOL stands ready to implement the Rule to protect American consumers.

- **IMOs and Third Parties Design their Complex Proprietary FIAS to Act as Variable Annuities to Potentially Skirt Regulatory Scrutiny**

Recently, the *Philadelphia Inquirer* documented the rise of inappropriate retirement investments, identified as questionable the marketing tactics to vulnerable populations such as retirees and seniors, and highlighted the lack of regulation over these products.[1] This problem, left unchecked, has cost retirees $17 billion a year in excess fees while insurance agents pocketed as much as 10% off each sale.[2] These marketing tactics include, but are not limited to:

- non-compliant advertisements in local newspapers touting teaser rates;
- advertising rates of return over the Internet on search engines such as Google;
- lunch and dinner seminars conducted by insurance agents masquerading as financial planners;
- using trust preparation as bait and then selling inappropriate annuities as the switch (referred to as "trust mills");
- teaming-up with local CPAs to cross-sell annuities and promoting the purchase of annuities to qualify for Medicaid to game the system.

These are just some of the gimmicks used to sell high-commission, complex proprietary FIAs.

Insurance agents have been selling FIAs for years, offering products to consumers looking for investment options as an alternative to investing directly in the stock market. IMOs and designers of complex proprietary FIAs employ hypothetical illustrations using a stock market index to make the sale. To explain properly the benefits of a complex proprietary FIA to potential investors such that the investors can make informed investment decisions, insurance

[1] Mark Fazlollah & Erin Arvedlund, *Fixed Index Annuities 'Magical' or "Unsuitable'?*, PHILADELPHIA INQUIRER, March 5, 2017, http://www.philly.com/philly/business/Fixed_Index_Annuities_Magical_or_Unsuitable.html (last visited Apr 17, 2017).

[2] *Id*.

agents must (or the institutions for whom they work or whose instruments they are offering should require that the agents) explain the stock market indices and the benefits of the annuity over other investment products. By coaxing seniors and retirees to sell their IRAs, securities, and other investments to fund purchasing complex proprietary FIAs, insurance agents transform themselves into the role of investment advisors. Therefore, if insurance agents are acting like investment advisors and performing the essential functions of investment advisors, then insurance agents also should be governed by the same laws that govern investment advisors – namely the Fiduciary Rule. However, presently, no law or regulation obligates insurance agents to warn their clients about products that may not make sense for them, particularly given that less complex, less expensive alternatives are available. The current regulatory regime that is absent from applicable governing regulations enables designers of complex proprietary FIAs, certain IMOs, and the insurance agents to skirt this important, fundamental, and logical consumer-centric, investor-protection oriented fiduciary responsibility.

There is an inherent conflict of interest when agents recommend a complex proprietary FIA on behalf of their IMO simply because of the compensation structure for the IMOs. Specifically, the institutions that create the complex instruments incentivize IMOs with the opportunity to receive high year-end bonuses and protected margins. The unfortunate byproduct is that the insurance carrier that promotes these complex proprietary FIAs also pays very handsome compensation on sales volume to designers of these complex proprietary FIAs. Examples of designers of complex proprietary FIAs are Annexus Group, Market Synergy, and Innovative Design Group.

As an advisor who contracts with insurance companies to distribute their retirement products, I have worked closely in the past with companies like Aviva Life & Annuity Company (Aviva), which Athene Insurance Company recently acquired. From this relationship, I am aware of its distribution partners, including Advisors Excel LLC (Excel), Annexus Distributors AZ LLC (Annexus), and Creative One Marketing Corporation (Creative). When I observed insurance agents giving investment advice without an investment license, I felt a moral and ethical obligation to report this activity, which appeared to me to violate federal and state securities laws, to appropriate regulators. After I blew the whistle on a number of these agents, they banded together and retaliated against me. This is but one example of the industry-wide "corrupt" practices that Senator Elizabeth Warren has previously called-out (see https://insurancenewsnet.com/innarticle/warren-targets-imos-operating-corrupt-status-quo).

One reaction to my discharging my duty to report misconduct illustrates the retaliate-first mindset of many in the insurance industry. For example, once it surfaced that I reported the abuses of insurance agents giving investment advice without an investment license, Michael Tripses, the Chief Executive Officer of Creative, sent an email to Michael Dickerson, Aviva's Vice President of Sales and Recruiting, with the subject heading "Can you help me get Anil Vazirani's AVIVA contract terminated?" and noted that "This guy [Anil Vazirani] is bad for the industry." Instead of embracing industry integrity, I was attacked for standing up for compliance with securities laws. What is particularly noteworthy is that Mr. Trispses served in an executive capacity at NAFA. Even more interesting is that the current spokesperson of NAFA, Chip Anderson, was an executive of Creative at the same time I was being vilified for standing up and supporting compliance with securities laws.

I also have witnessed first-hand how the designers of these complex proprietary FIAs have promised outlandish rates of returns using hypothetical illustrations and using insurance agents to encourage seniors and retirees to cash out their stocks, bonds, ETFs, and mutual funds in favor of investing in their "complex" and "proprietary" products. The promise of unreasonable – but not quite outlandish – returns by investment advisors and brokers commonly breeds enforcement actions by the SEC and FINRA. The materially false and misleading pitch to vulnerable consumers, and what consumers constantly are being misled to believe, is that there is *no* risk and high reward. Unsuspecting investors are being misled into believing they can consistently earn the non-guaranteed projected percentage rate of return year-in and year-out without any loss. The insurance companies and the designers of these complex proprietary FIAs provide back-tested data and hypothetical charts as proof of performance, when such data does not exist (a detail disclosed only in the tiny fine print). These hypothetical illustrations and back-tested data contradict the very principle that past performance is not indicative of future results. SEC Rule 156 expressly requires mutual funds to tell investors not to base their expectations of future results on past performance before they invest. And, similarly, the SEC's Enforcement Division reiterates this point in its investment advisor advertising cases.

For example, a recent email promotion for The NYSE Zebra® Edge Index™ advertises a "**106% higher** annual compound returns than the S&P 500 Price Index with 24% less volatility," and underneath the headline shows a chart of performance of The NYSE Zebra® Edge Index™ versus the S&P 500 Price Index since 2000. What's odd, however, is that the NYSE Zebra® Edge Index™ only recently began in October 2016 (inception). In short, this Index inception was only seven months ago, yet the back-test and past performances go back anywhere from 10-20 years. Examples are Nationwide Insurance Company marketing proprietary complex FIA designed by Annexus Group called New Heights that offer The NYSE Zebra Edge Index and JP Morgan Mosaic Index. Athene Insurance Company offers Balance Choice Elevate, a proprietary complex FIA designed by Annexus Group that offers Merrill Lynch RPM Index. These indexes have only been in existence for a short period of time but nevertheless the designers of these complex instruments and Insurance Carriers that market them show projections of back test and past performance going back 10-20 years.

So, how is it that the designers of these complex proprietary FIAs and the insurance companies that market them can show – and pass off – hypothetical and back-tested data to investors who may not be as sophisticated to understand that this data is not real, but hypothetical? Investors will only know of this risk *if* they read the fine print because their agents, who are not fiduciaries, are not obligated to disclose this information to them. The unsuspecting consumer receives a generic brochure and signs various forms, typically without reading them or understanding the full extent of their risk due to the complexity of the language the brochures and forms contain. If the agent successfully makes a sale, then the consumer will receive a complex FIA contract that has many pages of data and confusing formulas. These complex proprietary index annuities have so many moving parts that trying to grasp the basics leaves consumers perplexed. To make matters worse many of the key items that are not in the consumer's best interest are buried in a lot of legalese language of the FIA contract. Years after the SEC's "Plain English" initiatives, the absence of a strict fiduciary rule governing insurance agents, as contained in the Fiduciary Rule, enables insurance agents and their sponsors to make sales of unsuitable and/or misrepresented instruments with near impunity.

The insurance industry for the most part has turned a blind eye to this problem, allowing certain IMOs and designers of complex proprietary FIAs to perpetrate these acts of bad faith. Some of the marketers of these complex proprietary FIAs are Nationwide (Annexus Group), Athene (Annexus Group), and Security Benefit Insurance Company (complex proprietary FIAs designed by Innovative Design Group for the sole use and benefit of Advisors Excel IMO in most cases). The Fiduciary Rule would go a long way towards creating accountability and plugging this gaping regulatory compliance hole.

- **Designers of Complex Proprietary FIAs and NAFA File Lawsuits to Protect their Interests**

As DOL is well aware, several of the designers of complex proprietary FIAs have filed lawsuits against DOL to prevent implementation of the Fiduciary Rule. One prime example is the lawsuit that Market Synergy Group (Market Synergy) filed. Market Synergy, Annexus, and Innovative Design Group each offer complex proprietary FIAs for "limited model distribution." When agents sell complex proprietary FIAs that their IMOs recommend, the agents generally are not acting in the consumers' best interest; instead, their incentives for selling the overwhelmingly unsuitable instruments are potentially higher commissions, year-end production bonuses, and protected margins for the IMOs.

What would be more troubling to regulators, however, is how Market Synergy, Annexus, and Innovative Design Group have designed these complex proprietary FIAs. These designers of complex products induce or at a minimum cause, insurance agents to give investment advice without an investment license, commit source-of-funds violations by influencing the movement of money from securities into complex proprietary FIAs without the proper securities license, and potentially abuse the principle of past performance not being indicative of future results by using hypothetical illustrations to project non-guaranteed returns. NAFA, the trade association for FIAs, condones and endorses these activities and has been instrumental – it is a named Plaintiff in one case – in leading the charge against protecting investors by its centrality in challenging DOL's proposed Fiduciary Rule. NAFA appears to have no compunction or remorse about putting investor protection and informed investor decision-making behind manipulative marketing.

NAFA claims that its mission is to educate and inform state and federal regulators, legislators, industry personnel, media, and consumers about the value of fixed indexed annuities and their benefits to Americans in financial and retirement planning. NAFA differentiates FIAs from variable annuities on the grounds that investors bear the investment risk attendant to variable annuities. However, what NAFA fails to disclose is that, in some segments, complex proprietary

FIA designers use sales and marketing techniques whereby these FIAs have characteristics similar to variable annuities and, thus, they force insurance agents to give investment advice without an investment license and move funds from securities-type investments into these complex proprietary FIAs in violation of securities laws regarding the source of funds.

Finally, NAFA expresses concern that thousands of independent insurance agents may exit the business of selling FIAs due to the requirements that the Fiduciary Rule will place on them. This position is disingenuous and all too convenient. In 2009, NAFA turned a blind eye to Aviva USA, one of the largest life insurance and annuity providers, terminating in bad faith and without cause more than 10,000 insurance agents. Mark Heitz, one of the members of Market Synergy and a Plaintiff against DOL, was part of the Aviva executive team that was responsible for the termination of approximately 10,000 agents for no cause and in bad faith. One can only speculate why NAFA abandoned and chose not to protect the 10,000 insurance agents whom Aviva terminated. Some speculation is that NAFA had no financial vested interest then but has a vested financial interest now. The answer may come out in the litigation; the information only is relevant here so as to reflect the strong biases, prejudices, and inconsistencies that NAFA brings to the Fiduciary Rule implementation discussion.

One striking irony is that Annexus Group and Advisors Excel are among the few IMOs to apply for financial institution status under the Fiduciary Rule. An appropriate analogy is the fox guarding the hen house. What is important is that DOL understands the conflicted interests of the IMOs and the appreciation for who truly does – and conversely does not – speak for investor protection.

FIAs that are not complex and not proprietary are a valuable benefit for American consumers who are planning a guaranteed income in retirement, but complex proprietary FIAs can wreak havoc unless insurance agents are required to act in consumers' best interests. I certainly hope that based on the feedback from the insurance industry and the securities industry we can move forward with the final Fiduciary Rule, which protects and benefits all parties. Complex proprietary FIAs are the reason the insurance industry has come under more intense scrutiny by government regulators and the DOL. Based on my 20 years of industry experience, I see these complex proprietary FIAs as deceptive devices to generate potentially high commissions, year-end bonuses and protected margins for certain IMOs; instead, I prefer to work with a majority of the financial institutions that offer high-quality FIAs that have guaranteed riders and provide peace of mind and safety that the American consumers deserve. Such instruments, like the Fiduciary Rule itself, are in the best interest of retirees and consistent with a fiduciary obligation to investors.

Regards,
Anil Vazirani (LUTCF)
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