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DEPARTMENT OF LABOR'S PROPOSED FIDUCIARY RULE

HEARING

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT

OF THE

COMMITTEE ON WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

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DEPARTMENT OF LABOR'S PROPOSED FIDUCIARY RULE

WEDNESDAY, SEPTEMBER 30, 2015

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON WAYS AND MEANS,
SUBCOMMITTEE ON OVERSIGHT,
Washington, DC.

The subcommittee met, pursuant to call, at 10:05 a.m., in Room 1100, Longworth House Office Building, the Honorable Peter Roskam [chairman of the subcommittee] presiding.

[The advisory announcing the hearing follows:]

COMMITTEE ON
WAYS AND MEANS
CHAIRMAN PAUL RYAN

Chairman Roskam Announces Hearing on the Department of Labor's Proposed Fiduciary Rule

House Committee on Ways and Means Subcommittee on Oversight Chairman Peter J. Roskam (R-IL) today announced that the Committee on Ways and Means Subcommittee on Oversight will hold a hearing on the Department of Labor's proposed fiduciary rule. The hearing will take place on Wednesday, September 30, 2015 at 10:00 AM in Room 1100 of the Longworth House Office Building.

Oral testimony at the hearing will be from the invited witnesses only. However, any individual or organization may submit a written statement for consideration by the Committee and for inclusion in the printed record of the hearing.

Details for Submission of Written Comments:

Please Note: Any person(s) and/or organization(s) wishing to submit written comments for the hearing record must follow the appropriate link on the hearing page of the Committee website and complete the informational forms. From the Committee homepage, http://waysandmeans.house.gov, select "Hearings." Select the hearing for which you would like to make a submission, and click on the link entitled, "Click here to provide a submission for the record." Once you have followed the online instructions, submit all requested information. ATTACH your submission as a Word document, in compliance with the formatting requirements listed below, **by the close of business on Wednesday, October 14, 2015**. For questions, or if you encounter technical problems, please call (202) 225-3625 or (202) 225-2610.

Formatting Requirements:

The Committee relies on electronic submissions for printing the official hearing record. As always, submissions will be included in the record according to the discretion of the Committee. The Committee will not alter the content of your submission, but we reserve the right to format it according to our guidelines. Any submission provided to the Committee by a witness, any materials submitted for the printed record, and any written comments in response to a request for written comments must conform to the guidelines listed below. Any submission not in compliance with these guidelines will not be printed, but will be maintained in the Committee files for review and use by the Committee.

1. All submissions and supplementary materials must be submitted in a single document via email, provided in Word format and must not exceed a total of 10 pages. Witnesses

and submitters are advised that the Committee relies on electronic submissions for printing the official hearing record.

2. All submissions must include a list of all clients, persons and/or organizations on whose behalf the witness appears. The name, company, address, telephone, and fax numbers of each witness must be included in the body of the email. Please exclude any personal identifiable information in the attached submission.

3. Failure to follow the formatting requirements may result in the exclusion of a submission. All submissions for the record are final.

The Committee seeks to make its facilities accessible to persons with disabilities. If you are in need of special accommodations, please call 202-225-1721 or 202-226-3411 TTD/TTY in advance of the event (four business days notice is requested). Questions with regard to special accommodation needs in general (including availability of Committee materials in alternative formats) may be directed to the Committee as noted above.

Note: All Committee advisories and news releases are available at http://www.waysandmeans.house.gov/.

Chairman ROSKAM. The hearing will come to order.

Welcome to the Ways and Means Oversight Subcommittee hearing on the Department of Labor's fiduciary rule proposal.

I know that everyone on this dais agrees that, given all the economic challenges of our economy, saving for a secure retirement is more important than ever.

Last April, the Department of Labor issued a proposed rule that would drastically expand the definition of a fiduciary. The administration says this is a regulation that will protect people from bad financial advice, and, while that is a good thought and an objective that we can all support, but you know what they say: The road to hell is paved with good intentions.

The reality is that this regulation would prevent many people from getting any investment advice at all because the rule would essentially hold anyone giving retirement advice of any kind to the standards of a fiduciary, with all of the legal implications and the complexity that that entails. The reason we don't have such a standard right now is because it would make it extremely difficult for people to access financial advice without having to pay costly fees.

Small businesses, low- and middle-income families, and underserved communities would be hurt by this rule far more than the wealthy. That is because the majority of small investors use financial advisors called broker-dealers, who typically work on a commission basis instead of charging fixed fees up front. Brokers are a major provider of retirement and investment advice. Although they are not considered fiduciaries, they are held to a high standard which requires them to provide advice that is suitable for their clients' financial interests.

A broker's compensation is based on the number of people they enroll, a commission-centric model that the administration opposes. The administration thinks that a salesperson selling an investment product has an inherent conflict of interest that harms an individual receiving their advice in considering whether or not to buy their product. However, commission-based retirement investments can often be the best option for many people. They offer a wide variety of investment choices, and, since brokers are paid on a commission, the investors don't have to pay hefty fees up front in order to access those products.

This type of investment advice is so popular that if you look at individual retirement account investors with less than $25,000 in savings, 98 percent choose to go through a broker-dealer. It is sort of the same approach as we take with contingent fees in personal injury cases. We don't make someone hire a lawyer on an hourly basis. There is a contingent-fee arrangement that is also acceptable to both sides and has proved to be successful.

Under the proposed fiduciary rule, commission-based plans would be virtually eliminated. There is an exception if the advisors and their clients enter into a so-called best-interest contract, but this adds a layer of complexity for individual investors and creates a legal and financial liability for investment advisors that will have serious consequences on access to competent and affordable financial advice.

Consequently, if the fiduciary rule is implemented, small investors will have two choices.

The first choice, which the administration is encouraging, is using automated computer programs to invest. I mean, spare me. This may work for some, but many people want to talk to a real person and get individualized advice on how to invest their hard-earned money. A computer program is a poor substitute for a qualified financial advisor who can understand a person's unique circumstances and personal financial goals and provide in-person advice.

The second choice under the rule would be a fee-based model, where the investor would be responsible for paying set fees for financial advice. These fees can be significant, and even a 1-percent fee adds up quickly if it is charged every year. It gets worse. The smaller the account, the higher the fees. And if the rule is implemented, millions of people who are currently commission-based accounts, they would have to start paying fees to get the same type of financial advice they currently get for free.

In putting forward this fiduciary rule, the White House is relying on a study by the White House Council of Economic Advisers, which claims that the conflicts of interest in retirement advice result in 1-percent losses for investors each year, or $17 billion in lost investment earnings annually.

However, expert review shows this study is fundamentally flawed. For example, the study assumes that broker-sold funds are underperforming when, in fact, the data suggests that they outperform similar funds. The White House study also doesn't consider the fact that retirement advice may actually be helpful and increase the value of an investor's retirement savings, a severe analytical flaw that runs contrary to just plain common sense. For helpful advice, the study calculates no financial benefit.

The Investment Company Institute, which has a representative present that will testify today, estimates that the fiduciary rule would actually result in investors losing more than $100 billion over a 10-year period because of increased fees and lower returns on their savings.

One grave concern I have heard over and over again from my constituents is that the administration's objective is to force Americans out of private-sector IRAs and 401(k)s, which are generally working very well under current law, and into retirement plans controlled by the government. This administration's own regulations, as well as public comments, have made it clear that they don't want Americans to have that much control over how to invest, which investments to choose, and when to draw down their accounts.

In the same speeches and press releases touting the fiduciary rule, the administration is boasting that it will soon create new Federal rules allowing State and local governments to create so-called "Secure Choice pensions," run by government officials with a mandate for private-sector employers to enroll their employees.

I say this "so-called Secure Choice" on purpose because I am from Illinois. Under these plans, workers would be promised pensions at retirement, but they would lose them if the government officials running the plan weren't able to meet the investment returns they promised. And that is not just a hypothetical. After years of unrealistic projections and underfunding, pensions in Illinois and in States all across the country are in crisis.

Given the extent of the mismanagement and underfunding of existing public pension plans, which are underfunded by some $4 trillion, I can't think of a better way to undermine the retirement security of Americans than to push them out of the private sector and into government-run public pension plans that are absolutely failing working families today.

The administration claims that the fiduciary rule is necessary to save and protect small businesses and families from bad advice and the big, bad financial industry. Yet, most people who are saving for their retirement are pretty happy with the choices they have right now on access to investment advice.

I would argue instead that the fiduciary rule puts the government in the driver's seat, allowing bureaucrats to pick and choose how people invest their paychecks. What we should really be focusing on in this whole situation are on Americans who aren't saving for a secure retirement adequately or aren't saving for retirement at all. We should be doing everything we can to encourage savings for the future, not passing regulations that make it harder for people to do so.

And despite the fact that the Department of Labor received almost 3,000 comments during the rule's notice period, the administration has decided to move forward without issuing a pre-proposal to address those concerns. That is a problem. In fact, literally hundreds of Members of Congress, across the entire ideological spectrum, from both sides of the aisle, have gone on the record to express deep concerns about the rule. Yet the Department of Labor has chosen to move forward with impunity.

The current rule is unworkable, and the administration has done nothing to fix it. The American people, through Congress, have delegated rulemaking authority to the executive branch, and we will exercise vigorous oversight where necessary in order to make sure that this is not abused.

I was reading through the comments the Department of Labor received on the fiduciary rule proposal from industries, small businesses, and small investors, and I would like to end my statement with one of the comments that stood out to me, submitted by Dorothy Coleman from Hockley, Texas. She wrote, "It is my money. I was smart enough to save it, and I am smart enough to know how to spend it or save it in my retirement." If only the administration agreed.

I would like to recognize Mr. Lewis for his opening statement.

Mr. LEWIS. Thank you very much, Mr. Chairman, for holding this hearing.

Today's topic is very important to millions of Americans who are saving for their retirement. Over the last 40 years, retirement plans have changed. Today, fewer Americans are covered by traditional pension plans, and many are covered by a defined contribution plan, like Individual Retirement Accounts, IRAs, and 401(k)s.

These plans often require employees to make three decisions. First, the employee must decide how much to save. Second, the employee must decide where to invest his or her savings. And, third, the employee must manage the payouts from the plan during retirement. An employee might also need to weigh the merits of a lump-sum distribution option.

Now, these are not easy decisions. A person's retirement is at stake. For help, Americans rely on the advice of retirement industry professionals to make the best decision.

Now, the Department of Labor recently issued a proposed rule designed to ensure that consumers receive conflict-free advice from their retirement advisor. However, the rule also would affect the longstanding way advisors are paid. The rule is controversial and has been the subject of thousands of comments.

We must do all we can, Mr. Chairman, to help American families save for their retirement. And, this morning, I look forward to hearing more about why the rule is important and whether changes should be made to the proposal so that it works as intended.

Again, I thank the chairman for holding today's hearing. And, with that, Mr. Chairman, I yield back.

Chairman ROSKAM. Thank you, Mr. Lewis.

Today we will hear from a panel comprised of industry experts, financial advisors, and small businesses: Bradford Campbell, counsel of Drinker Biddle & Reath; Paul Schott Stevens, president and CEO of Investment Company Institute; Judy VanArsdale from Lake Zurich, Illinois—just saying—financial advisor to enRich Private Wealth Management; Kenneth Specht, financial services professional, agent at New York Life Insurance Company; Patricia Owen, president of FACES DaySpa; and Damon Silvers, director of policy and special counsel at AFL–CIO.

Thank you all for your time today.

I think we are going to do some good work today on this subcommittee. The premise of the subcommittee is that we might need to pump the brakes a little bit on this rule and hear from people with some experience and depth.

You know how this works. We will hear from each of you. We have your written testimony already. You each have 5 minutes. Red, yellow, green are the clues. If I have to explain that further, it is hopeless. If you can stay within the 5 minutes, then we can get to questions and answers and have a better discussion all the way around.

So, Mr. Campbell, you are recognized for 5 minutes.

STATEMENT OF BRADFORD CAMPBELL, COUNSEL, DRINKER BIDDLE & REATH LLP

Mr. CAMPBELL. Well, thank you very much, Chairman Roskam, Ranking Member Lewis, and the other Members of the Committee. I appreciate the opportunity to be here today to testify on this very important hearing on the Department of Labor's fiduciary investment advice rule.

Before I begin, though, I do need to advise you that the views I express today are my own. They are not those of Drinker Biddle & Reath or necessarily my colleagues or my firm or any of our clients. They are my personal views, informed by my experience working at ERISA.

I am currently, as obviously indicated, an ERISA attorney in private practice, but from 2006 to 2009 I served as the United States Assistant Secretary of Labor for Employee Benefits, the head of the Employee Benefits Security Administration, the agency that is promulgating this regulation.

I would like to use my time today to discuss certain misconceptions about the Department's proposal and to explain why I believe the proposal's technical and policy flaws would, in fact, harm the very persons it is intended to protect.

I am very concerned that the proposal's increased costs and legal liability risks for advisors would reduce choices, increase costs, and reduce the availability of advice for small plans and small accounts.

The first misconception I would like to address is the notion that this proposal simply requires advisors to act in the best interests of participants and IRA owners. In truth, the proposal does not create a new, quote, "best-interest standard." Instead, it seeks to apply the ERISA fiduciary regime and prohibited transaction rules to IRAs.

These rules and the effect of these rules don't actually consider the content of the advice provided. And, in fact, they can prevent an advisor from acting in your best interest, because the prohibitions are based on the structure and the relationships of the parties, not of the content of the advice.

The Department has previously recognized this issue. In 2011, the Department estimated that, due in part to the very same rules this proposal would expand, participants and IRA owners are denied access to investment advice, costing them more than $100 billion a year in preventable investment mistakes.

And these rules would also prevent essential activities, just, again, based on the structural cost differences between products, that have nothing to do with conflicts of interest. For example, a plan advisor would be prohibited from helping a plan participant who approached her to do a rollover simply because the pricing in the individual IRA is likely to be higher than the pricing in the institutional 401(k). That has nothing to do with a conflict of interest and everything to do with the differences in financial products.

Didn't the Department fix this in the proposal with the "best-interest contract exemption" to permit some of these activities to occur? Well, that is the next misconception that I would like to address, because the BIC exemption, as proposed, doesn't actually address these problems effectively. And, in fact, the BIC exemption contains a number of provisions that, in my opinion, are beyond the Department's authority to regulate.

The BIC exemption has four provisions, in particular, that I think exceed the Department's regulatory authority.

First, ERISA provides exclusive remedies for participants, and the Department has no authority to create new remedies, yet the BIC exemption would create a new State law cause of action for breach of contract. I don't believe the Department can require in an exemption a condition that it lacks the authority to directly promulgate.

Secondly, the Department is trying to establish a fiduciary conduct standard for IRA advisors through a condition in the BIC exemption. The Department has no authority to do this. In fact, when

Congress simultaneously created ERISA and IRAs in 1974, it explicitly did not apply the ERISA fiduciary standard to IRAs.

Third, the IRS, not the Department of Labor, has enforcement authority over the prohibited transaction rules for IRAs. The Department cannot outsource to State courts enforcement authority that it doesn't possess.

And, fourth, the Department cannot prohibit binding arbitration clauses in the BIC exemption under the Federal Arbitration Act.

Now, the unusually extensive public comments and the, in my opinion, unprecedented, or at least in my experience unprecedented, 4 days of administrative hearings that the Department of Labor held highlighted that the proposal has significant technical flaws regardless of one's view on the underlying policy. These flaws are the product of an agency working behind closed doors to attempt to regulate an IRA marketplace it doesn't really understand. And I agree with the chairman that, in fact, the Department needs to repropose this rule and benefit from an additional round of public comments.

Finally, I would like to address a related issue, which is that the Department has fast-tracked a regulation that did not appear on any of its previous unified regulatory agendas that is intended to facilitate State efforts to create State-based retirement plans for private-sector employees and potentially employers. We don't know what is actually in this regulation, but it was sent to the White House, the Office of Management and Budget, for review on September 1.

I believe Congress should be concerned about this and look at some oversight here, in that Federal preemption of these State rules has provided the benefits and the protections that workers rely on, and I think we should wonder what provisions States might change as they go through and do these activities.

My time has expired. I appreciate your indulgence and look forward to answering any questions.

[The prepared statement of Mr. Campbell follows:]

Statement of Bradford P. Campbell, Esq.
ERISA Attorney and Former U.S. Assistant Secretary of Labor
For Employee Benefits

Before

The U.S. House of Representatives
Committee on Ways and Means
Subcommittee on Oversight

Hearing on the Department of Labor's Proposed Fiduciary Rule

September 30, 2015

Introduction:

Chairman Roskam and Ranking Member Lewis, thank you for the opportunity to testify today regarding the U.S. Department of Labor's (the "Department") proposed regulatory package redefining fiduciary investment advice and proposing new and amended prohibited transaction class exemptions (the "Proposal").[1] I commend the Committee for holding this hearing, as Congressional oversight on the remarkably broad scope of the Department's regulatory activity is necessary to ensure that any final regulation resulting from this process protects, rather than disrupts, Americans' efforts to save for retirement.

I share the goals motivating the Department to take up this regulatory initiative, even though I believe the resulting Proposal is fundamentally flawed, exceeds the Department's regulatory authority, and must be significantly revised. As the former U.S. Assistant Secretary of Labor for Employee Benefits and head of the Employee Benefits Security Administration ("EBSA"), the agency that is promulgating this rule, I understand the enforcement concerns that led the Department to review the 1975 regulation. The current regulation does contain conditions that are worthy of review, such as the requirement that advice be provided on a "regular basis" in order to be fiduciary advice.[2]

I also believe that investment advice provided to retirement plan fiduciaries, to plan participants, and to IRA owners should be in their "best interest"—that is, the advisor should put the needs of the retirement investor ahead of the advisor's own interests. Unfortunately, as I'll explain in more detail below, the Proposal does not achieve these goals—in fact, it likely will harm the very retirement investors it is intended to help.

The Proposal Would Increase the Cost and Reduce the Availability of Advice to Small Plans and to Small-Account IRA Owners:

I am particularly concerned about the effect the Proposal likely would have on reducing choice, restricting access, and increasing costs facing small retirement plans and individuals with small account balances. These groups are most in need of access to

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[1] 80 Fed. Reg. 21,927-22,042 (Apr. 20, 2015).

[2] *See*, 29 CFR 2510.3-21(c)(1)(ii)(B)

professional investment advice, but are least likely to be served due to the increased compliance costs and increased legal liability risks unnecessarily created by the Proposal.

The Small Business Administration's ("SBA") Office of Advocacy expressed similar concerns in its formal comment letter to the Department in which it questioned the Department's economic analysis and criticized the Department for not sufficiently taking into account the effects of the Proposal on small businesses. The conclusion from focus groups held by the SBA was that "the proposed rule would likely increase the [advisers'] costs and burdens associated with serving smaller plans...[and] could limit financial advisers' ability to offer savings and investment advice to clients...ultimately lead[ing] advisors to stop providing retirement services to small businesses."[3]

- The Cost of No Advice

The Department itself estimated in 2011 that plan participants and IRA owners already lose more than $100 billion per year due to the lack of access to investment advice, due in part to the very rules that this Proposal would apply even more broadly.[4] Instead of tackling that very real problem by expanding access to investment advice, the Proposal goes in the opposite direction, further restricting access to advice.

- Conflating Sales with Advice

One of the essential flaws of the Proposal reducing access is that it redefines sales activity as fiduciary investment advice. The effect of this is to reduce the sources and methods of providing investment information to retirement investors. For example, an agent for a specific company would be effectively prohibited from discussing the company's investments because they are proprietary products, and she is not impartially recommending her competitors' products. This restriction would apply regardless of how well the investment might have served the retirement investor's "best interest" (unless there is an applicable exemption). Despite this, it is clear the Department recognizes that sales activity is valuable, as it permits such activity for large plans with more than 100 participants or more than $100 million in assets, but it denies the right to receive sales information to small plans, participants and IRA owners.

The Department's rationale that large plan fiduciaries are sophisticated investors who can distinguish between sales activity and impartial advice makes little sense on its face—there is no clear basis to believe that plan size is a proxy for financial sophistication, and no basis to treat every IRA owner as if she is incapable of making informed choices. With clear disclosure that the information being provided is not fiduciary advice but is sales activity

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[3] Comment letter from the Small Business Administration's Office of Advocacy, July 17, 2015, at 5-6.

[4] *See*, The Preamble to the final regulation implementing the Pension Protection Act investment advice provisions, 76 FR 66,151-66,153 (October 25, 2011) ("Unfortunately, there is evidence that many participants of these retirement accounts often make costly investment errors due to flawed information or reasoning...Financial losses (including foregone earnings) from such mistakes likely amounted to more than $114 billion in 2010...Such mistakes and consequent losses historically can be attributed at least in part to provisions of the Employee Retirement Income Security Act of 1974 that effectively preclude a variety of arrangements whereby financial professionals might otherwise provide retirement plan participants with expert investment advice.) [Emphasis added].

for which the seller receives compensation, there is no reason to so narrowly restrict permissible activity by so broadly defining fiduciary advice.

A well-crafted proposal would focus on the specific conduct the Department has found to be abusive through its enforcement efforts, rather than attempting to change the entire regulatory structure governing retirement advice, resulting in significant unintended consequences and practical barriers to investment information. These unintended consequences and technical problems raise significant risks that a final rule will not function properly, causing disruption to necessary services to plans, plan participants, and IRAs.

Unless the Regulatory Package Is Reproposed to Permit an Additional Round of Public Comment There Will Be Serious Technical and Practical Problems:

The Department developed the Proposal behind closed doors, despite a limited knowledge of the IRA marketplace and the role of other financial regulators. The result is a Proposal that does not work in practice. Instead of learning from that experience, the Department intends again to draft the final regulation behind closed doors.

- One Round of Comments is Not Enough for a Rule of This Scope

While I appreciate that the Department received extensive comments, and heard four days of testimony during administrative hearings on the Proposal, the comments and testimony served to highlight that this unusually broad and aggressive rule has an unusually large number of technical and policy problems. A rule this complex cannot be fixed with only one round of comments and review. No matter how well-intentioned and hard-working the Department may be, retreating again behind closed doors to rewrite a final rule will result in serious technical flaws at the very minimum.

Based on my experience in promulgating regulations at the Department, including many of the regulations implementing the Pension Protection Act of 2006, the Department is unlikely to promulgate a well-crafted final rule that properly addresses the Proposal's practical problems without submitting a revised rule for public comment. While a reproposed rule would add a short amount of additional time to the process, it is necessary, in my view, to avoid promulgating a final rule that simply does not work in important respects.

The Proposal's Overly Broad Scope Will Result in Serious Unintended Consequences Harming Retirement Investors and Ongoing Conflicts with Federal and State Financial Regulators:

As the former head of EBSA, I am very familiar with the Department's responsibility under the Employee Retirement Income Security Act of 1974 ("ERISA") to regulate private-sector, employer-provided benefit plans. However, in this Proposal, the Department is attempting to position itself broadly as the primary regulator of compensation and conduct for all types of financial advisors—registered investment advisors, insurance agents, bank officials, registered representatives of broker dealers, consultants, etc.—not only to ERISA-covered employee benefit plans, but also to Individual Retirement Accounts ("IRA"), and to rollovers and other distributions from ERISA plans and IRAs. This is a significant departure from the Department's traditional view of its authority, particularly with respect to IRAs.

In my opinion, the controversy surrounding the Proposal and the comments and testimony identifying a large number of significant technical problems are a direct result of the Department's unfamiliarity with the IRA marketplace and with the role of other regulators in governing financial advice provided to IRAs. The Department is trying to force a square peg into a round hole by asserting that the ERISA standards can and should apply to IRAs.

- Lack of Coordination with Other Regulators Would Lead to Conflicting but Simultaneously Applicable Advisor Requirements

It is difficult to overstate how broad the Proposal's effects would be. ERISA plans and IRAs collectively hold approximately $16 trillion in assets on behalf of tens of millions of Americans.[5] The Proposal would impose new restrictions and compliance obligations on advisors to these plans and IRAs that apply in addition to the extensive State and Federal regulatory regimes already in place. The result is predictable—the Proposal and the existing regulations do not mesh. It is very clear that the Department did not coordinate its Proposal sufficiently with other financial regulators. The Financial Industry Regulatory Authority ("FINRA") offered 21 pages of formal comments to the Department identifying various problems, including direct conflicts with securities law and regulation, created by the Proposal.[6]

Another example is the likely effect of the Proposal on the types of fee arrangements used in IRAs and plans. While the Proposal does not directly prohibit commission or transaction-based fees, the fee-leveling requirements associated with the new fiduciary status of advisors will put considerable pressure to transition many IRAs to fee-based accounts. This is a likely outcome due to the administrative complexity of levelizing commissions and transaction-based compensation. However, this will clearly increase costs for some workplace plans and IRAs that benefit from transaction-based pricing. The U.S. Securities and Exchange Commission ("SEC") has a targeted enforcement program directly addressing this so-called "reverse churning" in which fee-based accounts are used to make investors pay more for services than they would have paid in transaction-based accounts. The inappropriate use of fee-based accounts is an SEC examination priority for 2015.[7] It is not clear how advisors pushed towards fee-based accounts by the Proposal would comply with the SEC standards.

Congress Did Not Intend IRAs to Be Treated As ERISA Plans:

The reality is that the Department is attempting to do something through the prohibited transaction rules (and the Best Interest Contract Exemption) that Congress explicitly chose not to do. Congress devised through ERISA a very specific and protective fiduciary standard for employee benefit plans rooted in trust law in response to the unique history of abuses in pension plans. Despite their simultaneous creation in 1974, Congress expressly chose not apply the ERISA fiduciary standard to IRAs. Instead, the standard of care for

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[5] *See*, "The U.S. Retirement Market, First Quarter 2015," the Investment Company Institute, June 24, 2015, available at https://www.ici.org/research/stats/retirement/ret_15_q1.

[6] *See*, Comment letter from Financial Industry Regulatory Authority ("FINRA"), July 17, 2015.

[7] *See* "Examination Priorities for 2015--National Exam Program, Office of Compliance Inspections and Examinations," available at http://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2015.pdf

advice to IRAs is determined by the conduct requirements of financial regulators governing each type of advisor. While the prohibited transaction rules apply to IRAs, the ERISA fiduciary standard of conduct does not.

In my opinion, Congress' choice recognizes the essential difference between employee benefit plans and IRAs—in an employee benefit plan, the fiduciary makes decisions for me, and in an IRA I make them for myself. The tax advantages of an IRA as compared to a taxable investment account don't change the nature of the relationship between the account owner and the advisor.

Despite the Rhetoric, the Department's Proposal Is Not a "Best Interest" Standard—It Actually Could Prevent Advice That Is in Your Best Interest:

If the effect of the proposed rule was simply to ensure that advisors to retirement plans and IRA owners must give advice that is in retirement savers' "best interest," this Proposal would not be controversial. What the Department actually has proposed is something very different than a "best interest" standard. The reason is that the Proposal ultimately rests on an even broader application of the prohibited transaction rules in ERISA and the Code.

The prohibited transaction rules are not a proxy for the quality of advice—in fact, their application is effectively unrelated to the content of the advice. Instead, they broadly prohibit compensation arrangements based on cost differences or affiliated relationships. As discussed above, the prohibited transaction rules would prevent an agent from advising on her company's investment products unless specifically permitted to do so by an exemption. In another example, a plan's investment advisor would not be able to advise a plan participant on a rollover, simply because of the structural reality that a typical IRA has to charge a higher investment advice fee than a typical institutionally-priced 401(k). The reality is that different investment products and services have different costs and prices for reasons unrelated to any conflict—the Proposal does not take into account those realities and simply prohibits the advice, unless an exemption applies.

Unfortunately, the new exemption proposed by the Department to address these issues simply does not work as proposed, and its requirements exceed the Department's regulatory authority.

The Best Interest Contract Exemption Does Not Work as Proposed, Would Encourage Unnecessary Litigation, and Exceeds the Department's Regulatory Authority

The Best Interest Contract Exemption (the "BIC Exemption") is the key to the Proposal. In order to permit advice that would otherwise be prohibited by the broad fiduciary rule and the prohibited transaction rules (such as in the rollover advice example above), the advisor and the participant or IRA owner would sign a contract enforceable in state court. The contract could not restrict the ability to bring class action lawsuits, would require a long list of warranties and representations by the advisor and its financial institution, and would require very specific disclosures regarding fees and expenses. The advisor would also have to agree to a standard of conduct that is a slightly reworded version of the ERISA fiduciary standard.

As Proposed, the BIC Exemption would not be feasible for many advisors—the disclosure provision would require gathering and disclosing information to which some advisors would not have access (or only at great expense), and it is not clearly written to apply to many important transactions. For example, it would not apply to managed accounts, so a participant wanting to rollover from a 401(k) plan to a managed account in an IRA may not be able to find an advisor who could assist him.

The BIC Exemption essentially outsources enforcement of advice arrangement to private lawsuits. The class action requirement, combined with the subjective nature of many of the warranties and representations required to be in the contract, likely would result in excessive and unnecessary litigation. The lack of clear, objective criteria in the exemption and contract terms result in compliance uncertainty and greater risk of litigation.

- BIC Exemption Exceeds Regulatory Authority

It is my belief that the BIC Exemption exceeds the Department's legal authority to regulate in four areas.

First, by providing a new cause of action in state court, the BIC Exemption is attempting to create an alternative remedy to ERISA's exclusive remedies available to plan participants. The Department has no authority to create alternative remedies directly by regulation—it cannot, in my view, do as a condition of an exemption what it lacks the authority to do directly in a regulation.

Second, the contract creates a fiduciary conduct standard for advisors to IRAs. The Department has no authority to establish a standard of conduct for advisors to IRAs—it cannot, in my view, do so as a condition in an exemption.

Third, the requirement that the contract cannot limit access to class action litigation in state court impermissibly limits the right of private parties to agree to binding arbitration of disputes. The Federal Arbitration Act ("FAA") has been held to require a clear Congressional statement of intent to override the FAA's protection of arbitration clauses,[8] and ERISA does not have such a provision.

Finally, the IRS, not the Department, has the sole enforcement authority over prohibited transaction violations under Sec. 4975 of the Code under Sec. 105 of Reorganization Plan No. 4 of 1978. This Executive Order provides the Department the interpretive authority over prohibited transaction, but not enforcement authority. Thus, the exemption cannot delegate enforcement authority to state courts.

State-Run Private Sector Retirement Plans and Related Fast-Tracked DOL Regulation Suggest a Need for Congressional Oversight

Though never appearing on a semi-annual regulatory agenda, the Department wrote and submitted to the Office of Management and Budget on September 1st a proposed rule that apparently will facilitate various state efforts to provide a state-run retirement savings plan to private sector workers. This is a significant policy development, as it would be a Federal endorsement of a role for states in private sector retirement plans.

[8] *See, CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012).

While we don't know the details of the proposed regulation under review, I believe Congress should review these actions. Given this Committee's longstanding jurisdiction over the tax treatment of retirement plans, and the intentional decision by Congress to preempt the states in regulating private sector retirement plans, Congress has an interest in seeing how the Department is encouraging states in these matters.

Personally, I am curious what types of plans states would be establishing, how they will determine appropriate fees and investments, and whether any retirement promises made to participating private sector workers would be funded.

Conclusion:

Thank you Mr. Chairman and Mr. Lewis for your commitment to the retirement security of America's workers. I appreciate the opportunity to discuss these issues with the Committee, and I would be happy to answer any questions you may have.

Thank you.

Chairman ROSKAM. Thank you, Mr. Campbell.

Mr. Stevens.

STATEMENT OF PAUL SCHOTT STEVENS, PRESIDENT AND CEO, INVESTMENT COMPANY INSTITUTE

Mr. STEVENS. Thank you, Chairman Roskam, Ranking Member Lewis. I am grateful for the opportunity to discuss DOL's proposed new definition of fiduciary duty for retirement advice and services and also America's retirement system more broadly.

ICI and its members strongly support the principle that underlies the Department's proposal. All financial advisors should be held to act in the best interests of their clients.

The proposal itself, however, is deeply flawed. Were the rule adopted in anything like its current form, it would harm retirement savers by drastically limiting their abilities to obtain the guidance, products, and services that they need to meet their retirement goals. It also would increase costs, particularly for those retirement savers who can least afford them.

You have my detailed testimony. In this statement, I would like to make just four points.

First, supporters of the DOL proposal claim that retirement savers are suffering $17 billion a year in harm due to broker-provided advice. This claim is false. It is just an exercise in storytelling. Why? First, the claim relies on academic studies using outdated statistics that simply don't reflect today's marketplace. The Department then misapplies those studies to vastly overstate their findings.

The Department also assumes that broker-sold funds are, quote, "underperforming." In fact, a simple review of publicly available data shows that investors who own front-end load funds have concentrated assets in funds that outperform, not underperform, similar funds by about one-quarter of 1 percent annually.

Second, the Department ignores the significant societal harm that its proposed rule would cause. Its economic analysis takes no account of the costs the rule would impose on investors by forcing them to move from commission-based advice to fee-based accounts.

The Department also ignores the harm that investors with small accounts will suffer when they lose access to advice. Fee-based advisors typically require minimum balances of $100,000 or more, but 65 percent of households with individual retirement accounts hold less than $100,000 in those accounts, and that is 22 million American households.

Taking these two factors together, we submit that, far from helping savers, the rule would increase fees and reduce returns, resulting in $109 billion in net increased costs to American workers over 10 years.

My third point: In proposing such sweeping changes, the Department risks undermining a voluntary, employment-based retirement system that is helping millions of Americans achieve a secure retirement. ICI and its members support policies that would improve access to retirement savings opportunities and make plans more efficient and more effective, but those improvements must build upon the strengths of the current system.

What are those strengths? In today's system, Social Security provides a sound base for all workers and a near-complete pension for those with lower lifetime earnings. In addition, four out of five—that is 80 percent—of near-retiree households have accrued retirement benefits from employer plans or IRAs, and assets earmarked for retirement today are seven times greater than they were in 1975, before the DC system was invented, even after adjusting for inflation and growth in the number of households.

Finally, my fourth point. Recent initiatives to create State-administered retirement plans for private employers raise substantial and, in my mind, troubling questions:

Would these plans fragment retirement planning for mobile workers moving from State to State, for employers who employ individuals in different States, and for providers who are trying to serve a national market?

Would State-run plans erode the current private-sector system, for example, by allowing participating employers to avoid obligations and worker protections of ERISA?

How would State-administered plans be governed, and how would they protect participating investors?

And if these plans are developed without a clear understanding of the coverage gap—and my testimony goes into that question in considerable detail—would they impose needless costs on employers without actually increasing participation by workers?

Mr. Chairman, Members of the Subcommittee, the questions you are addressing today are vitally important to America's retirement savers. I appreciate the chance to participate in the hearing. I look forward to your questions. Thank you.

[The prepared statement of Mr. Stevens follows:]

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STATEMENT

OF

PAUL SCHOTT STEVENS
PRESIDENT & CEO
INVESTMENT COMPANY INSTITUTE

BEFORE THE

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON WAYS AND MEANS
SUBCOMMITTEE ON OVERSIGHT

ON

THE DEPARTMENT OF LABOR'S PROPOSED FIDUCIARY RULE

SEPTEMBER 30, 2015

EXECUTIVE SUMMARY

The key points covered in the body of my statement are summarized below.

The Department's Rulemaking Will Hurt—Not Help—Millions of Americans Saving for Retirement

- **We expect the Department of Labor's proposed fiduciary rule, if adopted, will make retirement savings *more* challenging and costly for retirement savers, particularly those with modest balances.** The Institute supports the principle at the heart of the proposal by the Department of Labor (the "Department")—financial advisers should act in the best interests of their clients when they offer personalized investment advice. But the added layers of unwarranted complexity and ambiguity that the Department proposes to pile on top of that simple best-interest principle creates the risk that lower- and middle-income savers, and small businesses, will receive *no* advice or guidance, or none that they can afford. For example, even the most basic information—such as that offered in many common call-center and web-based interactions—could trigger ERISA fiduciary status and prohibited transactions. Firms will have little choice but to stop providing that information.

- **The Best Interest Contract (BIC) Exemption cannot be implemented as drafted.** The Department purportedly designed the proposed BIC Exemption to permit broker-dealers and others to continue to receive commissions, notwithstanding their status as ERISA fiduciaries. But the BIC Exemption is loaded with compliance traps and barriers for financial advice professionals and their firms. It also does not provide an adequate "grandfathering" rule for accounts existing before the rule, resulting in retirement savers paying twice for advice.

- **The Institute has provided the Department with constructive recommendations for fixing the proposal's flaws.** Among our many recommendations, we counseled the Department to provide a reasonable implementation of the BIC Exemption over an appropriate number of years and to adopt a "good faith" compliance mechanism, consistent with previous regulatory initiatives.

The Department's Regulatory Impact Analysis Does Not Support the Massive Overhaul of the Retirement Marketplace the Rule Would Impose

- **Claims that retirement savers currently are suffering \$17 billion a year in harm are just wrong.** The White House Council of Economic Advisers (CEA) and Department leadership frequently claim that "conflicted advice costs Americans about \$17 billion in retirement earnings each year." The claim does not stand up when tested against the data, and constant repetition does not make it any truer. We find that the Department's proposal, if adopted, will result in net losses to investors of \$109 billion over 10 years.

- **The Department's claims that broker-sold funds "underperform" are not supported by the very academic studies on which it relies.** The Department relies on several academic studies to support its claims that investors are harmed by their use of brokers. None of these academic studies actually compares the outcomes of investing with a financial adviser that is a fiduciary to the outcomes of investing with a broker or other financial adviser that is not a fiduciary. These studies also rely on outdated data that fail to reflect fundamental changes in the market for broker-sold funds in the past 10 years. Finally, the Regulatory Impact Analysis misapplies the findings of a key study, leading to a vast overstatement of the rules' potential benefits.

- **Investors' actual experience with broker-sold funds further contradicts the Department's claims.** Publicly available data demonstrate that, contrary to the Department's claims, investors who own funds that are sold with front-end loads during the years 2007 to 2013 actually have concentrated their assets in funds that outperform—not underperform—their Morningstar category. On a sales-weighted basis, investors buying front-end load shares in those years outperformed the average for share classes in the same Morningstar category by 27 basis points. Similarly, publicly available data show that investors concentrate their purchases in front-end load share classes with lower expense ratios and that pay brokers lower-than-average loads—further contradicting the Department's claims of harm to retirement savers.

- **The Regulatory Impact Analysis ignores the cost of investment advice.** The total annual cost for the services provided by brokers and their firms to investors in front-end load funds is about 50 basis points a year. But retirement savers likely will pay more in a fee-based account. A recent study finds that fee-based accounts—the most likely alternative to brokerage accounts—cost investors 111 basis points per year on average, in addition to fund expenses.

- **The Regulatory Impact Analysis fails to account for the societal harm of investors losing access to advice and guidance.** Fee-based accounts may not be available to low- and middle-income individual retirement account (IRA) investors who cannot meet minimum account balance requirements (frequently, $100,000). Over time, investors who no longer have access to advice are likely to experience lower returns because of poor asset allocation and market timing, or because they incur tax penalties by taking early withdrawals.

- **The Regulatory Impact Analysis fails to meet the minimum standards applicable to agency rulemaking.** The Department's meager attention to the potential harm to investors resulting from its rule proposal is surprising given the proposal's likely impact on retirement savers.

<u>**Changes in Retirement Policy Should Begin with an Assessment of the Existing System and Should Not Put That System at Risk**</u>

- **The Institute supports policies that would improve access to retirement savings opportunities and make retirement plans more efficient and effective.** These improvements would build upon the strengths of the current system. Unfortunately, many other proposals for reform would undermine or attempt to replace the current system. As is the case with the Department's fiduciary proposal, many of these proposals are promoted without the necessary analysis supporting the need for the change, and without taking account of the harm they could inflict on the very people they are intended to help. Any examination of reforms designed to improve the retirement system must begin with a balanced, accurate assessment of Americans' retirement prospects and the role that the current system plays in helping American workers reach their retirement goals.

- **The U.S. retirement system is helping millions of Americans achieve a secure retirement.** A wide range of work by government, academic, and industry researchers who have carefully examined Americans' saving and spending patterns, before and after retirement, shows that the American system for retirement saving is working for the majority of American workers and has grown stronger in recent decades. Assets specifically earmarked for retirement have increased significantly over time. Adjusted for inflation and growth in the number of households, retirement assets at year-end 2014 were more than seven times the level at year-end 1975.

- **A multi-faceted retirement savings system has resulted in successive generations of American retirees being better off than in previous generations.** The U.S. retirement system relies upon the complementary components of Social Security, homeownership, employer-sponsored retirement plans (both defined benefit (DB) plans and defined contribution (DC) plans offered by both private-sector and government employers), IRAs, and other savings. In retirement, different households will depend on each of these components in differing degrees, reflecting overall saving levels, work history, and other factors.

<u>The Voluntary Employer-Provided Retirement System Is Characterized by Flexibility, Competition, and Innovation</u>

- **A strength of the voluntary employer-sponsored retirement system is the flexibility built into its design.** Combined with competition—among employers to offer attractive benefits packages that include retirement plans and among financial services firms to provide services to those plans—this flexibility has led to tremendous innovation in retirement plan design over the past few decades and to continually lower costs for retirement products and services.

- **Retirement plan sponsors and investors are cost conscious and 401(k) plan assets tend to be concentrated in lower-cost mutual funds.** The cost of 401(k) plans has fallen over time while services have expanded. Fees paid on mutual funds in particular have trended down over the past two decades—both on mutual funds invested in 401(k) plans and industrywide—and investors tend to concentrate their assets in lower-cost funds. Employers sponsoring 401(k) plans and their financial services providers have worked together to automate and simplify the enrollment process, expand the range of investment options, expand the services provided by the plans, and broaden the array of educational materials offered participants.

<u>Effective Policymaking Requires a Better Understanding of the "Coverage Gap"</u>

- **Any assessment of proposals intended to increase coverage must be based on an understanding of the reasons some employers do not offer retirement plans to their workers, and should not be based on snapshots of coverage rates or misleading coverage statistics.** Discussions about pension plan coverage often rely on misleading or incomplete coverage statistics. Efforts to expand coverage will be more successful if they focus on the underlying reasons why specific populations are not participating in retirement savings vehicles.

- **Differences in workforce composition appear to be a primary cause for the lower rate at which small employers sponsor retirement plans.** Employees who work for firms that do not sponsor retirement plans, whether those firms are large or small, are more likely to be younger, have lower earnings, and have less attachment to the workforce. These individuals are more likely to have other more immediate savings needs, such as saving for a home or car. Firms sponsoring retirement plans, on the other hand, have workforces that are older, have higher earnings, and are more likely to work full-time for a full year. Employers that have workforces that are more focused on saving for retirement—and, thus, more likely to value retirement benefits—are more likely to offer retirement plans. The characteristics of small-firm employees as a group differ substantially from the characteristics of large-firm employees—differences that help account for the lower rate of plan sponsorship among smaller firms.

- **Most workers will accumulate retirement benefits during their careers.** Many more workers will have access to an employer-sponsored retirement plan at some point during their working careers and will reach retirement with work-related retirement benefits than a snapshot of coverage among all workers at any point in time would imply. For the past two decades about 80 percent of near-retiree households—those with a working head of household aged 55 to 64 in the year indicated—have consistently accrued DB, DC, or both types of retirement plan benefits (from private-sector employer and government employer plans) or IRAs (rollover and contributory).

<u>**State-Administered Retirement Plan Proposals Raise Substantial Questions and Merit Close Scrutiny**</u>

- **Among these questions are the following:**

  - What are the implications of an escalating number of different state-administered plans for private-sector workers—for multi-state employers, for workers who move from one state to another, and for the marketplace for retirement plan products and services?

  - Will state-run plan options erode the successes of the current voluntary employer-sponsored system, by prompting employers currently offering plans to drop their 401(k) plans in favor of the state option?

  - What type of investor protections will apply to participants in state-run plans, particularly if state-run plans are exempted from ERISA or federal securities laws?

  These and other questions outlined in the testimony below illustrate the complex issues that state-run plan proposals for private-sector employees raise.

- **Policymakers also should consider what changes at the national level might help expand retirement plan coverage and obviate the need for a patchwork of state-administered plans.** Two ideas in particular would help bring more employers into and improve the effectiveness of the voluntary private-sector retirement system, without detracting from the system's successful features. These ideas—a new type of SIMPLE plan and easier access to multiple employer plans for small employers—would be based on existing concepts and easy to implement.

I. INTRODUCTION

My name is Paul Schott Stevens. I am President and CEO of the Investment Company Institute[1] and I am pleased to appear before the Subcommittee on Oversight today to discuss the U.S. Department of Labor's proposal to redefine the term "fiduciary" in the context of providing investment advice under the Employee Retirement Income Security Act of 1974 ("ERISA"). Chairman Roskam and Ranking Member Lewis, thank you for this opportunity to share our views and for the attention that you and your colleagues are paying to this issue so critical to American retirement savers.

Thanks in no small part to Congress's efforts to promote retirement savings, Americans currently have $24.8 trillion earmarked for retirement, with more than half of that amount in defined contribution (DC) plans and individual retirement accounts (IRAs).[2] About half of DC plan and IRA assets are invested in mutual funds, which makes the mutual fund industry especially attuned to the needs of retirement savers.

Under the framework of a voluntary system, Congress has made available the tax structure and savings vehicles necessary to promote savings by American workers, and the competitive private marketplace has provided innovative products and services at increasingly lower costs.[3]

Even with the many successes of the U.S. retirement system, we should always be open to considering ways in which that system can be strengthened further to help even more Americans achieve a secure retirement. For its part, the Institute has been vocal in its support for policies that would improve access to retirement savings opportunities and make retirement plans more efficient and

[1] The Investment Company Institute (ICI) is a leading, global association of regulated funds, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI's U.S. fund members manage total assets of $18.2 trillion and serve more than 90 million U.S. shareholders.

[2] At the end of the second quarter of 2015, U.S. retirement assets totaled $24.8 trillion, DC plan assets were $6.8 trillion, and IRA assets were $7.6 trillion. Investors held $3.6 trillion of IRA assets and $3.8 trillion of DC plan assets in mutual funds. *See* Investment Company Institute, *The U.S. Retirement Market, Second Quarter 2015* (September 2015), available at www.ici.org/info/ret_15_q2_data.xls.

[3] As discussed below, *infra* at p. 41, competition and a growing asset base have contributed to the success of 401(k) plans by reducing plan costs, resulting in cost-effective investing for 401(k) participants. For research on mutual fund fees, *see* Collins, Holden, Chism, and Duvall, "The Economics of Providing 401(k) Plans: Services, Fees, and Expenses, 2014," *ICI Research Perspective* 21, no. 3 (August 2015), available at www.ici.org/pdf/per21-03.pdf. For an analysis of the "all-in" fees of 401(k) plans, based on in-depth surveys of plan sponsors, *see* Deloitte Consulting LLP and Investment Company Institute, *Inside the Structure of Defined Contribution/401(k) Plan Fees, 2013: A Study Assessing the Mechanics of the "All-In" Fee,"* New York: Deloitte Consulting LLP and Washington, DC: Investment Company Institute, available at www.ici.org/pdf/rpt_14_dc_401k_fee_study.pdf. For analysis of "total plan cost," based on Form 5500 and industry data, *see* BrightScope and Investment Company Institute, *The BrightScope/ICI Defined Contribution Plan Profile: A Close Look at 401(k) Plans*, San Diego, CA: BrightScope and Washington, DC: Investment Company Institute, available at www.ici.org/pdf/ppr_14_dcplan_profile_401k.pdf. For insight into the changing services and educational materials provided by 401(k) plans, see Plan Sponsor Council of America member surveys.

effective. Any such reforms, however, must build upon the strengths of the current system—including the important role that the private marketplace plays in its support. Unfortunately, too often those seeking to improve the system ignore these basic tenets and propose changes that would actually harm the very people they intend to benefit.

Regrettably, the Department's proposal follows this misguided path. If adopted in anything like its current form, the rule would upend the retirement marketplace and do great harm to retirement savers by drastically limiting their ability to obtain the guidance, products, and services they need to meet their retirement goals. It also would increase costs, particularly for those retirement savers who can least afford it. The Institute is not alone in this assessment. In an array of letters and comments, Members of Congress from both parties have expressed concern with numerous aspects of the Department's rule proposal and urged a variety of important changes.[4]

The many problems with the Department's proposal may well be explained by the fundamental errors apparent in the Department's Regulatory Impact Analysis seeking to justify the massive overhaul of the retirement marketplace it would impose. In particular, this rulemaking—which has been ongoing for years—should have been preceded by and predicated on a comprehensive cost-benefit analysis. Such an analysis should have sought to demonstrate, among other things, that any restriction on future access to guidance, products, and services is justified in light of a clear problem best solved by an expansive redefinition of fiduciary duty.[5] It also should have considered less burdensome regulatory alternatives. The Department's Regulatory Impact Analysis does none of this. Indeed, it altogether fails to consider publicly available data that contradict its conclusions. It likewise fails to consider the significant harm to retirement savers that is sure to result if the Department adopts the rules as currently drafted.

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[4] *See, e.g.*, Letter from Reps. Ann Wagner (R-MO) and David Scott (D-GA) *et al.*, to the United States Department of Labor, dated July 29, 2015; Letter from House Committee on Education and the Workforce Chairman John Kline (R-MN) and Subcommittee on Health, Employment, Labor and Pensions Subcommittee Chairman Phil Roe (R-TN), *et al.*, to the United States Department of Labor, dated July 21, 2015; Letter from Sens. Jon Tester (D-MT) and Angus King (I-ME), *et al.*, to the United States Department of Labor, dated August 6, 2015; Letter from Sen. Claire McCaskill (D-MO), to the United States Department of Labor, dated August 5, 2015; Letter from Senate Finance Committee Ranking Member Ron Wyden (D-OR) and Sen. Debbie Stabenow (D-MI), *et al.*, to the United States Department of Labor, dated August 7, 2015; Letter from Reps. Tony Cardenas (D-CA) and Emanuel Cleaver (D-MO) *et al.*, (96 Democratic member signatories, including 10 House Ways and Means Committee members) to the United States Department of Labor, dated September 24, 2015.

[5] In several letters sent to the Department after the 2010 rule proposal was shelved, Congressional policymakers uniformly emphasized the importance of ensuring that any re-proposal of ERISA's fiduciary provision be preceded by a comprehensive regulatory impact analysis. *See, e.g.*, Letter from Reps. James Himes (D-CT), Richard Neal (D-MA), and Carolyn McCarthy (D-NY), *et al.*, to the United States Department of Labor, dated November 7, 2011; Letter from Reps. Gregory Meeks (D-NY) and Gwen Moore (D-WI), *et al.*, to the United States Department of Labor, dated March 15, 2013; Letter from House Committee on Education and the Workforce Chairman John Kline (R-MN), House Committee on Ways and Means Chairman Dave Camp (R-MI), Senate Committee on Health, Education, Labor and Pensions Ranking Member Michael Enzi (R-WY) and Senate Finance Committee Ranking Member Orrin Hatch (R-UT), to the United States Department of Labor and the United States Department of the Treasury, dated April 14, 2011.

My testimony today focuses on two key points: First, I will discuss the highly adverse impact the Department's rulemaking proposal will have on the ability of retirement savers—particularly low- and moderate-income savers—to obtain the guidance, products, and services they need to meet their retirement goals. In this connection, I will demonstrate why the Department's Regulatory Impact Analysis utterly fails to justify its expansive proposal and why, if its proposal is adopted, it will do significant net societal harm. Significantly, if the Department adopts the proposed rules without very substantial changes, the Institute estimates that retirement investors' returns could be reduced, conservatively, by $109 billion over 10 years as a result of the additional fees and lost returns they will incur. If, on the other hand, the Department reassesses its Impact Analysis in light of our comments, it will make policy choices that meet its goals while making its final rules simpler, more workable, and better for investors.

Second, my testimony will describe the strengths and successes of the U.S. retirement system and the important role that the private marketplace plays. I also will discuss why efforts to mandate state-administered retirement plans should be scrutinized with care. Such efforts raise many questions that Congress should explore. Policymakers also should consider what changes at the national level might help expand retirement plan coverage and obviate the need for a patchwork of state-administered plans. The Institute has proposed targeted reforms at the national level that would help bring more employers into the system and generate better outcomes for retirement savers—importantly without detracting from the system's effective features.

II. THE DEPARTMENT'S RULEMAKING WILL HURT—NOT HELP—MILLIONS OF AMERICANS SAVING FOR RETIREMENT

Some of the practical, human implications of the Department's proposal are underscored for me by an experience I recently had helping one of my adult children through a job transition. This is something some of you may have experienced. My son is in his 20s and recently left his first full-time job to take a position with a new company halfway across the country. He was a liberal arts major in college, more a student of history than of finance. And, young as he is, his personal financial experience is limited. After he got settled in his new job, we discussed what he might do with the 401(k) balance he had in his former employer's plan. The amount was modest—less than $10,000—but it was hard earned and if well managed over a long investing horizon it might amount to much more later in his life. Clearly, he wanted to do the right thing but was not sure exactly what that would be. In particular, he needed information that would help him to make a good decision for himself.

I suggested that we call a mutual fund company for information about its products and services, and my son agreed to have me sit in on the conversation. (I suggested a fund company knowing that the amount in question, while important to my son's future, was too small to interest a fee-based investment adviser.) The call center representative of the mutual fund company patiently walked my son through various options, outlining factors relevant to keeping the account in the former employer's plan or rolling it over to an IRA. He explained important investment considerations, like asset allocation and the need for diversification. He also described the various kinds of funds that the fund company offers and how they might help meet my son's savings goals. The conversation with the call center representative certainly validated my son's instinct to keep his modest balance at work for his retirement. But at no time did the representative cross the line and presume to act as an adviser, and the interaction clearly did not create the relationship of trust and confidence that is characteristic of a fiduciary.

Although my son spent close to an hour talking to the call center representative, the information and help came at no cost to him. But it equipped him to make a good decision, in light of his own situation and preferences. Ultimately, my son decided to roll over his 401(k) plan assets into an IRA and invested those assets in one of the mutual fund company's target date funds, which best matched his decision to concentrate his balances in a single product offering a diversified portfolio of stocks and bonds that adjusts over time.

There are hundreds of thousands of retirement savers like my son in your home states and across our country—young men and women just starting out, people with less financial sophistication for whom help and information are critically important, and workers trying to make the most of small accounts. It is essential to ask: how will the Department's proposal affect them?

The answer: the wide net cast by the Department's proposal threatens to eliminate or severely reduce these very types of commonplace exchanges of information—provided at no cost to millions of retirement savers through call centers, walk-in centers, and websites. Particularly troubling, the proposal would require firms that offer primarily proprietary investment products to forego the ability simply to explain to a retirement saver how their products and services may meet the retirement saver's needs.

In the future, under the Department's proposal, such exchanges would have to take place under a cumbersome and convoluted contractual relationship required by the so-called "Best Interest Contract" Exemption. As described below, this so-called exemption—replete with compliance burdens and litigation risks—gives every appearance of having been devised in such a manner that it was never intended to be used. Certainly, it will pose very significant barriers to the type of commonplace interactions described above and no doubt will occasion substantial additional costs.

To be clear, the Institute has been and remains ready to assist the Department in every way possible to get its fiduciary proposal right. We have provided the Department three detailed comment letters on the proposed rule defining the term "fiduciary,"[6] the proposed exemptions in connection with that definition,[7] and the Regulatory Impact Analysis justifying the Department's proposals.[8] A fourth letter I sent to Secretary Perez highlights the key areas of the rule proposal that we believe make it unworkable and conveys at a high level the changes we urge the Department to make to the proposed

[6] Letter from David Blass and David Abbey, ICI, regarding the proposed fiduciary rule (July 21, 2015), available at www.ici.org/pdf/15_ici_dol_fiduciary_def_ltr.pdf.

[7] Letter from David Blass and David Abbey, ICI, regarding the proposed best interest contract exemption (July 21, 2015), available at www.ici.org/pdf/15_ici_dol_fiduciary_best_interest_ltr.pdf.

[8] Letter from Brian Reid and David Blass, ICI, regarding the Department's Regulatory Impact Analysis (July 21, 2015), available at www.ici.org/pdf/15_ici_dol_fiduciary_reg_impact_ltr.pdf.

rules.[9] The letters spell out the many serious flaws in the rule proposal that collectively make it hopelessly unworkable. The letters also advance numerous constructive suggestions for improving the rules as proposed. We also testified at the Department's recent public hearings and supplemented our earlier comments in response to questions raised by representatives of the Department at the hearing.[10] While I summarize the key changes we recommend later in my testimony, it is instructive to first appreciate just how damaging the Department's rulemaking will be on the ability of savers to engage in even the most commonplace of financial interactions.

A. The Department's Overly Expansive and Ambiguous Fiduciary Definition Will Impede Commonplace Financial Interactions That Retirement Savers Now Take for Granted

The Department has proposed criteria for triggering "fiduciary" status that are so expansive and ambiguous that they would serve to establish a vast new regulatory regime over the retirement marketplace. The criteria fail to distinguish between circumstances in which individuals and fiduciaries have a reasonable expectation of a fiduciary relationship and those interactions where there can be no such reasonable expectation. This is a matter of the deepest concern.

ERISA is a uniquely prescriptive statute. It expressly prohibits an ERISA "fiduciary" from engaging in many routine transactions. Most importantly, ERISA prohibits a fiduciary from performing services as a fiduciary that affect the compensation that the fiduciary receives. This prohibition applies regardless of whether the outcome resulting from such services is in the best interest of the recipient. Rules governing what activities give rise to a fiduciary relationship accordingly must provide genuine clarity about who does or does not have that status.[11] These rules must facilitate commonplace financial interactions and must allow plans and retirement savers to obtain investments that meet their needs and to gather a range of market input on which to base decisions.

B. The Department's BIC Exemption Will Not Mitigate the Harm Caused by Its Overly Expansive and Ambiguous Fiduciary Definition

The Department suggests that the impact of its expansive fiduciary definition—like the inability to engage in helpful interaction—will be mitigated substantially by the BIC Exemption proposed along with its rule proposal. We strongly disagree. That exemption as currently drafted is quite useless because of the multitude of ambiguous and impractical conditions to which it is subject. Thus, for example, the BIC Exemption would require that a retirement saver to enter into a three-party written contract and receive a mountainous disclosure document before engaging in any conversation with the call center representative. This hardly would create an environment that would encourage a

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[9] Letter from Paul Schott Stevens, ICI, to Thomas E. Perez, Secretary, U.S. Department of Labor (July 21, 2015) available at www.ici.org/pdf/15_ici_dol_fiduciary_overview_ltr.pdf.

[10] The Institute's supplemental letter on the proposed Conflict of Interest Rule and proposed Best Interest Contract Exemption is available at www.ici.org/pdf/15_ici_dol_rule_comment.pdf The Institute's supplemental letter on the Regulatory Impact Analysis is available at www.ici.org/pdf/15_ici_dol_ria_comment.pdf.

[11] Testimony of Paul Schott Stevens before the Department (March 1, 2011), available at www.ici.org/policy/ici_testimony/11_dol_fiduciary_tmny.

young saver to seek out information from providers about products and services needed to make informed investment choices.

It is widely understood that financial services firms will not be inclined to subject themselves to the multitude of ambiguous and impractical conditions required of those who wish to rely on the BIC Exemption. The exemption's requirement of a prior contract, its requirements for voluminous fee reporting and disclosure, and its overwhelming data creation and retention requirements, not to mention the substantial threat of unwarranted litigation,[12] all undermine the usefulness of the exemption. The result will be far reaching. Savers who today rely on brokers and other commission-based advisers for investment services no longer will be able to do so. They will be forced either to engage fee-based advisers, significantly increasing their investment expenses, or to go without information and guidance—the most costly course of all.

Indeed, adopting the current proposals could well reduce the current level of competition in the market by making it more difficult for investors to switch from one fund manager to another or from one financial adviser to another. This outcome would harm, not help, investors who need and want financial advice to make informed investment decisions—potentially setting back the success of generations of retirement savers and putting at risk our nation's progress on retirement security.

C. "Robo Advice" Is Not a Panacea for an Unworkable Fiduciary Rule

Secretary Perez contends that small savers might be better off working with "robo advisers"—*i.e.,* computer-programmed advice delivered on-line—than with human representatives of financial services firms. The "robo-advice" service model is relatively new. The Institute strongly supports innovation and we understand that for some investors getting "robo" advice online may be appropriate. While online guidance certainly has a helpful and growing role to play in helping savers, it is foolhardy to conclude that those services are a suitable substitute for human interactions for all the millions of small savers that will be impacted by the proposed rule and in all circumstances, including periods of great market volatility.

ICI's members reported sharp increases in the volume of investor contacts through their call centers during the sharp swings in equity markets in late August and early September of this year. During episodes such as this or the fall of 2008, an email, text message, or website alert from a "robo adviser" is not likely to suffice to keep millions of concerned savers from selling into a stressed market, with devastating consequences for their nest eggs.

[13] The Department exceeds its authority by creating, through the BIC Exemption, a new private right of action for IRA holders to sue advice providers for breach of contract, *see Alexander v. Sandoval,* 532 U.S. 275, 286 (2001) ("... private rights of action to enforce federal law must be created by Congress ...," which will undoubtedly serve to increase the cost and reduce the availability of advice and products.)

It is particularly curious that many of the very same organizations that oppose efforts to make better use of the Internet for delivery of information to investors[13]and plan participants,[14] support the Department's rule proposal that seems intent on sending many retirement savers to robo advisers. In lobbying against Internet-based solutions to document delivery, such groups often cite the existence of an alleged "digital divide" in which individuals in certain ethnic groups, occupations, or income levels are less likely to have computers at home or access to the Internet. Yet, neither these organizations nor the Department offer any explanation as to why these very same people would not also be vulnerable to a shift to Internet-based advice services.

D. The Institute Recommends Revisions to the Department's Rule Proposal

The Institute's detailed comment letters highlight the many serious flaws that, we believe, collectively make the Department's proposal impossible to implement. The letters also advance numerous constructive suggestions for improving the rules as proposed. The key recommended changes identified in our comment letters are as follows:

1. **Draw a commonsense—and clear—line between the provision of fiduciary advice and that of information and education.** Chief among our recommendations is greater clarity regarding what results in the provision of fiduciary advice. The Department must craft the definition of fiduciary advice more carefully to capture only individualized recommendations that are intended for a retirement saver to rely on to take a specific action. We provided alternative text in our comment letter that would accomplish this goal.

2. **Do not treat selling an investment product or service as a fiduciary act.** Small employers, as well as retirement savers generally, should have the option to choose among a wide range of investment products and services. Service providers should be able to provide investors with information and data about those options, both during the sales process and on an ongoing basis. As we demonstrate in our comment letters, there is compelling evidence that Congress did *not* intend for ERISA to disrupt the lawful functioning of the securities markets, to prevent retirement investors from accessing investments, or to turn the "ordinary functions of consultants and advisers" into fiduciary activities.[15] The Department's proposals, at a minimum, should conform to Congress's clear intent in the underlying statute and provide a meaningful seller's exception that covers all savers and applies to true marketing and sales activities.

[13] *See* letter from Barbara Roper, Consumer Federation of America, regarding SEC Proposal, Investment Company Reporting Modernization (July 29, 2015), available at www.sec.gov/comments/s7-08-15/s70815-40.pdf.

[14] *See* Letter from AFL-CIO, Consumer Union, Pension Rights Center and others to Department of Labor Assistant Secretary Phyllis C. Borzi (April 19, 2012), available at www.pensionrights.org/sites/default/files/docs/120419_group_letter_and_memorandum_on_electronic_disclosure.pdf.

[15] *See* ERISA Conference Report, P.L. 93-406, at 323 ("... the ordinary functions of consultants and advisers (other than investment advisers) may not be considered as fiduciary functions ...").

3. **Modify the BIC Exemption.** As explained above, and in detail in our comment letters, the BIC Exemption's requirement of a pre-advice contract, its voluminous fee reporting and disclosure requirements, and its overwhelming data creation and retention requirements, not to mention the substantial threat of unwarranted litigation, all threaten the usefulness of the exemption. A better approach is to heed Secretary Perez's call to give sufficient flexibility and discretion to allow fiduciaries to determine how best to satisfy their duties in light of the unique attributes of their businesses and, I would add, the needs of investors. If it actually intends the BIC Exemption to have any practical value, the Department should simplify it as follows:

   - ***Take a truly principles-based approach.*** The BIC Exemption will work only if the Department strips it of excessive conditions. A starting point would be eliminating the proposed contractual warranties and representations. They are not needed to protect investors and only serve to expose firms to significant new litigation risk.

   - ***Streamline the required disclosures.*** The proposed disclosures needed to qualify for the BIC Exemption are redundant, granular, costly, and unreasonable. As proposed, these disclosures would serve only to overwhelm retirement investors, in the unlikely event that investors actually read them. The Department should revise the disclosure conditions to align them with the far more workable precedents the Department has adopted under ERISA sections 408(b)(2) and 404(a).

   - ***Expand the scope of coverage of the BIC Exemption.*** The BIC Exemption contains exclusions and limitations that needlessly harm broad classes of retirement plans and savers. The BIC Exemption takes a "legal list" kind of approach—long ago abandoned by mainstream trust law—in proposing a list of certain favored investment choices and eschewing other investment choices not on the list. As a result, the proposed rules would unnecessarily and inappropriately restrict retirement investors' choices. This is, quite simply, an altogether improper role for the Department or any other regulator, and it should have no place in a final rule. In addition, the Department must expand the BIC Exemption to cover advice provided to all small employers. There is absolutely no sound policy justification for refusing sponsors of small plans access to information and advice about the retirement plans they sponsor and administer.

   - ***Eliminate compliance traps.*** The proposed written policies and procedures requirement for "material conflicts of interest" pose insuperable compliance hurdles for advice providers. The Department must clarify and simplify these requirements.

4. **Avoid retroactive application of the rules.** The Department must modify the proposed exemption so that it does not unnecessarily harm retirement savers by prohibiting ongoing advice on assets acquired prior to the rules' implementation dates. Savers who bought investments using the services of a broker, for example, already have paid some form of fee for the advice they received. It would be an absurd, quite harmful outcome if the

Department's rule results in those savers receiving no further advice for those investments or paying twice for advice (which would be the case if the Department effectively requires moving the assets, which have already incurred a commission, to a fee-based account).

5. **Provide a meaningful and orderly implementation period.** Even if the Department makes the changes needed to make its rule workable, implementing the rule in an orderly fashion will be a challenge. We strongly recommend that the Department provide an implementation period that allows financial services firms to work with the millions of retirement savers to arrive at an account choice that works best for those savers.

6. **End speculation about special rules for products the Department finds worthy.** The preamble accompanying the proposed BIC Exemption suggests that the Department might craft a "streamlined" exemption from ERISA's prohibitions for so-called "high-quality low-fee" investment products. This idea is both premature and disconcerting. Not only has the Department failed to provide sufficient information about this aspect of its proposal to allow the public to comment in any meaningful way, but its assumption that a durable, universal definition of investment quality can or should be determined by a federal agency is troubling.

III. THE DEPARTMENT'S REGULATORY IMPACT ANALYSIS DOES NOT SUPPORT ITS PROPOSAL

Given the massive new restrictions on access to guidance, products and services that the Department has proposed, one might expect its Regulatory Impact Analysis (RIA) to provide compelling and unequivocal evidence of a vast market failure necessitating nothing less than an expansive new definition of fiduciary status. In fact, the Department's RIA is fatally flawed: it simply does not support the Department's assertion that there is a "substantial failure of the market for retirement advice." [16] It also does not properly consider how the proposal actually could limit retirement savers' access to guidance, products, and services, or how such limits could affect savers—particularly lower- and middle-income savers with smaller account balances.

The Department bases its RIA on the contention that broker-sold funds "underperform," "possibly due to loads that are taken off the top and/or poor timing of broker sold investments."[17] The Department's analysis does not, however, provide a benchmark for returns against which it measures this claim of "underperformance."

The Department uses a confusing array of claimed loss estimates. It presents different assessments of what underperformance could cost IRA mutual fund investors based on alternative calculations. Under one calculation, it contends that such underperformance could cost IRA mutual

[16] DOL, *Fiduciary Investment Advice Regulatory Impact Analysis* (Apr. 14, 2015), at p. 7, available at www.dol.gov/ebsa/pdf/conflictsofinterestria.pdf.

[17] *Id.*, at p. 98.

fund investors $18 billion per year[18]—a number close to the claim made by the White House Council of Economic Advisers (CEA) and often cited by Department leadership that "conflicted advice costs Americans about $17 billion in retirement earnings each year."[19]

Regardless of the number used—the Department's $17 billion or the CEA's $18 billion per year—the claims have ***no basis in fact***. The calculations underlying these numbers misinterpret and incorrectly apply the findings of the very same academic research cited as the foundation of the claims, and do not consider the significant harm to retirement savers that is sure to result if the Department adopts the rules as currently drafted. In fact, these assertions do not stand up when tested against actual experience and data.

Correcting for the Department's many errors and omissions, we find that the Department's proposal, if adopted, will result in net losses to investors of $109 billion over 10 years.

A. The Department's Claims That Broker-Sold Funds "Underperform" Are Not Supported by the Very Academic Studies on Which It Relies

The RIA points to a set of academic studies to buttress its claims that investors are harmed by their use of brokers, but these studies do not support its sweeping claims.[20]

1. The academic research does not support the RIA's statement that "[a] wide body of economic evidence supports a finding that the impact of these conflicts of interest on investment outcomes is large and negative."[21]

There are three overarching problems with using the research cited in the RIA to argue that investors using brokers earn lower returns than if they received advice from a fiduciary.

First, none of these academic studies actually compares the outcomes of investing with a financial adviser that is a fiduciary to the outcomes of investing with a broker or other financial adviser that is not a fiduciary. Thus, the findings of underperformance cited in the RIA do not actually measure—and cannot measure, based on these studies—whether an investor using a fee-based ERISA fiduciary adviser would experience a different investment outcome than an investor using another financial adviser that is not an ERISA fiduciary.

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[18] *Id.*, at p. 93.

[19] CEA, *The Effects of Conflicted Investment Advice on Retirement Savings*, (Feb. 2015), p. 21. The CEA white paper is available at www.whitehouse.gov/sites/default/files/docs/cea_coi_report_final.pdf.

[20] In our comment letter on the Regulatory Impact Analysis ("RIA Letter"), we discuss each of the articles cited by the Department and explain why they do not support these statements. *See* RIA Letter, at pp. 11–16. For reasons of brevity, we do repeat that discussion here. Because it is instrumental to the claims advanced in the RIA, a paper by Christoffersen *et al.*—that purports to measure the cost to investors of investing in funds sold through brokers—is described in detail below.

[21] RIA at p. 7.

Instead, these studies seek to measure indirectly how investors fare when receiving assistance from financial professionals who are not fiduciaries, by comparing the performance of funds sold through brokers ("broker-sold" funds) with that of funds sold directly to investors ("direct-sold" funds). The inference that these studies make is that any difference in performance by investors using brokers could be the result of the brokers' conflicts of interest. This is a leap of logic and is not a direct test of the outcomes of using a financial professional that is not a fiduciary (as compared with using one that is a fiduciary).

Second, most of the studies measure the relative performance of broker-sold funds using data from the 1990s and early 2000s. Fundamental changes in the mutual fund markets since that time have made these studies out of date. Fifteen to twenty years ago, mutual fund markets were segmented, with little head-to-head competition between broker-sold funds and direct-sold funds or funds that did not charge a load ("no-load" funds). Several of the academic papers argue that this segmentation led to broker-sold funds having weaker competitive pressures to produce returns.[22]

Reliance on these studies ignores significant changes in the mutual fund markets. For example, in 2000 only about half of the funds with a front-end load share class also had no-load share classes (Figure 1).[23] By 2010, however, 90 percent of funds with a front-end load share class also offered a no-load share class. These no-load share classes are available on investment-only 401(k) platforms, at discount brokerages, and through fee-based advisory firms. This head-to-head competition between broker-sold funds and no-load funds has transformed the market for mutual funds.

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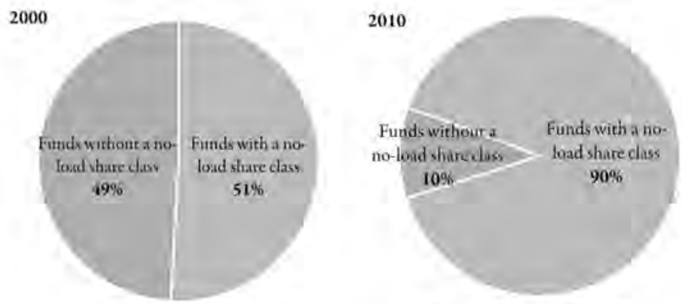
[22] *See* Daniel Bergstresser, John Chalmers, and Peter Tufano, "Assessing the Costs and Benefits of Brokers in the Mutual Fund Industry," *Review of Financial Studies* 22, no. 10 (2009): 4129–4156; Diane Del Guercio and Jonathan Reuter, "Mutual Fund Performance and the Incentive to Generate Alpha," *Journal of Finance* 69, no. 4 (2014): 1673–1704; and Susan Christoffersen, Richard Evans, and David Musto, "What Do Consumers' Fund Flows Maximize? Evidence from Their Broker's Incentives," *Journal of Finance* 68 (2013): 201–235.

[23] Throughout the comment letter, we exclude money market funds, variable annuities, and funds of funds. Money market funds constitute less than 0.1 percent of front-end load fund assets at year-end 2014. Including funds of funds would have created double counting in some of analysis, so we excluded them in all of the analysis. Funds of funds account for 6.6 percent of the front-end load fund assets.

Figure 1
Front-End Load Funds with No-Load Share Classes Have Risen Since 2000
Percentage of funds with a front-end load share class; 2000 and 2010



Total number of funds with a front-end load share class: 2,991

Total number of funds with a front-end load share class: 3,010

Note: The analysis includes equity, balanced, and bond mutual funds with at least one share class with a front-end load, excluding mutual funds available as investment choices in variable annuities and mutual funds that invest primarily in other mutual funds (funds of funds).
Sources: Investment Company Institute and Lipper

Third, only one study that the RIA cites (Bergstresser *et al.*) assesses the performance of investors using broker-sold funds on an asset-weighted basis. By contrast, the other studies look at individual fund performance. Asset-weighted and sales-weighted returns provide a superior measure of overall market impact by showing how the average dollar invested with a broker-sold fund performs. Another reason for using asset- or sales-weighted returns is that the RIA seeks to measure the proposal's impact on a market-wide basis. Asset- or sales-weighted measures of performance are necessary to make such calculations.

Asset- and sales-weighted performance measures also are useful for determining if brokers are directing investors to lower performing funds. If the asset- and sales-weighted performance of broker-sold funds is below the returns on the average fund, that would provide evidence of brokers steering investors to funds with weaker performance. If, instead, the asset- and sales-weighted performance of broker-sold funds is higher, then brokers are directing clients to funds that outperform, and this would cast doubt on the argument that there is a widespread market failure.

These three problems with the academic literature highlight why it is inaccurate for the RIA to claim that "[a] wide body of economic evidence supports a finding that the impact of these conflicts of interest on investment outcomes is large and negative."[24] Furthermore, the academic literature does not support the statement that a "careful review of this data ... consistently points to a substantial failure of the market for retirement advice"[25] and "that IRA holders receiving conflicted investment advice can expect their investments to underperform by an average of 100 basis points per year over the next 20 years."[26]

2. The RIA's reliance on Christoffersen *et al.* is misplaced.

The RIA rests heavily on a paper by Christoffersen, Evans, and Musto (2013).[27] As discussed in detail in our comment letter on the RIA,[28] this paper has two fundamental errors that the RIA repeats. These errors present a false impression of the relationship between fund performance and the payments of front-end loads to brokers. Christoffersen *et al.* finds evidence that a subset of funds—those whose front-end loads result in higher broker compensation than can be explained by the average of similar funds—underperformed the average return of their fund category during the next year. The Department, based on an incorrect assumption that all IRA assets that are invested in front-end load funds suffer the same underperformance, erroneously applies this result from a small subset of load funds to all load funds. Once these errors are corrected, the sweeping statements in the RIA about brokers' incentives and investor harm collapse.

These errors, on top of certain other misinterpretations made in the Christoffersen *et al.* paper, invalidate the RIA's assertion that the typical investment in a broker-sold fund underperforms by 100 basis points. In turn, that claim of 100-basis-point underperformance is the foundation for the Department's claim that, unless it adopts its proposed rules, investors in front-end load funds will lose $500 billion to $1 trillion in foregone returns during the next 20 years.[29] In fact, that claim is mere hyperbole, unsupportable by the data.

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[24] *See* RIA at p. 7.

[25] *Id.*

[26] *Id.*

[27] Susan Christoffersen, Richard Evans, and David Musto, "What Do Consumers' Fund Flows Maximize? Evidence from Their Broker's Incentives," *Journal of Finance* 68 (2013): 201-235. Christoffersen *et al.* claims to find that funds that compensated brokers with higher-than-average loads, adjusting for a set of fund features, earned lower returns than funds in the same Morningstar category. As with the other papers that the RIA cites, Christoffersen *et al.* do not measure or test whether these returns were lower than what investors would have received had they used a fiduciary adviser. Nor does the paper provide asset-weighted or sales-weighted returns to demonstrate how investors who use broker-sold funds performed as a group relative to those using similar funds in their Morningstar category. Finally, the sample period used in the paper extends from 1993 to 2009, relying largely on fund performance that is 10 to 20 years old.

[28] *See* RIA Letter at pp. 13–15.

[29] *Id.*

B. Investors' Actual Experience with Broker-Sold Funds Contradicts the Department's Claims

The RIA does not contain any independent analysis of fund performance to support its claim of underperformance arising from investors' use of brokers that are not fiduciaries. We are not aware of any data available to measure directly how investors using brokers fare relative to investors using fiduciaries. Instead, given the shortcomings of the academic literature and flawed analysis the RIA relies on to support its claims of "underperformance," we undertook our own analysis of the recent actual performance of fund investors in broker-sold funds. As discussed below, our findings contradict the RIA's "underperformance" claims. We find that front-end load funds outperform the average fund with the same investment objective and only slightly underperform the sales- or asset-weighted returns on retail no-load funds.

1. Contrary to the Department's claims, investors who own funds that are sold with front-end loads actually have concentrated their assets in funds that outperform—not underperform—their Morningstar category.

To measure the experience of investors in broker-sold share classes, we use gross sales and assets of front-end load share classes from 2007 through 2013. The reason for focusing on the more recent time period is that the mutual fund market has changed significantly in the past 20 years, as we discussed above.[30] We then calculate fund returns, net of fund fees, based on Morningstar data.[31]

Using sales data from 2007 through 2013, we find that front-end load share classes tended to perform better than their Morningstar category average, and that investors concentrated their purchases (*i.e.*, fund sales) in better performing front-end load share classes. As Figure 2 shows, weighting each share class's relative return by its previous year's gross sales as reported by funds to the ICI, the sales-weighted one-year relative return was 27 basis points. In other words, investors buying front-end load shares in those years outperformed the average for share classes in the same Morningstar category by 27 basis points. The simple-average outperformance of front-end load share classes was 13 basis points during this period. The fact that the sales-weighted average exceeds the simple average suggests that brokers tended to guide their clients to funds that subsequently slightly outperformed, not underperformed, the average front-end load share class.

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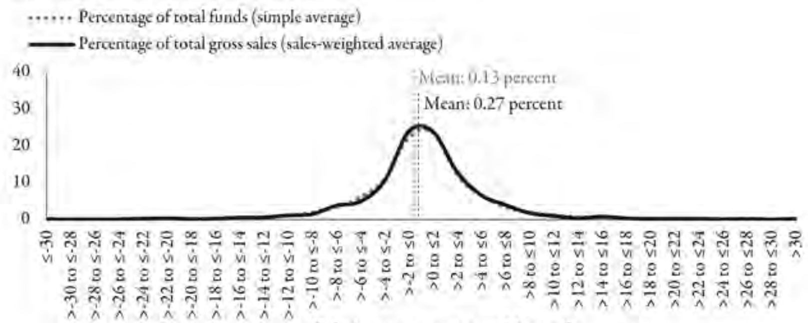
[30] Our analysis begins in 2007 because the shift to direct competition between broker-sold and direct-sold funds continued to occur in the mid-2000s. The analysis ends with funds' performance in 2014, the last full year of performance data.

[31] ICI maintains a survivorship-bias free database of Morningstar data.

Figure 2

Annual Returns on Front-End Load Share Classes Relative to Their Morningstar Category Returns

2008–2014



Note: The relative return is calculated by taking the one-year return of a share class of a fund (net of expenses) less the one-year return on the share class's Morningstar category (net of expenses) for each year from 2008 through 2014. The results are then placed into bins and plotted by summing each share class's gross sales in each prior year as a percentage of gross sales over the entire 2007–2013 period. The analysis includes equity, balanced, and bond mutual funds with at least one share class with a front-end load, excluding mutual funds available as investment choices in variable annuities and mutual funds that invest primarily in other mutual funds.

Sources: Investment Company Institute and Morningstar

Some academic studies seek to measure the outcomes of investors using brokers by comparing returns on broker-sold funds with those of no-load or direct-sold funds,[32] under the assumption that no-load or direct-sold funds capture how investors using broker-sold funds might perform if their brokers could use funds outside the broker-sold universe.

On a three-year relative return, the difference in returns between front-end load and retail no-load share classes is 27 basis points (*see* Figure 3).[33] Some of this difference is accounted for by 12b-1 fees, which compensate brokers and their firms for the services that they provide to their clients. Investors would have to pay for such services whether they used a broker or a financial adviser that was an ERISA fiduciary. When 12b-l fees are added back to measure the performance before compensating the brokers and their firms, the difference in returns between front-end load funds and retail no-load funds drops to 6 basis points on a sales-weighted average and 7 basis points on an asset-weighted

[32] Direct-sold funds are funds sold *directly* by a fund company, in contrast to funds that are sold *indirectly* by intermediaries to a fund company—like brokers.

[33] *See* RIA Letter, Figure 4 and accompanying text, at pp. 20–21.

average. These differences are less than one-tenth the 100 basis point "underperformance" that the RIA asserts.[34]

Figure 3

Three-Year Returns on Front-End Load Share Classes and Retail No-Load Share Classes Relative to Their Morningstar Category Returns

Percent; selected periods

	ICI sales-weighted average		Morningstar asset-weighted average	
Year	Front-end load	Retail no-load	Front-end load	Retail no-load
2007	-0.09	-0.03	0.20	0.45
2008	0.07	0.56	0.07	0.56
2009	0.14	0.33	0.23	0.55
2010	0.39	0.62	0.62	0.77
2011	0.41	0.70	0.67	0.88
Average:				
2007–2011	0.17	0.44	0.37	0.65
Memo: Sales- and asset-weighted 12b-1 fee over given period				
2007–2011	0.23	0.03	0.23	0.02

Note: The relative return is calculated by taking the three-year return of a share class of a fund (net of expenses) less the three-year return on the share class's Morningstar category (net of expenses) for each year from 2010 through 2014. These relative returns are then matched to their three-year prior gross sales or assets. For example, the 2007 sales-weighted averages report the three-year relative return for the period 2008–2010 weighted by gross sales in 2007. The analysis includes equity, balanced, and bond mutual funds with at least one share class with a front-end load, excluding mutual funds available as investment choices in variable annuities and mutual funds that invest primarily in other mutual funds.

Sources: Investment Company Institute and Morningstar

2. **Data also show that investors concentrate their purchases in front-end load share classes with lower expense ratios and that pay brokers lower-than-average loads.**

There is further evidence that brokers do not systematically steer their clients to poor-performing funds with higher loads or fees. We examined data from Strategic Insight Simfund, which contains N-SAR data from 2010 to 2013 showing loads paid to brokers, measured as a percentage of total fund sales subject to a load.[35] If brokers are skewing investors to funds that pay the brokers higher loads, then we should expect sales-weighted average loads to be higher than the simple average load paid.

[34] Using a three-year relative return introduces a small survivorship bias because some share classes are in the one-year returns but not in the three-year returns. On average, 1.6 percent of the front-end load sales in each year have no three-year return and 2.0 percent of retail no-load sales, on average, have no three-year return.

[35] *See* RIA Letter, Figure 6 and accompanying text, at pp. 22–23.

Instead, for each fund investment group, the sales-weighted average load paid to brokers is less than the simple average load paid. These data on loads contradict the notion that brokers are systematically steering their clients to funds that pay above-average loads.

3. Sales of front-end load share classes are skewed toward those with below-average expense ratios—further contradicting the notion that brokers systemically are not acting in the best interests of their clients.

Fund expense data also show strong market forces at work driving investors to funds with below-average expenses. Sales of front-end load share classes are skewed to those with below-average expense ratios, measured as either the total expense ratio (which includes the 12b-1 fee) or the fund expenses used to operate the fund (the total expense ratio minus the 12b-1 fee). Sales-weighted and asset-weighted expense ratios for front-end load share classes are below the simple average total expense ratios or operating expense ratios for front-end load share classes.[56]

Investors in front-end load share classes are paying fund expenses that are in line with retail no-load share classes. Sales-weighted and asset-weighted expense ratios are higher for front-end load share classes than for retail no-load share classes, but a large portion of the difference is that expenses of front-end load share classes include 12b-1 fees used to pay brokers or intermediaries for their services. Focusing on the expenses used to operate the fund ("operating expense ratios"), investors in front-end load share classes generally are paying operating expenses near what investors in retail no-load share classes are paying. And the asset-weighted and sales-weighted operating expense ratios for front-end load share classes are below the simple average operating expenses charged by the average retail no-load share class in all but one case (the sales-weighted taxable bond). These figures undermine the Department's contention that investors "pay insufficient attention to expenses."[57]

In conclusion, our analysis shows that the experience of investors in front-end load funds since 2007 is dramatically different from the RIA's description of the experience of investors using front-end load funds. We find no evidence to support the RIA's assertion that there is a "substantial failure of the market."[58] Furthermore, as we discuss below, the RIA overstates the benefits of the Department's proposal by failing to consider all of its costs. Under the proposal's current design, investors with small balances could potentially pay more for their services from financial advisers, be shut out of the advice market, or be faced with much larger switching costs. In fact, the net impact of the fiduciary proposal as it is currently designed could be negative for many IRA investors.

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[56] *See* RIA Letter, Figure 7 and accompanying text, at pp. 23–25.

[57] *See* RIA at p. 97.

[58] *See* RIA at pp. 3, 7, and 211.

C. The RIA Ignores the Economic Impact of Moving Investors to Fee-Based Accounts

The Department's evaluation of the impact of the fiduciary proposal focuses solely on the costs of advice and assistance paid through a fund—pursuant to an up-front sales charge and 12b-1 fees, for example. But the Department fails to consider how these costs compare to the costs that investors incur when they pay a financial adviser directly for advice (for example, using an asset-based fee that an investor pays directly to a financial adviser) rather than paying through a fund with a front-end load or a 12b-1 fee. In doing so, the Department exaggerates the benefits from lower loads resulting from its proposal and ignores possible costs that investors could incur if they move to fee-based advice.

The RIA calculates that IRA investors currently pay between 26 and 28 basis points per year in front-end loads, in addition to fund expenses. Most front-end load funds have a 12b-1 fee which also is used to compensate the broker and the brokerage firm for their services. The average 12b-1 fee for front-end load funds, on an asset-weighted basis, is about 24 basis points. Adding together both the annualized load costs of 26 to 28 basis points and the 12b-1 fees, the total annual cost for the services provided by brokers and their firms to investors in front-end load funds is about 50 basis points a year.

The Department predicts that its BIC Exemption will induce brokers to reduce loads substantially over 20 years.[39] As the Institute points out in its comment letters, the BIC Exemption is unworkable; even if it could work, it would impose prohibitive costs on brokers. Brokers subject to the Exemption's many new limitations, burdens, and costs, as well as its increased exposure to liability, are likely to seek to move many of their clients to fee-based accounts. Such accounts, however, require much greater level of time and engagement through frequent rebalancing of investors' accounts—a level of service that is unnecessary for an investor with a modest balance who is typically better off as a buy-and-hold investor. This additional ongoing engagement results in higher and ongoing expense for the investor.

A recent study by Cerulli Associates finds that fee-based accounts—the most likely alternative to brokerage accounts—cost investors 111 basis points per year on average, in addition to fund expenses.[40] As detailed in ICI's comment letter to the Department of Labor, it is reasonable to assume that many IRA investors with larger balances will migrate to fee-based advisers and thus pay more. Even allowing for an increase in performance equal to that of investors in no-load funds relative to broker-sold funds over the past few years, if all IRA investors in broker-sold funds with balances of at least $100,000 migrate to fee-based accounts, we estimate that they will pay higher fees and thus earn lower returns totaling $47 billion over 10 years.

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[39] *See* RIA at p. 113.

[40] *See* Cerulli Associates, Inc., *Cerulli Report RIA [Registered Investment Advisor] Marketplace 2014* at p. 20. The average asset-based fee includes high-net worth accounts, which typically are charged lower asset-based fees. Accounts of average or smaller size may pay higher fees.

D. The RIA Fails to Account for the Societal Harm of Investors Losing Access to Advice and Guidance

In its estimates of the cost of its proposed rule, the Department focuses only on administrative or compliance costs. It does not measure any harm that can occur if it adopts the proposed rule—including the risk that at least some retirement savers could lose access to advice and information they currently rely on to meet their savings goals.

If the problems with the proposed fiduciary definition and the BIC Exemption are not addressed, significant numbers of investors can be expected to lose access to the guidance, products, and services that they currently receive from brokers. Financial advisers, regardless of their standard of care, are unlikely to work in an environment of greater costs, limitations, and exposures to liability for less compensation. Indeed, many broker-dealers are likely to exit the market for retirement advice under the proposed rule. The Department thus ignores the impact of its proposed rule on the quality and appropriateness of investment choices that retirement savers must make.

ICI research finds that IRA investors rely on financial professionals to assist with rollovers, creating a retirement strategy, and determining withdrawal amounts.[41] We also find a positive correlation between investors' use of financial professionals and investors' willingness to take financial risk.[42] Indeed, in its justification of an earlier rule change, the Department said that retirement investors who do not receive investment advice are twice as likely to make poor investment choices as those who do receive that advice.[43] The benefits of advice—and, conversely, the harm of losing access to advice—are significant.

Retirement investors may be left with no choice but to seek asset-based fee accounts to obtain the investment assistance that they need. But as we have already established, the cost of investing through those accounts can be greater—not less—than the cost of investing with brokers.

Moreover, fee-based accounts may not be available to low- and middle-income IRA investors who cannot meet minimum account balance requirements. Currently, fee-based advisers often require minimum account balances of $100,000 because, even with a 1 percent fee, accounts with fewer assets generate too little income to make the provision of ongoing advice profitable. Significantly, 22.2 million U.S. households hold IRA assets of less than $100,000, and low- and middle-income households are more likely to have IRA balances below $100,000, as shown in Figure 4.

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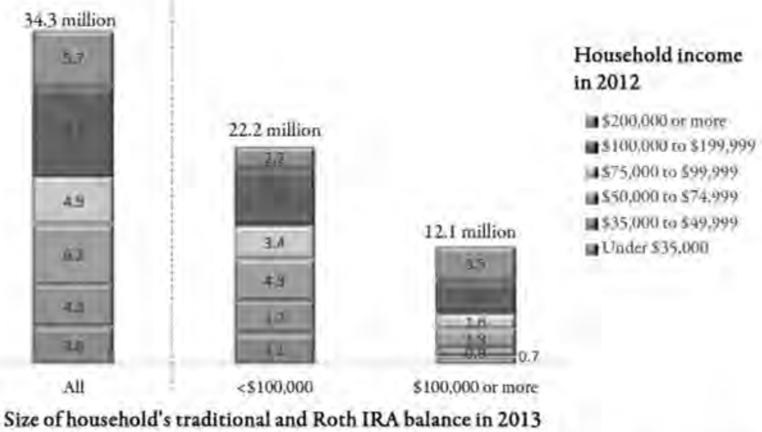
[41] *See* Sarah Holden and Daniel Schrass, "The Role of IRAs in U.S. Households' Saving for Retirement, 2014," *ICI Research Perspective* 21, no. 1 (January 2015), available at www.ici.org/pdf/per21-01.pdf.

[42] *See* Daniel Schrass, "Ownership of Mutual Funds Through Investment Professionals, 2012," *ICI Research Perspective* 19, no. 2 (February 2013), available at www.ici.org/pdf/per19-02.pdf

[43] *See* Investment Advice—Final Rule, 76 Fed. Reg. 66136, 66152 (October 25, 2011).

Figure 4
22.2 Million Households Have IRA Balances Less Than $100,000
Millions of households by household income and household IRA balances

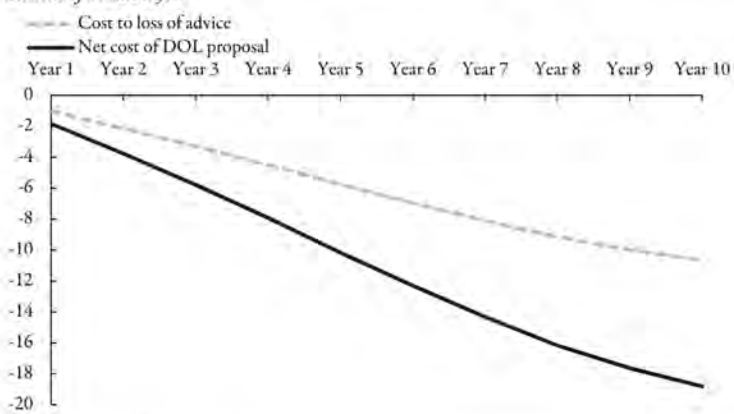


Note: In 2013, 22.2 million, or 65 percent of, households with traditional or Roth IRAs had balances of less than $100,000, and 12.1 million, or 35 percent, had balances of $100,000 or more. Components may not add to 100 percent because of rounding.
Source: Investment Company Institute tabulation of Federal Reserve Board 2013 Survey of Consumer Finances

Other market participants may seek to overcome the proposed rule's barriers and find ways to serve retirement savers who now rely on broker-dealers. It is entirely foreseeable, however, that many IRA investors would no longer be able to obtain advice under the proposed rule. If these investors, over time, lose access to advice and service, their accounts are likely to earn lower returns in the future. These lower returns could occur, for example, through poor asset allocation decisions, poorly timed investment decisions, penalties for early withdrawals, or incorrectly calculated required minimum distributions. Even if these individuals no longer have to pay for services, the net loss on their accounts would have a negative impact.

Assuming that investors with less than $100,000 in IRA balances no longer have access to advice because the BIC Exemption is not workable, then over time these investors are likely to experience lower returns because of poor asset allocation and market timing, or because they incurred tax penalties by taking early withdrawals. Factoring in the lower performance for these investors, and adding to the additional costs for the other 81 percent of IRA assets that would shift to fee-based accounts, it is possible that the net loss from the proposal, if adopted, could impose annual losses to investors mounting to nearly $19 billion a year within 10 years (Figure 5).

Figure 5
Annual Effect on Investors If They Lose Access to Financial Advice
Billions of dollars a year



Source: Investment Company Institute

The losses that investors would likely incur under the Department's proposal stand in stark contrast to the benefits that the CEA and the Department claim. The reason that the CEA and the Department can claim that the proposal would have a net benefit to investors is that their analysis shares several common errors, including: (a) overestimate of the "underperformance" of broker-sold funds; (b) misapplication of the academic research underlying the estimates; (c) failure to acknowledge the added costs borne by investors forced to move from commission-based to fee-based accounts; and (d) failure to acknowledge lost returns suffered by investors with small accounts who forego advice altogether due to loss of the commission-based option.

Correcting for these errors and omissions, we find significant net costs to investors, whether calculated on an annual basis using the CEA's methods or for the first 10 years after implementation by the Department's methods. Indeed, correcting for the Department's many errors and omissions, we find that the Department's proposal, if adopted, will result in net losses to investors of $109 billion over 10 years.

We are, of course, unable to quantify other significant potential costs resulting from the Department's proposed rules. As we discuss above and in our comment letters, the consequence of an expansive and ambiguous fiduciary definition combined with an unworkable BIC Exemption will be that investors—particularly investors with small account balances—will find significant barriers for seeking out advice and assistance, even outside the broker market. Increasing information barriers and transaction costs certainly would reduce the ability of IRA investors to move from one adviser to another or from one fund provider to another, further harming investors.

E. The RIA Fails to Meet the Minimum Standards Applicable to Agency Rulemaking

The Department's meager attention to the potential harm to investors resulting from its rule proposal is surprising given the proposal's likely impact on retirement savers. To meet even the minimum standards required of an agency rulemaking of this nature,[44] the RIA at a minimum should have included information derived from quantitative or qualitative data focused more clearly on showing the problem that the proposal is intended to solve, as well as the anticipated costs and benefits of the proposal as a solution.

The Department fails to provide supportable data and other information describing the nature and magnitude of the *costs* arising from persons and financial services firms with alleged potential conflicts. Consistent with its regulatory obligations, however, the Department also should have provided data and other information on the *benefits* stemming directly or indirectly from the services provided by these persons and financial services firms. For example, given the Department's identification of front-end loads or the receipt of 12b-1 fees as creating a potential conflict, it should have identified and analyzed the benefits to investors of advice or information provided to them by the broker-dealers who receive those fees (for example, through the greater availability of guidance, diverse product offerings, educational tools, and information generally). Wrong on the costs and silent on the benefits, the RIA falls far short of what retirement savers and Congress have a right to expect from the Department.

IV. CHANGES IN RETIREMENT POLICY SHOULD BEGIN WITH AN ASSESSMENT OF THE EXISTING SYSTEM AND BUILD UPON ITS STRENGTHS AND SUCCESSES

Even with its many current strengths, the U.S. retirement system can be strengthened further to help even more Americans achieve a secure retirement. The Institute supports policies that would

[44] Executive Order 12866 (*see* 58 Fed. Reg. 51735 (October 4, 1993)), as reaffirmed by the Administration in January 2011, pursuant to Executive Order 13563 (*see* 76 Fed. Reg. 3821 (January 21, 2011)), is well understood to govern the rulemaking process. The Department states in the preamble to the Proposed Fiduciary Rule that the Office of Management and Budget has determined that the proposed rule is economically significant within the meaning of section 3(f)(1) of Executive Order 12866, because it likely would have an effect on the economy of $100 million in at least one year. *See* Fiduciary Rule Notice at 21951. As the Proposed Fiduciary Rule is a "significant" regulatory action, the Department is required to include, within its RIA: (i) an assessment, including the underlying analysis, of the benefits anticipated from the regulatory action; (ii) an assessment, including the underlying analysis, of the costs anticipated from the regulatory action; and (iii) an assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, and an explanation why the planned regulatory action is preferable to the identified potential alternatives. *See* Executive Order 12866, section 6(a)(3)(C).

improve access to retirement savings opportunities and make retirement plans more efficient and effective. These improvements would build upon the strengths of the current system. Unfortunately, as is the case with the Department's fiduciary proposal, there are many who promote drastic reforms without analyzing the actual need for such changes or the impact they will have on the very people they seek to help.

Any examination of reforms designed to improve the retirement system should begin with an assessment of Americans' retirement prospects and the role that the current system plays in helping American workers reach their retirement goals. The Institute believes that a careful examination of the facts will lead this Subcommittee to continue its support for policies that protect the national voluntary retirement system and scrutinize with some caution the prospect of an ever-expanding patchwork of 50 state-run plans for private-sector employees.

A. The U.S. Retirement System Is Helping Millions of Americans Achieve a Secure Retirement

Retirement policy discussions often start from the premise that retirees' pension income has fallen over time. Contrary to this conventional wisdom, private-sector pension income has become more prevalent and more substantial—not less prevalent or less substantial—over time. Since the enactment of ERISA, increasing numbers of retirees receive benefits from private-sector pension plans (DB and DC) and receive more in benefits from these plans:

- Data from the Current Population Survey (CPS) show the share of retirees receiving private-sector pension income increased by more than 60 percent between 1975 and 1991, and has remained fairly stable since.[45]

- Among those receiving income from private-sector pensions, the median amount of inflation-adjusted income—which had remained fairly flat between 1975 and 1991—increased by more than 40 percent between 1991 and 2013.[46]

Other evidence indicates that retirees have become better off over time.

[45] In 1975, the median per capita pension benefit for the 20 percent of retirees with pension income only from private-sector pensions was about $4,900 per year in constant 2013 dollars. *See* Brady and Bogdan, "A Look at Private-Sector Retirement Plan Income After ERISA, 2013," *ICI Research Perspective* 20, no. 7 (October 2014), available at www.ici.org/pdf/per20-07.pdf. Recent efforts by the CPS to improve the collection of retiree income information have further increased the share of retirees with private-sector pension income and the amount of that income (based on ICI tabulation of the recently released March 2015 CPS data).

[46] *Id.* (Figure 7 and Table 19 in the supplemental tables). The increase in pension income since ERISA is likely understated because the survey data used to analyze retiree income do not fully capture payments from DC plans and IRAs. *See also* Figure 20 and discussion, pp. 20–22, in Sabelhaus and Schrass, "The Evolving Role of IRAs in U.S. Retirement Planning," *Investment Company Institute Perspective* 15, no. 3 (November 2009), available at www.ici.org/pdf/per15-03.pdf.

- Poverty rates for people aged 65 or older have fallen. In 1966, the elderly poverty rate was nearly 30 percent. In 2014, it was 10 percent—and the elderly had the lowest poverty rate among all age groups.[47]

- Academic analysis has found that successive generations have reached retirement wealthier than the last.[48]

- Assets specifically earmarked for retirement have increased significantly. Adjusted for inflation and population growth, retirement assets at year-end 2014 were more than seven times the level at year-end 1975.[49]

- Asset accumulation in defined contribution (DC) plans compares favorably with that in defined benefit plans.[50]

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[47] *See* Figure 5 in U.S. Census Bureau, "Income and Poverty in the United States: 2014," *Current Population Reports,* no. P60-252 (September 2015), available at www.census.gov/content/dam/Census/library/publications/2015/demo/p60-252.pdf. In 2014, the poverty rate for individuals aged 18 to 64 was 14 percent, while it was 21 percent for those younger than 18.

[48] *See* Haveman, Holden, Wolfe, and Romanov, "The Sufficiency of Retirement Savings: Comparing Cohorts at the Time of Retirement," *Redefining Retirement: How Will Boomers Fare?* Edited by Madrian, Mitchell, and Soldo: pp. 36–69. New York: Oxford University Press (2007); and Gustman, Steinmeier, and Tabatabai, "How Do Pension Changes Affect Retirement Preparedness? The Trend to Defined Contribution Plans and the Vulnerability of the Retirement Age Population to the Stock Market Decline of 2008–2009," *Michigan Retirement Research Center Working Paper* 2009-206 (October 2009), available at www.mrrc.isr.umich.edu/publications/papers/pdf/wp206.pdf.

[49] *See* Brady, Burham, and Holden, *The Success of the U.S. Retirement System,* Figure 4, p. 11 (updated to year-end 2014), available at www.ici.org/pdf/ppr_12_success_retirement.pdf.

[50] Taking into account the risks faced by retirement plan participants—for example, the investment risk faced by workers in DC plans and the job turnover risk faced by workers in DB plans—several studies have concluded that the majority of workers who only have access to DC plans during their working careers will be better off than if they only had access to DB plans. For example, Samwick and Skinner (2004) analyze SCF data that provide detailed plan descriptions for a representative sample of DB plans and DC plans. Comparing typical DB plans with typical 401(k) plans under a variety of possible labor market and investment return scenarios, the authors concluded that "generally, 401(k) plans ... are as good or better than DB plans in providing for retirement." Schrager (2009) uses data from the Panel Study of Income Dynamics (PSID) to model four sources of uncertainty: wage growth, job turnover, asset returns, and life expectancy. Comparing DC plans and DB plans that are of equal cost to the employer, the author concludes that, by the 1990s, DC plans were preferred by most workers. Poterba et al. (2007) analyze HRS data that include both detailed descriptions of retirement plans and the actual work histories of individuals. The authors project that retirement resources will be higher on average with private-sector DC plans than they would be with private-sector DB plans.

See Samwick and Skinner, "How Will 401(k) Pension Plans Affect Retirement Income?" *The American Economic Review* 94, no. 1 (March 2004): 329–343; Schrager, "The Decline of Defined Benefit Plans and Job Tenure," *Journal of Pension Economics and Finance* 8, no. 3 (July 2009): 259–290; and Poterba, Rauh, Venti, and Wise, "Defined Contribution Plans, Defined Benefit Plans, and the Accumulation of Retirement Wealth," *Journal of Public Economics* 91, no. 10 (November 2007): 2062–2086.

These statistics speak to the impact of the combined changes implemented over many years, with the increased generosity of Social Security benefits, the enactment of ERISA in 1974, the creation of the 401(k) plan in 1978,[51] the Economic Growth Tax Relief Reconciliation Act (EGTRRA) in 2001, the Pension Protection Act (PPA) in 2006, and other measures. A crucial foundation of this success is the voluntary employer-sponsored retirement plan system, built around the laws and regulations that allow deferral of tax on compensation set aside for retirement. Rules allowing tax-deferred compensation date back to the origin of the income tax,[52] and play a crucial role in encouraging employers to establish and maintain retirement plans for their workers.

As discussed below, however, even with its many successes, the U.S. retirement system can be strengthened further to help even more Americans achieve a secure retirement.

B. The Composition of Resources Relied Upon in Retirement Differs from Household to Household

Assessing whether or not workers are saving enough for retirement requires a standard by which to judge savings adequacy. Retirement savings adequacy typically is defined in relative, rather than absolute, terms: savings would be judged adequate if the savings allowed retired households to maintain the standard of living they enjoyed while working. It is difficult to judge adequacy early in a worker's career because the focus on dedicated retirement savings typically occurs later in a working career. Younger households typically have other savings goals that compete with retirement savings, such as funding education, purchasing a home, and building a rainy-day fund. Importantly, this life-cycle pattern of savings observed in the data is consistent with rational economic behavior. Because of this change in focus over the life cycle, it is difficult to assess retirement preparedness for households that are not in or near retirement.

In assessing whether American workers are saving enough for retirement, it is also important to understand the different resources that most people will draw upon in retirement and the role that each resource plays. The traditional analogy is that retirement resources are like a three-legged stool. This analogy implies that everyone should have resources divided equally among Social Security, employer-sponsored pension plans, and private savings. This is not an accurate picture of Americans' retirement resources—nor has it ever been. Retirement resources are better represented as a pyramid (*see* Figure 6). The retirement resource pyramid has five basic components: Social Security; homeownership; employer-sponsored retirement plans (both private-sector employer and government employer plans, including both DB and DC plans); IRAs (including contributory and rollover accounts); and other

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[51] Although Congress added section 401(k) to the Internal Revenue Code with the Revenue Act of 1978, it was not until November 10, 1981 that the Internal Revenue Service (IRS) formally described the rules for these plans. *See* discussion pp. 1–4 in Holden, Brady, and Hadley, "401(k) Plans: A 25-Year Retrospective," *Investment Company Institute Research Perspective* 12, no. 2 (November 2006), available at www.ici.org/pdf/per12-02.pdf.

[52] The modern federal income tax was established in 1913. The deferral of tax on contributions to profit-sharing plans was codified in the Revenue Act of 1921, and deferral of tax on contributions to DB plans was added in the Revenue Act of 1926. The earlier statutory text is vague as to what forms of compensation represent current income, so it is not clear how deferred compensation was treated before these laws were enacted.

assets.[53] The composition of the retirement resource pyramid—that is, the extent to which a household relies on any given resource—will differ from household to household.

Figure 6
Retirement Resource Pyramid

Source: Investment Company Institute; *see* Brady, Burham, and Holden, *The Success of the U.S. Retirement System* (December 2012)

It is possible to estimate the retirement resource pyramid for U.S. households, but doing so requires measuring the value of a household's future stream of Social Security and DB plan benefits. Gustman, Steinmeier, and Tabatabai (2009) undertook this exercise using data from the Health and Retirement Study (HRS).[54] The analysis focuses on households approaching retirement—in this case, households with a member born between 1948 and 1953 (aged 57 to 62 in 2010). Their analysis is used to estimate the components of the retirement resource pyramid for these households, with households grouped by their augmented wealth (*see* Figure 7). Reflecting Social Security's progressive benefit

[53] These assets can be financial assets—including bank deposits and stocks, bonds, and mutual funds owned outside of employer-sponsored retirement plans and IRAs—and nonfinancial assets—including business equity, nonresidential property, second homes, vehicles, and consumer durables (long-lived goods such as household appliances and furniture). Assets in this category tend to be owned more frequently by higher-income households. For a more complete discussion of the retirement resource pyramid, *see* Brady, Burham, and Holden, *The Success of the U.S. Retirement System*, Investment Company Institute (December 2012).

[54] *See* Gustman, Steinmeier, and Tabatabai, "How Do Pension Changes Affect Retirement Preparedness? The Trend to Defined Contribution Plans and the Vulnerability of the Retirement Age Population to the Stock Market Decline of 2008–2009," *University of Michigan Retirement Research Center Working Paper* 2009-206 (October 2009). The paper used 2006 HRS data, and the authors provided updated data from the 2010 HRS, which are presented in Figure 7.

formula, households approaching retirement in the lowest augmented wealth quintile (the lowest 20 percent) rely heavily on Social Security benefits. In 2010, Social Security comprised 80 percent of total augmented wealth for those households. Even with Social Security replacing a high percentage of earnings for these households, many also had equity in their homes, accumulated retirement benefits, and other assets.

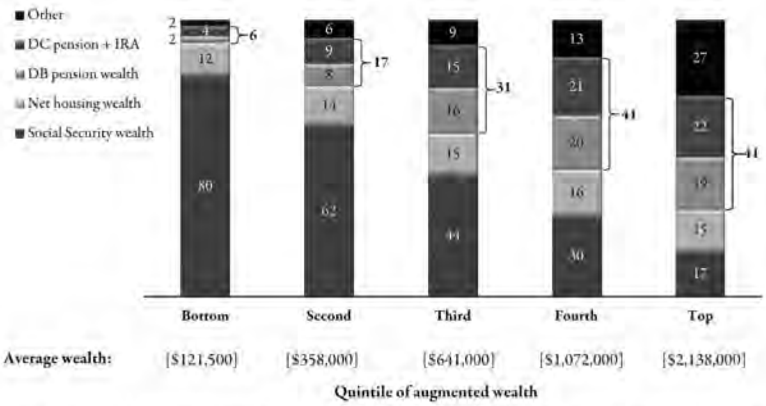
In comparison with those with lower augmented wealth, households approaching retirement in the middle of the augmented wealth distribution rely more heavily on resources other than Social Security. Social Security comprised a large portion of total augmented wealth (44 percent) for households approaching retirement in the middle of the augmented wealth distribution (*see* Figure 7). For this group, equity in their homes made up 15 percent of augmented wealth and the combination of employer-sponsored DB and DC retirement plans and IRAs comprised another 31 percent of augmented wealth. Thus, in the middle of the augmented wealth distribution, households draw more than half of their retirement resources from employer-sponsored retirement plans and IRAs, equity in their homes, and other assets.

The highest augmented wealth quintile of households approaching retirement relies relatively little on Social Security, reflecting the fact that Social Security benefits typically replace a much smaller share of lifetime earnings for this group. For these households, employer-sponsored retirement plans, IRAs, and other assets are more important. For households approaching retirement in the top augmented wealth quintile, Social Security comprised only 17 percent of total augmented wealth (*see* Figure 7). For this group, 22 percent of total augmented wealth was composed of employer-sponsored DC plans and IRAs, 19 percent from DB plans, 15 percent from equity in their homes, and 27 percent from other assets.

Figure 7

Retirement Resource Pyramid Varies with Wealth

Percentage of wealth by wealth quintile, households with at least one member age 57 to 62, excludes top and bottom one percent, 2010



Source: Investment Company Institute tabulation derived from an updated Table 3 of Gustman, Steinmeier, and Tabatabai (2009) using Health and Retirement Study (HRS) data

1. Social Security

Retirement policy discussions often ignore the fact that the United States already has a mandatory retirement plan: Social Security. Social Security stands as the broad base of the retirement resource pyramid, providing households across all levels of earnings with inflation-indexed income for life. For most households, Social Security is one of their most valuable resources.

When Social Security was signed into law in 1935, it was intended to replace a modest portion of income. Changes to the system since its inception—in particular, two periods of expansion, first in the 1950s and then again in the 1970s—increased benefits substantially, especially for those with low lifetime earnings.[55] Described as a "cornerstone" for U.S. retirement security at its beginning, Social Security has transformed into a comprehensive government-provided pension for workers with lower

[55] *See* Brady, Burham, and Holden, *The Success of the U.S. Retirement System*, Investment Company Institute (December 2012), at pp. 17–20.

lifetime earnings and a strong foundation for retirement security for those with higher lifetime earnings.

The expansion of benefits has not come without costs. In 1937, the OASDI tax rate was 2.0 percent on up to $3,000 of wages and salary (equivalent to about $49,000 in constant 2015 dollars). Today, Social Security mandates contributions for American workers of 12.4 percent of wages and salary from the first dollar they earn up to the maximum annual earnings covered by the system, *i.e.*, $118,500 in 2015.[56]

Social Security benefits are designed to be progressive; that is, the benefits represent a higher proportion of pre-retirement earnings for workers with lower lifetime earnings than for workers with higher lifetime earnings. For example, for the cohort of individuals born in the 1960s who claim benefits at age 65, Congressional Budget Office (CBO) analysis shows that Social Security benefits are projected to replace 69 percent of average wage-indexed earnings for the typical individual in the lowest-earning 20 percent of households ranked by lifetime earnings (*see* Figure 8, left panel).[57] The replacement rate falls to 44 percent for individuals in the middle 20 percent of households and 27 percent for individuals in the highest 20 percent of households, ranked by lifetime earnings.

These statistics, however, understate the generosity of Social Security benefits. As explained in a recent paper by Pang and Schieber, traditional replacement rate measures used by both the CBO and the Social Security Administration (SSA) measure Social Security benefits as a percentage of *wage-indexed* lifetime earnings.[58] If a worker is seeking to maintain their standard of living in retirement, *inflation-indexed*, not wage-indexed, earnings represent a better metric of success. Because wages have grown more quickly than inflation over time, Social Security benefits replace a higher percentage of inflation-indexed earnings.

This can be illustrated using CBO projected replacement rates, which, for the first time in December 2014, reported Social Security replacement rates for both wage-indexed earnings and inflation-indexed earnings. For workers born in the 1960s who claim benefits at age 65, CBO projects

[56] *See* Social Security Administration, "Contribution and Benefit Base Determination," available at www.ssa.gov/oact/cola/cbbdet.html. For historical tax rates, *see* www.ssa.gov/oact/progdata/taxRates.html. For the historical earnings base, *see* www.ssa.gov/oact/COLA/cbb.html. OASDI taxes as a percentage of earnings increased to 3.0 percent by 1950, to 6.0 percent by 1960, to 8.4 percent by 1970, to 10.16 percent by 1980, and reached the current 12.4 percent rate in 1990.

[57] *See* Congressional Budget Office, *The 2014 Long-Term Projections for Social Security: Additional Information* (December 2014), available at www.cbo.gov/publication/49795.

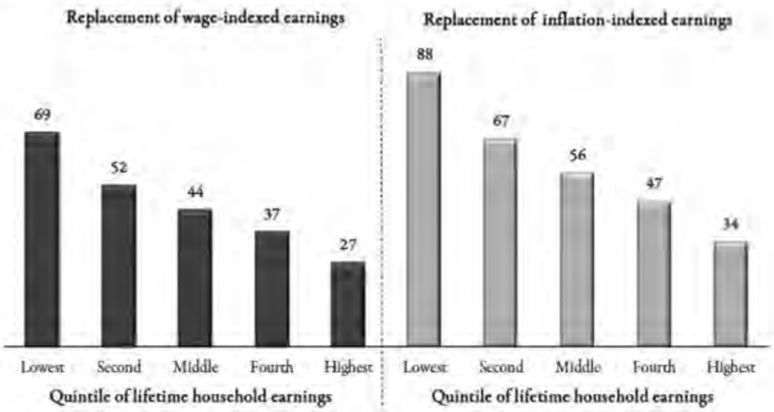
[58] *See* Pang and Schieber, "Why American Workers' Retirement Income Security Prospects Look so Bleak: A Review of Recent Assessments," *Working Paper* (May 31, 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2433193.

that Social Security benefits will replace, on average, 88 percent of inflation-indexed lifetime earnings for individuals in the lowest-earning 20 percent of households, 56 percent for individuals in the middle 20 percent, and 34 percent of individuals in the highest 20 percent (*see* Figure 8, right panel).

Figure 8

Generosity of Social Security Benefits Is Typically Understated

Average replacement rates for workers claiming at age 65 by household lifetime earnings, 1960s birth cohort, percent



Note: Replacement rates are calculated as the ratio of Social Security benefits to average lifetime earnings for each worker.
Source: Congressional Budget Office, *The 2014 Long-Term Projections for Social Security: Additional Information*

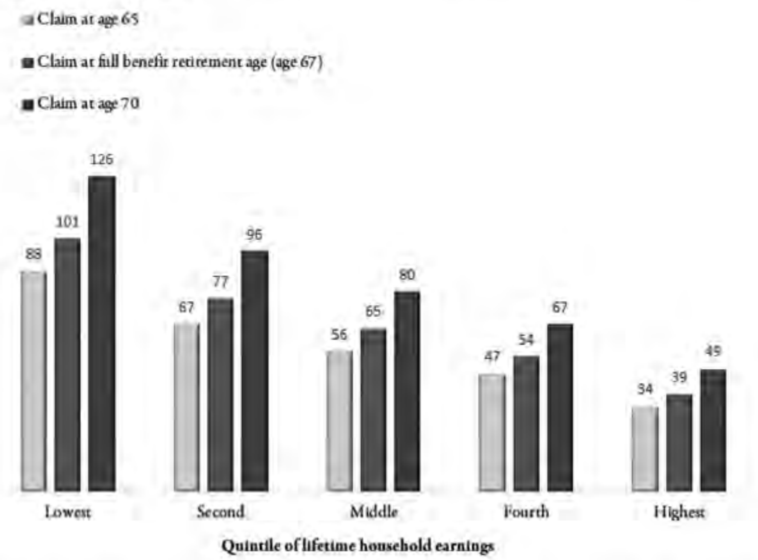
Even the replacement rates of inflation-indexed earnings published by CBO understate the generosity of the Social Security system as it was designed to work. CBO presents replacement rates for workers who claim benefits at age 65. For individuals born in 1960 or later, the full benefit retirement age is 67. For every month that claiming is delayed, Social Security benefits are increased. If workers delayed claiming benefits until age 67, Social Security benefits would increase by approximately 15.3 percent (*see* Figure 9). For the typical individual in the lowest-earning 20 percent of households, Social Security benefits would more than replace average inflation-indexed lifetime earnings if claimed at age 67, and the average replacement rate would increase to 65 percent for workers in the middle 20 percent of households.[39]

[39] Benefits would continue to increase with delayed claiming up to age 70. If claiming was delayed until age 70, benefits would increase an additional 24 percent compared with claiming at age 67. If workers claimed at age 70, the replacement

Figure 9

Workers Can Increase Social Security Benefits by Delaying Claiming

Average Social Security replacement rates by quintile of lifetime household earnings and claiming age, 1960s birth cohort, percent



Note: For each worker, the replacement rate is the ratio of Social Security benefits to average inflation-indexed lifetime earnings.

Sources: Congressional Budget Office, *The 2014 Long-Term Projections for Social Security: Additional Information*, and Investment Company Institute

From its more modest beginnings, the current Social Security system is designed to provide a full pension to workers with low lifetime earnings, and to provide a substantial share of retirement resources for workers with moderate or high lifetime earnings. Consistent with the design of the system, Social Security benefits comprise a higher share of retirement resources for retirees with low wealth or low income. In contrast, to maintain their standard of living in retirement, higher-earning households have a greater need to supplement Social Security benefits.

rate for workers in the lowest-earning 20 percent of households would increase to 126 percent and the replacement rate would increase to 80 percent for workers in the middle 20 percent of households (*see* Figure 9).

2. **Homeownership**

A second resource available to the vast majority of retired households is the home in which they live.[60] Homeownership increases with age and is high across all income groups among near-retiree households. Households who own homes often have no or low mortgage debt by the time they reach retirement age. Households do not have to sell their homes to benefit from them in retirement; they simply have to live in them. An owner-occupied home functions like an annuity that provides rent, as the home provides a place to live that otherwise would have to be rented.

3. **Employer-Sponsored Retirement Plans and IRAs**

The next two layers of the retirement resource pyramid consist of accumulations in employer-sponsored retirement plans (both private-sector employer and government employer plans, including both DB and DC plans) and IRAs (both contributory and those resulting from rollovers from employer-sponsored plans). Near-retiree households across all income groups have these retirement benefits, but employer-sponsored retirement plans and IRAs typically provide a larger share of resources for higher-income households, for whom Social Security benefits provide a smaller share.

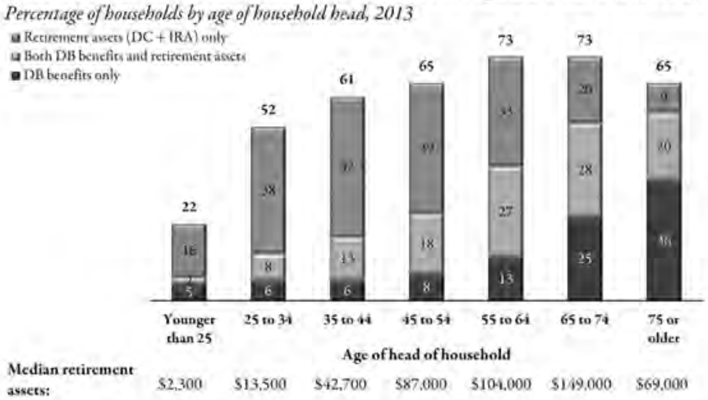
The share of households with retirement accumulations—that is, with benefits accrued in a DB plan or assets in a DC plan or IRA—follows a life-cycle pattern. Based on data from the 2013 Survey of Consumer Finances (SCF), conducted by the U.S. Federal Reserve Board, the share of households with retirement accumulations increases from 22 percent of households younger than 25, to 61 percent of households aged 35 to 44, to 73 percent of households aged 65 to 74 (*see* Figure 10). Similarly, among those with a DC plan or IRA, median retirement assets increase from $2,300 for households younger than 25, to $42,700 for households aged 35 to 44, to $149,000 for households aged 65 to 74.

[60] *See* Brady, Burham, and Holden, *The Success of the U.S. Retirement System*, Investment Company Institute (December 2012), at pp. 22–26.

Figure 10

Share of Households with DB, DC, or IRA Increases with Age, as Do Retirement Assets

Percentage of households by age of household head, 2013



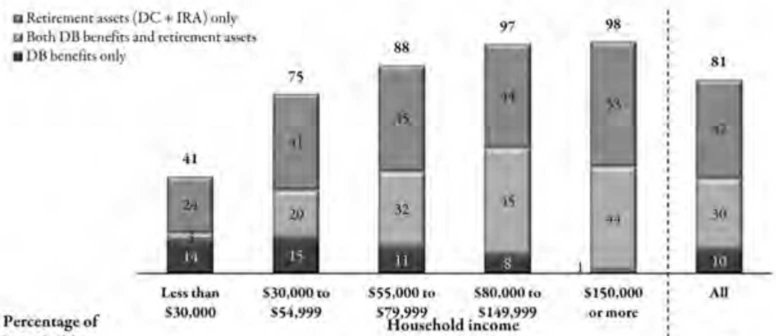
Note: Retirement assets include DC plan assets and IRAs. DB benefits include households currently receiving DB benefits and households with the promise of future DB benefits. Components may not add to the total because of rounding.
Source: Investment Company Institute tabulation of the 2013 Survey of Consumer Finances

Figure 10 analyzes the incidence of retirement accumulations by age of household across all households to highlight the life-cycle pattern of focus on saving for retirement. Figure 11 looks more closely at households who are still working and are getting close to retirement. Among these near-retiree households—that is, working households aged 55 to 64—81 percent have retirement accumulations and, among those with DC plans or IRAs, median retirement assets are $107,000 (*see* Figure 11). Near-retiree households across all income groups have retirement accumulations, including 41 percent of near-retiree households with income less than $30,000 and 75 percent of near-retiree households with income of $30,000 to $54,999. For the top 60 percent of households by income, over 90 percent have retirement accumulations.

Figure 11

Near-Retiree Households Across All Income Groups Have Retirement Assets, DB Plan Benefits, or Both

Percentage of households with working head aged 55 to 64, by household income, 2013



	Less than $30,000	$30,000 to $54,999	$55,000 to $79,999	$80,000 to $149,999	$150,000 or more	All
Percentage of households:	16%	24%	16%	26%	18%	100%
Median retirement assets:	$10,300	$35,000	$88,000	$129,000	$425,000	$107,000

Note: Near-retiree households are households with a working head aged 55 to 64 in 2013, excluding the top and bottom 1 percent of the income distribution. Retirement assets include DC plan assets and IRAs. DB benefits include households currently receiving DB benefits and households with the promise of future DB benefits. Components may not add to the total because of rounding.

Source: Investment Company Institute tabulation of the 2013 Survey of Consumer Finances

As with Social Security benefits, assets specifically earmarked for retirement have increased significantly over time. In 1975, aggregate retirement assets, including assets in DB plans, represented about $27,900 per household in constant 2014 dollars. By year-end 2014, that figure stood at about $199,200—7.1 times the level in 1975.[61]

[61] *See* Brady, Burham, and Holden, *The Success of the U.S. Retirement System*, Investment Company Institute (December 2012), Figure 4, p. 11 (updated to year-end 2014).

V. THE VOLUNTARY EMPLOYER-SPONSORED RETIREMENT SYSTEM IS CHARACTERIZED BY FLEXIBILITY, COMPETITION, AND INNOVATION

A. Flexibility Has Led to Innovation

A strength of the voluntary employer-provided retirement system is the flexibility built into its design. This flexibility has allowed a tremendous amount of innovation to take place over the past few decades, due to the combined efforts of employers, employees, and plan service providers. Some of these innovations—for example, making contributions through regular payroll deduction, which provides convenience and stability, or employer matching contributions, designed to provide further incentives for employee participation—are now taken for granted as standard plan features. Another important improvement has been automatic enrollment to increase plan participation.[62] Another change, auto-escalation, gradually increases the share of pay contributed each pay period until an employee's savings rate reaches a desired goal. Further, target date funds also have become increasingly popular both as a default and as an employee choice and have been successful in ensuring that investors have a diversified portfolio that rebalances to be more focused on income and less focused on growth over time.[63]

It is important to remember that the employer-sponsored retirement system is premised on its voluntary and flexible nature. Employers can choose to provide retirement plans to their employees tailored to their specific needs—but they are not required to do so. Employers today can select from a wide range of retirement plan options including payroll-deduction IRAs, SEP IRAs, SIMPLE IRAs, safe-harbor 401(k) plans, traditional and Roth 401(k) plans, and in some cases, 403(b) plans.[64] A payroll-deduction IRA program has virtually no set-up costs beyond establishing a payroll feed. Retirement savings opportunities—for those who value them—are not lacking.

The current tax structure—including allowing the deferral of tax on compensation contributed to employer-sponsored retirement plans—provides a strong and effective incentive for individuals at all income levels to save for retirement and encourages employers to sponsor plans that provide significant

[62] The EBRI/ICI 401(k) Accumulation Projection Model demonstrates the increases in retirement income that can result from automatic enrollment. Replacement rates, modeled after adding automatic enrollment and investing contributions in a target date fund, increase significantly. *See* Holden and VanDerhei, "The Influence of Automatic-Enrollment, Catch-Up, and IRA Contributions on 401(k) Accumulations at Retirement," *Investment Company Institute Perspective* 11, no. 2, and *EBRI Issue Brief*, no. 283 (July 2005), available at www.ici.org/pdf/per11-02.pdf and www.ebri.org/pdf/briefspdf/EBRI_IB_07-20054.pdf. Furthermore, studies find that adopting an automatic enrollment feature has a particularly strong impact on improving participation rates among low-income and younger workers. *See, e.g.*, Utkus and Young, *How America Saves, 2015: A report on Vanguard 2014 defined contribution plan data*, Vanguard Center for Retirement Research (2015), available at https://institutional.vanguard.com/iam/pdf/HAS15.pdf.

[63] *See* Charlson, "Diversification Pays Off for Target-Date Funds," *Morningstar Advisor* (January 17, 2013), available at www.morningstar.com/advisor/t/69996173/diversification-pays-off-for-target-date-funds.htm.

[64] *See, e.g.*, "Choosing a Retirement Solution for Your Small Business," Internal Revenue Service and Department of Labor, available at www.irs.gov/pub/irs-pdf/p3998.pdf.

benefits to American workers of all income levels. Of course, any changes in the retirement tax incentives could dramatically affect a prior decision to sponsor a plan and require employers to reevaluate and potentially redesign their retirement plan offerings, or even to decide to eliminate their plans entirely.

B. 401(k) Plan Costs Have Fallen over Time

Employers design and offer 401(k) plans to compete for and attract and retain qualified workers, and financial services companies compete to provide services to the plans. Competition and a growing asset base have contributed to the success of 401(k) plans by reducing costs, resulting in cost-effective investing for 401(k) participants. Whether measured by the average total expense ratios of mutual funds held in 401(k) plans, by "all-in" 401(k) plan fees (including all fees whether paid by the plan sponsor, the plan, or the participant), or by "total plan cost" (reflecting fees paid by the plan or the participants), the cost of 401(k) plans has fallen over time.

Analyzing plan sponsor data, it is possible to gain insight into how total 401(k) plan expenses and fees have changed over time. For example, Deloitte Consulting/Investment Company Institute surveys of plan sponsors find that the median all-in fee in 401(k) plans declined between 2011 and 2013.[65] BrightScope's total plan cost measure, based on Form 5500 annual filings and industry data, indicates that 401(k) plan fees fell between 2009 and 2012.[66]

Institute research shows that the costs 401(k) plan participants have incurred for investing in long-term mutual funds have trended down over the past nearly decade and a half. For example, in 2000, 401(k) plan participants incurred expenses of 0.77 percent of the 401(k) assets they held in equity funds (*see* Figure 12).[67] By 2014, that had fallen to 0.54 percent, a 30 percent decline.[68] The expenses 401(k) plan participants incurred for investing in hybrid and bond funds also fell from 2000

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[65] *See* Deloitte Consulting LLP and Investment Company Institute, *Inside the Structure of Defined Contribution/401(k) Plan Fees, 2013: A Study Assessing the Mechanics of the "All-In" Fee,* "New York: Deloitte Consulting LLP and Washington, DC: Investment Company Institute (August 2014), available at www.ici.org/pdf/rpt_14_dc_401k_fee_study.pdf.

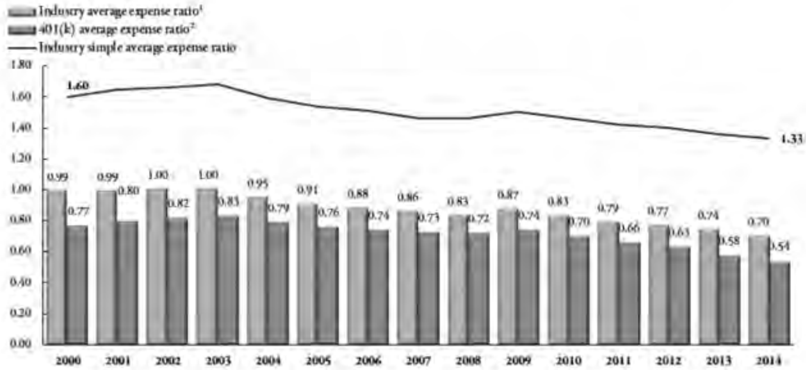
[66] *See* BrightScope and Investment Company Institute, *The BrightScope/ICI Defined Contribution Plan Profile: A Close Look at 401(k) Plans*, San Diego, CA: BrightScope and Washington, DC: Investment Company Institute (December 2014), available at www.ici.org/pdf/ppr_14_dcplan_profile_401k.pdf. In addition, analysis of ERISA 403(b) plans (another type of DC plan) finds that their total plan costs have fallen as well. See BrightScope and Investment Company Institute, *The BrightScope/ICI Defined Contribution Plan Profile: A Close Look at ERISA 403(b) Plans*, San Diego, CA: BrightScope and Washington, DC: Investment Company Institute (June 2015), available at www.ici.org/pdf/ppr_15_dcplan_profile_403b.pdf.

[67] *See* Collins, Holden, Chism, and Duvall, "The Economics of Providing 401(k) Plans: Services, Fees, and Expenses, 2014," *ICI Research Perspective* 21, no. 3 (August 2015), available at www.ici.org/pdf/per21-03.pdf.

[68] *Id.* (Figure 6, p. 11).

to 2014, by 24 percent and 28 percent, respectively.[69] It is also significant that participants in 401(k) plans tend to pay lower fees than fund investors overall. The 0.54 percent paid by 401(k) investors in equity funds is lower than the expenses paid by all equity fund investors (0.70 percent) and less than half the simple average expense ratio on equity funds offered for sale in the United States (1.33 percent). The experience of hybrid and bond fund investors is similar.

Figure 12
401(k) Mutual Fund Investors Concentrate Their Assets in Lower-Cost Equity Funds
Percent, 2000–2014



[1]The industry average expense ratio is measured as an asset-weighted average.
[2]The 401(k) average expense ratio is measured as a 401(k) asset-weighted average.
Note: Data exclude mutual funds available as investment choices in variable annuities.
Sources: Investment Company Institute and Lipper; *see* Collins, Holden, Chism, and Duvall, "The Economics of Providing 401(k) Plans: Services, Fees, and Expenses, 2014," *ICI Research Perspective* 21, no. 3 (August 2015)

VI. EFFECTIVE POLICYMAKING REQUIRES A BETTER UNDERSTANDING OF THE "COVERAGE GAP"

While the current laws and policies governing retirement saving are working well and are helping tens of millions of American workers accumulate savings and generate retirement income, some argue that the system is a failure because some Americans do not have access to an employer-sponsored retirement plan. This perceived failure is referred to as the "coverage gap." This "gap" is poorly understood and frequently incorrectly measured.

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[69] *Ibid.*

The fact is that the vast majority of private-sector workers needing and demanding access to pensions as part of their compensation have pension plan coverage.[70] Accordingly, any assessment of proposals intended to increase coverage must be based on a factual understanding of the reasons some employers do not offer retirement plans to their workers.

A. Workforce Composition Plays a Key Role in Whether an Employer Offers a Plan

Differences in workforce composition appear to be a primary cause for the lower rate at which small employers sponsor retirement plans.[71] Employers offer benefits that their employees value and prefer to receive in lieu of higher wages. Employers that have workforces that are more focused on saving for retirement—and, thus, more likely to value retirement benefits—are more likely to offer retirement plans. This is consistent with the empirical evidence, which shows that firms sponsoring retirement plans have workforces that are older, have higher earnings, and are more likely to work full-time for a full year.

This is because older households are more likely to save primarily for retirement, and thus are more likely to prefer having a portion of their compensation in the form of retirement benefits. Younger households, on the other hand, are more likely to report that they save primarily for reasons other than retirement—for example, to pay for education, to buy a house, or for the family.[72]

Among employers that do not sponsor retirement plans, 29 percent of their employees are younger than 30; 57 percent of their employees are low earners; and 39 percent of their employees are not full-time, full-year (*see* Figure 13). In contrast, among employers that do sponsor retirement plans, only 20 percent of their employees are young; only 25 percent are low earners; and only 20 percent are not full-time, full-year.

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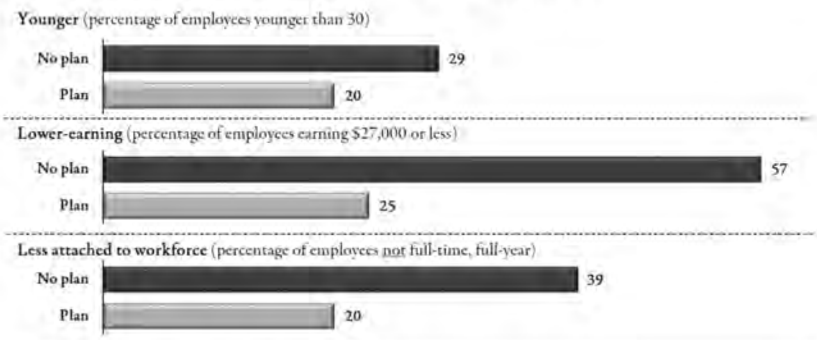
[70] *See* Brady and Bogdan, "Who Gets Retirement Plans and Why, 2013," *ICI Research Perspective* 20, no. 6 (October 2014), available at www.ici.org/pdf/per20-06.pdf. Current Population Survey (CPS) data for 2013 indicate that 53 percent of private-sector wage and salary workers aged 21 to 64 were employed by firms that sponsored retirement plans (including both DB and DC plans). However, access to retirement plans is not random. Limiting the analysis to full-time, full-year workers aged 30 to 64, access to retirement plans increases to 62 percent. If the analysis is narrowed further to the groups of workers most likely to be focused on saving for retirement—workers aged 30 or older with at least moderate levels of earnings and all but the lowest earning workers aged 45 or older—then 70 percent work for employers that sponsor retirement plans. In addition, some in this group without access to plans at their own employers have access to plans through their spouses' employers. Taking into account access through spouses, 75 percent of workers who are likely to be focused on saving for retirement have access to employer-provided retirement plans, and 93 percent participate in the plans offered.

[71] *See* Brady and Bogdan, "Who Gets Retirement Plans and Why, 2013," *ICI Research Perspective* 20, no. 6 (October 2014).

[72] *Id.* (Figure 1, p. 5, which has ICI tabulations of the 2013 SCF analyzing households' primary reasons for saving and how they vary with age and income).

Figure 13
Companies That Don't Offer Pension Plans Have Workforces That Are:



Note: This analysis is of private-sector workers aged 21 to 64.
Source: Investment Company Institute tabulation of March 2014 Current Population Survey; *see* Brady and Bogdan, "Who Gets Retirement Plans and Why, 2013," *ICI Research Perspective* 20, no. 6 (October 2014)

Workers who work part-time or part-year are less likely to be focused on saving for retirement because, on average, they have low earnings. If they typically work part-time or part-year, Social Security benefits will replace a high share of their earnings (*see* Figure 9, above). If they typically work full-time or full-year, they likely would delay saving until they return to more normal work.

Small employers are much less likely to offer a retirement plan than large employers.[73] As a group, small firms are more likely than large firms to have a large share of their employees who are lower-earning and who work part-time or part-year. For many small employers, their employees are likely to value retirement benefits less than higher wages or employer-sponsored health insurance and other benefits (*see* Figure 14).

Current plan structures discourage employers from offering plans if many or most of their workers are less likely to value a retirement plan. If many or most of a firm's workers do not value a retirement plan, and thus do not participate, the firm's plan is not likely to meet tax code nondiscrimination tests. Employers can create safe harbor plans through auto enrollment and mandatory employer contributions, but those measures raise the employer's cost of offering plans.

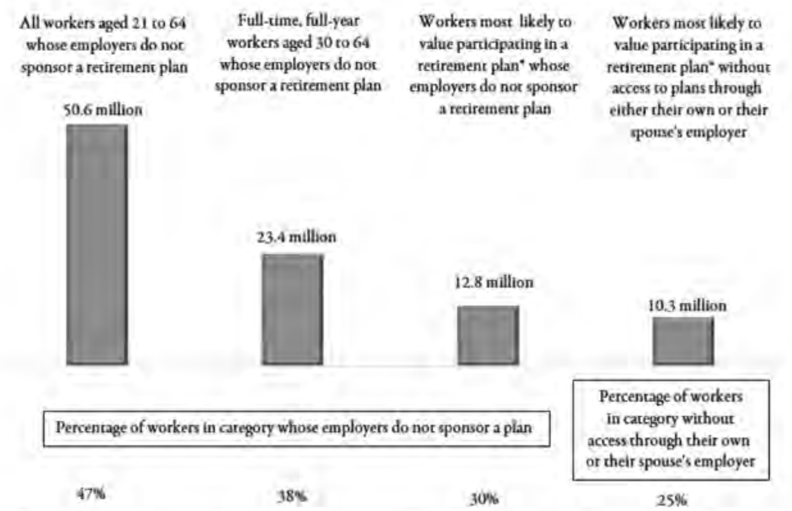
If such firms could offer a retirement plan that did not have to meet nondiscrimination tests and did not require employer contributions, our research suggests that some employers that currently do not offer such plans might do so.

[73] *See* Brady and Bogdan, "Who Gets Retirement Plans and Why, 2013," *ICI Research Perspective* 20, no. 6 (October 2014).

Figure 14

Only a Minority of Workers Without Access to an Employer-Sponsored Retirement Plan Are Likely to Value a Plan

Workers without access to a retirement plan by selected categories of workers



*Full-time, full-year workers aged 30 to 44 with annual earnings of $45,000 or more; and full-time, full-year workers aged 45 to 64 with annual earnings of $25,000 or more.

Source: Investment Company Institute tabulations of March 2014 Current Population Survey; *see* Brady and Bogdan, "Who Gets Retirement Plans and Why, 2013," *ICI Research Perspective* 20, no. 6 (October 2014)

B. Most Workers Have Access to Savings Plans Through IRAs or Plans for the Self-Employed

It is important to remember that individuals who are not offered an employer-sponsored plan do have options for saving. All households with earned income have access to IRAs to save for retirement on a tax-advantaged basis. Congress designed the traditional IRA with two goals in mind: (1) to create a contributory retirement account for workers, and (2) to provide a rollover vehicle to preserve assets accumulated in employer-sponsored retirement plans (both DB and DC). IRAs typically have very small minimum opening balance requirements. Although a small share of individuals contributes to traditional IRAs in any given year,[74] the majority of those who contribute make repeat contributions in succeeding years.[75] In addition, many of those IRA investors contributing to traditional IRAs contribute at the limit.[76]

Self-employed individuals also have ready access to various convenient retirement plan options. Simplified Employee Pensions ("SEP IRAs"), SIMPLE IRAs, and solo-401(k) plans are all easy to establish and maintain. Moreover, self-employed individuals often find it advantageous to set up a DB plan.

C. Most Workers Will Accumulate Retirement Benefits During Their Careers

Many more workers will have access to an employer-sponsored retirement plan at some point during their working careers and will reach retirement with work-related retirement benefits than is implied by looking at a snapshot of coverage among all workers at any point in time. Data from the SCF show that about 80 percent of near-retiree households in 2013 had accrued benefits and asset accumulations in employer-sponsored retirement plans and IRAs (*see* Figure 15).[77] For the past two decades about 80 percent of near-retiree households—those with a working head of household aged 55 to 64 in the year indicated—have consistently accrued DB, DC, or both types of retirement plan benefit (from private-sector employer and government employer plans), or IRAs (rollover and contributory). Despite the fact that DC plans have grown relative to DB plans among private-sector employers, the portion of near-retiree households with retirement accumulations has remained stable. What has changed is the composition of those retirement accumulations: in 1989, 55 percent of near-retiree households had DB benefits and 60 percent had retirement assets (DC plans or IRAs, or both), compared with 2013, when 40 percent of near-retiree households had DB benefits and 72 percent had retirement assets.

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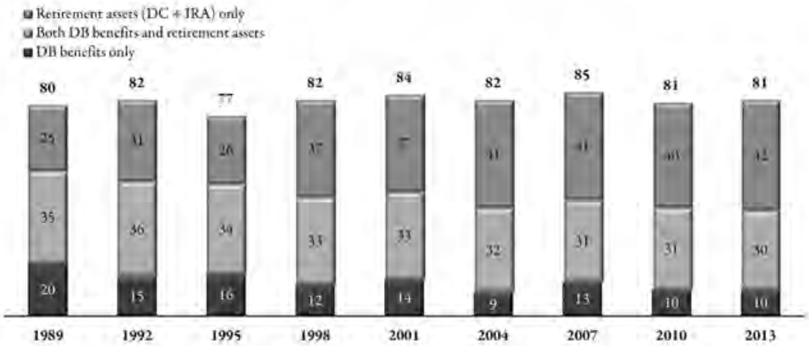
[74] A number of factors may account for this relatively low contribution rate. Two of the major determinants of individuals' decisions to contribute to traditional IRAs are their assessment of their need for additional retirement savings and their ability to deduct contributions from their taxable income. Individuals who are covered by retirement plans at work may find that they can meet their saving needs through those plans. In addition, coverage by such plans may curtail their eligibility to make tax-deductible contributions. For lower-income households, Social Security replaces a much higher fraction of pre-retirement earnings, which may reduce their need for additional retirement savings. Furthermore, there is some evidence that confusion about IRA rules may prevent some individuals from contributing. *See* Holden and Bass, "The IRA Investor Profile: Traditional IRA Investors' Activity, 2007–2013," *ICI Research Report* (July 2015), available at www.ici.org/pdf/rpt_15_ira_traditional.pdf.

[75] *Id.* (Figure 2.7, p. 32).

[76] *Id.* (Figures 2.5 and 2.6, pp. 30–31).

[77] Update of tabulations in Brady, Burham, and Holden, *The Success of the U.S. Retirement System*, Figure 13, p. 29.

Figure 15
Vast Majority of Near-Retiree Households Have Accrued Pension Benefits
Percentage of near-retiree households, 1989–2013



Note: Near-retiree households are households with a working head aged 55 to 64 in the year indicated, excluding the top and bottom 1 percent of the income distribution. Retirement assets include DC plan assets and IRAs. DB benefits include households currently receiving DB benefits and households with the promise of future DB benefits. Components may not add to the total because of rounding.
Source: Investment Company Institute tabulation of the 1989–2013 Survey of Consumer Finances

VII. STATE-ADMINISTERED RETIREMENT PLAN PROPOSALS RAISE SUBSTANTIAL QUESTIONS AND MERIT CLOSE SCRUTINY

Over the past few years, several states have taken steps to establish state-administered retirement plans for resident private-sector workers. These initiatives generally are in response to concerns that private-sector employees in these states do not have sufficient access to retirement savings opportunities through their employers. For example, California, Illinois, and Oregon have enacted legislation to implement mandatory state-administered retirement plans for private-sector employees. Massachusetts has passed legislation to offer a voluntary DC program for employees of small non-profits in that state and, more recently, Washington enacted legislation creating a voluntary retirement "marketplace" to connect small employers with financial institutions offering retirement plan options. Several other states are considering whether to create similar plans or to conduct feasibility studies.

These state initiatives raise significant questions, and we urge that Congress consider them carefully.

- **Are the state-run plan proposals based on an accurate understanding of coverage statistics and the role that workforce composition plays in plan sponsorship?** As explained earlier, the vast majority of private-sector workers needing and demanding access to pensions as part of their compensation have pension plan coverage.[78] Moreover, firms that do not sponsor plans are more likely to have workforces that place less value on retirement benefits than other forms of compensation. These workers may be saving primarily for reasons other than retirement—such as education, buying a house, or starting a family—or may have day-to-day needs that preclude current saving. It bears repeating that Social Security provides very high replacement rates for individuals in lower-earning households.[79] All of these factors bear on the fundamental rationale for the state-run plan initiatives.

- **Are the costs and burdens that will be imposed on employers subject to state mandates to offer such plans, and the possible costs to state taxpayers, justified by the likelihood of benefits that workers will value?** The research discussed above suggests that many of the workers whose employers would be subject to state mandates (because they do not offer a retirement plan) likely would opt out of participating. If state programs do not have the desired effect of increasing participation among certain worker populations, they may not justify the costs and burdens they will impose, especially on small employers.

- **What are the implications of an escalating number of different state-administered plans for private-sector workers—for multi-state employers, for workers who move from one state to another, and for the marketplace for retirement plan products and services?** A proliferation of state-run retirement programs for private-sector workers could result in conflicting requirements for employers with workers in more than one state. Such a patchwork of solutions also could be confusing to individual retirement savers and may leave workers who move from a state with such a plan no ability either to continue participating in the plan or to transfer the assets accrued to another plan.

- **Will state-run plan options erode the successes of the current voluntary employer-sponsored system, by prompting employers currently offering plans to drop their 401(k) plans in favor of the state option?** Implementation of some proposed state plans is premised on exemption from federal laws like ERISA, and the Department of Labor has been directed to issue guidance by the end of this year to support the states' efforts.[80] If state-run plans are exempted from ERISA, such plans could become a more attractive option for employers in terms of reduced compliance burdens, costs and legal liabilities. Policymakers need to determine whether such programs have the potential to prompt a "race to the bottom," leading to an erosion of the existing 401(k) system.

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[78] *See* note 70 and accompanying text at p. 43, *supra.*

[79] *See* discussion of Social Security replacement rates and how the role of Social Security varies by income and wealth on pp. 33–36, *supra.*

[80] *See* U.S. Department of Labor, *Fact Sheet* (July 13, 2015), available at www.dol.gov//ebsa//pdf//fswhconferenceonaging.pdf.

- **What type of investor protections will apply to participants in state-run plans, particularly if state-run plans are exempted from ERISA or federal securities laws?** Policymakers must consider whether government exemptions from investor protections like ERISA for state-sponsored retirement plans could create significant advantages for such plans at the expense of plan participants and private-sector plan sponsors. Many open questions remain about the state programs, such as whether the protections of the Investment Company Act of 1940 will apply to the plans' underlying investments; whether assets will be held in trust; what reporting, valuation, and other requirements will apply; and what disclosures participants will receive.

- **How will the administrative costs of such state-run plans be covered?** Consideration must also be given to how the plans will be administered. Will plan recordkeeping be performed by the states, necessitating significant investment in systems and personnel? Who will pay such costs—taxpayers, or the private-sector employees and employers participating in the programs?

- **What governance structure applies to such state-run plans?** Many of the states enacting such programs contemplate that the plans will be administered by state-appointed boards, raising questions regarding potential conflicts of interest, political favoritism, and similar concerns that need to be addressed. In addition, proposals like the California Secure Choice Retirement Savings Program, which would allocate a guaranteed rate of return to participant accounts, raise substantial questions about the potential for conflicts of interest arising when managers of large pools of money have competing obligations to both private- and public-sector employees.

The above list of questions is not exhaustive. Rather, the questions simply illustrate the complex issues that state-run plan proposals for private-sector employees raise. These issues deserve Congress's consideration. Perhaps the biggest question of all is this: **What changes at the federal level might help expand retirement plan coverage and obviate the need for a patchwork of state-administered plans?**

In this regard, we would urge that Congress consider targeted changes to the current national system. Two ideas in particular would help bring more employers into and improve the effectiveness of the voluntary private-sector retirement system, without detracting from the system's successful features. These ideas would be simple to implement.

New SIMPLE Plan. While the existing SIMPLE IRA and other available plan options[81] offer a relatively simple solution to plan sponsorship, none of the existing plan options work well for workplaces where the majority of workers are focused on saving for goals other than retirement—such as education, a home, or an emergency fund. Many small employers want to offer employees the option to contribute to a 401(k) or similar plan, but cannot meet the non-discrimination tests and may not have the capacity to make the required employer contributions associated with the safe harbor 401(k) plan or a SIMPLE plan. For employers whose workforce places less value on compensation paid as

[81] *See* note 64 and accompanying text, *supra*.

retirement benefits as opposed to take-home wages, the required employer contributions discourage the adoption of SIMPLE plans. Creating a new type of SIMPLE plan for such small employers would encourage greater plan creation and coverage in smaller workplaces. The new plan would be modeled on existing SIMPLE plans, but would not require employer contributions. It would have contribution limits above traditional and Roth IRA limits, but below existing SIMPLE plan limits.[82] Such a plan would accommodate any employee who wants to save for retirement, while preserving the incentives for the employer to step up to a SIMPLE IRA or 401(k) plan.

Open MEPs for Small Employers. The Institute also supports easing restrictions on "open" multiple employer plans (or "open MEPs") established as DC plans, but targeting the provision to employers with no more than 100 employees—the employer segment most in need of solutions to encourage retirement plan sponsorship.[83] Allowing small employers to participate in a MEP—regardless of the employer's industry or any other preexisting relationship with other participating employers or the plan sponsor—will reduce administrative and compliance costs and burdens, and ultimately improve the availability of retirement plans to employees of small employers. In addition to administrative and compliance burdens, smaller employers may be challenged by the fiduciary responsibility and liability of selecting and monitoring service providers and plan investment options. By providing a level of liability relief for investment options offered under the plan, small employers would be encouraged to participate in a MEP, while at the same time ensuring that plan participants are protected. Our proposal also includes important safeguards for open MEP arrangements to ensure the legitimacy of the sponsoring entity and that fiduciary standards are met.

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On behalf of the Institute and all of our members, I thank you for the opportunity to offer this statement. I look forward to answering any questions of the Subcommittee.

[82] We note that a conceptually similar provision, referred to as the "starter k" plan, has been proposed by Senator Orrin Hatch (R-UT) in S. 1270, the "Secure Annuities for Employee (SAFE) Retirement Act of 2013."

[83] For a discussion of how pension coverage varies by plan size, *see* Brady and Bogdan, "Who Gets Retirement Plans and Why, 2013," *ICI Research Perspective* 20, no. 6 (October 2014), available at www.ici.org/pdf/per20-06.pdf.

Chairman ROSKAM. Thank you, Mr. Stevens.

Ms. VanArsdale.

STATEMENT OF JUDY VanARSDALE, LPL FINANCIAL ADVISOR, ENRICH PRIVATE WEALTH MANAGEMENT

Ms. VANARSDALE. Chairman Roskam, Ranking Member Lewis, and Members of the Committee, I am Judy VanArsdale, co-owner of enRich Private Wealth Management and a financial advisor affiliated with LPL Financial. My business is based in the Chicago area, and I am excited to discuss the work I do every day to help my clients save for their futures and highlight the way in which the DOL-proposed fiduciary rule could impact my work and the ability of millions of Americans to save for their retirement.

From young teachers to folks in retirement, the one thing my clients have in common is that they want to be proactive and engaged in the creation of their financial plan and goals. I am proud that my small business is able to make a difference in the lives of so many individual investors.

I believe firmly in the best-interest standard. In my mind, that has never been the debate. My concern is that the DOL's proposed rule could create unintended consequences that would make it harder for me to provide services that I currently offer and harder for my clients to access my advice.

Here is why. In order for me to serve my retirement clients using the brokerage model, I would have to satisfy the requirements of the DOL's proposed best-interest contract exemption. Based on my understanding of the BIC, satisfying its requirements would be challenging and would create problematic new liabilities.

The sad reality is that if I am unable to use the BIC exemption my clients with small accounts could be hurt. Those clients would not have access to advisory services because their accounts are small. If they lose access to brokerage services, they may lose the ability to get personal assistance with their retirement accounts.

It might be helpful if I describe how I interact with clients today. During my first meeting with a potential client, I learn about the client's complete financial picture. I will ask about her goals and aspirations, purchasing a home, children's education, retirement. I encourage clients to ask me how and why I should be paid; what happens if the market plunges; how will they protect themselves from the rising cost of health care; and other questions.

If the relationship is a fit, I will recommend an investment strategy that will help my client pursue her goal and try to stay in close contact with her because it is important to know what is going on in her life. If the DOL implements its rule proposal in anything close to its current form, I might not be able to serve clients with small accounts with respect to their retirement needs.

I believe in clear, simple disclosure. The BIC exemption requires many costly, complicated disclosures and requirements. The lack of clarity in the rule proposal and the new exposure to class action under State law creates an increased risk of litigation.

I am a small-business owner. I employ five women in my office. I have great concern over subjecting my business to increased business and litigation risk. Without a workable solution, small businesses like mine may not feel comfortable using the BIC exemption and would be restricted from serving my smaller retirement brokerage accounts.

The DOL offers robo-advisor services as an option for small investors. If the proposed rule is implemented, what would happen to the man in his 50s who recently contacted me about anticipated changes to the Illinois pension system? He thought his pension would be enough for retirement but realizes it is not. I was able to get him started on a savings plan. Would a robo-advisor understand the complexities of this man's situation?

Indeed, during the market volatility event in August, I spoke with many clients concerned about their accounts. Could a robo-advisor help clients who want to cash out when the market drops? Could a robo-advisor help a young investor set up an IRA, figure out how to save additional funds so that she can move out of her parents' home? Could a robo-advisor help the woman who at 53 finds herself a widow?

An algorithm does not take into account the need for human interaction and understanding, and sometimes my investors just need to know I can help them in a time of personal crisis.

As I have said before, I believe in the best-interest standard. I also believe that the challenges with respect to the proposed DOL rule may effectively be resolved either through significant revision or legislatively, in a bipartisan manner, requiring clear and understandable disclosures.

This is my life's work, and I have a great passion for what I do. As many have said before me, we are now in a moment of great opportunity. Let's work together to craft a fiduciary rule that is workable and protects the best interest of all investors.

Thank you so much for your time.

[The prepared statement of Ms. VanArsdale follows:]

Statement of Judy VanArsdale

Co-Owner, enRich Private Wealth Management

LPL Financial Advisor

Hearing on the Department of Labor's Proposed Fiduciary Rule

Before the Subcommittee on Oversight of the House Ways and Means Committee

September 30, 2015

Chairman Roskam, Ranking Member Lewis, and Members of the Committee, I am Judy VanArsdale, co-owner of enRich Private Wealth Management and a financial advisor affiliated with LPL Financial LLC. My business is based in the Chicago area. I am grateful for the opportunity to testify at this hearing before the Subcommittee on Oversight. I am excited to discuss the work I do every day to help my clients save for their futures and to highlight the ways in which the U.S. Department of Labor's ("DOL") proposed fiduciary rule could impact my work and the ability of millions of Americans to save for their retirement.

I. Introduction

Fifteen years ago, I was a corporate executive in the pharmaceutical industry. I was successful, but unfulfilled and decided to become a financial advisor to help individuals and families pursue their financial dreams. Today, I am the co-owner of enRich Private Wealth Management. I have over 1,100 clients. These clients hold an aggregate of over 2,500 accounts, and over 800 client accounts are under $25,000. From young teachers just starting out to executives in the prime of their careers; from small business owners to folks in retirement; the one thing my clients have in common is that they want to be proactive and engaged in the creation of their financial plans and goals. It is with this in mind that I educate and empower my clients to have financial security.

I am a proud small business owner, and I am thrilled that my small business is able to make a difference in the lives of so many individual investors. I would not be able to do this very important work without the critical support from my partner, LPL Financial. LPL provides me with back-office tools and resources, allowing me to spend more time building relationships with my clients and discussing their financial goals.

I am here representing myself today to talk about my business and the many clients that I serve.

II. Support for the Best Interest Standard

I believe firmly that we should put clients' interests first, and I believe in the best interest standard. In my mind, this has never been the debate. Every day, I work hard to advise my clients with their best interest at the forefront of my mind.

My concern is that the DOL's proposed rule could create unintended consequences that would make it harder for me to provide the services that I currently offer and harder for my clients to access my advice. Here is why. In order for me to serve my retirement clients using the brokerage model, I would have to satisfy the requirements of the DOL's proposed Best Interest Contract (BIC) exemption. Based on my understanding of the BIC, satisfying its requirements would be exceedingly challenging operationally, and would create problematic new liabilities.

The sad reality is that if I am unable to use the BIC exemption and thus unable to provide brokerage services to my retirement clients, my clients with small accounts could be hurt. Those clients may not have access to advisory services because their accounts are small. If they lose access to brokerage services, they may lose the ability to get personal assistance with their retirement accounts.

It is important that we create a rule that will allow financial advisors to provide critical brokerage services to our clients, as these services are often the best mechanism for providing personal advice to small accounts. I am concerned that without a workable solution, many small accounts will not be serviced; and these are the people who often need my help the most.

III. How I Serve My Clients Today

It might be helpful to describe how I interact with my clients today.

During my first meeting with a potential client, I learn about the client's complete financial picture. I will ask about her goals and aspirations – is retirement the sole priority? Does she need to save for her children's education? Does she need to purchase a home? I encourage potential clients to ask me how and why I should be paid, if they can manage accounts online why pay an advisor, what happens if the market plunges before they retire or send their children to college, how will they protect themselves from the rising costs of healthcare, and other questions.

If the relationship is a fit, I will work with my client to develop and implement a plan. I will recommend an investment strategy that will help my client achieve her goal. I will walk my client through the process of opening accounts. I will speak with her about the fees she will pay for the products and services I recommend. Once I have set up my client with a plan, I follow up with her as needed. I encourage her to reach out to me if there is ever a significant change in her family or financial situation so that we are able to reassess her plan.

IV. How the Proposed Rule Could Hurt Access to Financial Advice

When I meet with clients to view their financial picture or to reassess their strategic plan, I focus on their overall portfolio, investment objectives, and financial needs. If the DOL implements its rule proposal in anything close to its current form, as noted, I might not be able to serve clients with small accounts with respect to their retirement needs. I believe in clear simple disclosure; the BIC exemption requires many costly complicated disclosures and requirements that could prevent timely execution of trades. In addition, the lack of clarity in the rule proposal and the new exposure to state law class action lawsuits creates an increased risk of litigation. I am a small business owner and I employ five women in my office. I have great concern over subjecting my business to increased business and litigation risk.

Without a workable solution, small businesses like mine may not feel comfortable using the BIC exemption, and we would be restricted from serving retirement brokerage accounts. Under this situation, I would be able to discuss with clients their advisory accounts and their brokerage non-retirement accounts, but not their brokerage retirement accounts. This is not a way to put a client's best interests first. For certain larger accounts, if appropriate for the client and the circumstances, as noted, I could continue to serve the accounts if the clients were interested in moving to an advisory model.

The DOL offers robo adviser services as an option for small investors. The DOL has also indicated that robo advisers would provide less expensive advice. If the proposed rule is implemented, what would happen to the man in his fifties who recently contacted me? He thought his pension would be enough for retirement, but realized it is not. He is concerned about the anticipated changes to the current pension system in Illinois and wants to know how to be prepared. I was able to get him started on a savings plan. I also helped him figure out what questions he needs to ask about his pension. Would the robo advisor understand how school district contracts work and how the pension changes may affect the client? A clear understanding of my client's environment and circumstances is a major reason why my clients choose to work with me.

Indeed, during the market volatility event in August, I spoke with many clients concerned about their accounts. Could a robo advisor help clients who want to cash out accounts when the market drops? Could a robo advisor help a young investor set up an IRA, and figure out how to allocate money from her raises into her retirement savings, and how to save additional funds so she can move out of her parent's home? Could a robo advisor help the woman who at 53 finds herself a widow? She will need to make critical financial decisions at a time when her mind isn't very clear. An algorithm does not take into account the need for human interaction and understanding, and sometimes my investors just need to know I can help in a time of personal crisis.

V. A Way Forward

As I have said before, I believe in a best interest standard that is applied across all accounts. I also believe the challenges with respect to the proposed DOL rule may be effectively resolved either through significant revision of the current rule proposal or legislatively in a bipartisan manner. I do think that a rule proposed by the SEC would be beneficial as it would govern all brokerage accounts, and not just retirement accounts.

I am a strong proponent of clear and understandable disclosures. I would embrace a rule that would require simple, digestible disclosures that make it easier for investors to understand what they are purchasing and how much they are paying. I would support the requirement of a new short form disclosure that would explain in plain English the services being provided, the potential conflicts of interest, and the range of compensation for each product that can be sold. This form could then be combined with a requirement to provide clients with an annual disclosure document (similar to the current form ADV on the advisory side) that would set forth conflicts of interest in greater detail.

VI. Conclusion

Fifteen years ago, I left corporate America to serve my community and help individual investors make a better life for themselves. This is my life's work, and I have a great passion for what I do. As many have said before me, we are now at a moment of great opportunity. Let's all work together to craft a fiduciary rule that is workable and protects the best interest of all investors.

Thank you so much for your time. I am happy to answer any questions you may have.

Chairman ROSKAM. Thank you very much.
Mr. Specht.

STATEMENT OF KENNETH SPECHT, FINANCIAL SERVICES PROFESSIONAL, AGENT, NEW YORK LIFE INSURANCE COMPANY

Mr. SPECHT. Good morning, Chairman Roskam, Ranking Member Lewis, and Members of the Subcommittee. Thank you for inviting me to testify. My name is Ken Specht. For the past 27 years, I have served as a financial advisor with New York Life in Kenosha, Wisconsin. The views I share this morning are my own.

I support the Department of Labor's goal of a best-interest standard. That is how I work. But the proposed rule, as written, could hurt middle-class consumers by cutting off access to affordable advice and a secure retirement.

As a financial advisor, my goal is to build relationships, working with clients to help them achieve financial security. I serve my clients' best interests. Nearly all of my clients come from referrals and repeat business. Even my wife was a referral; Judy's parents were clients of mine before I ever met her.

When I meet with my clients, sometimes in their homes or in their offices, we talk about their family, their personal circumstances, everyone's health, current and future needs, future plans. There are no cookie-cutter deals, just tailored solutions to fit their personal situation. And we review their needs on a regular basis.

Based on information received from my company and industry trade associations, I have three major concerns with the proposal and the impact it will have on my clients. First, the rule seems to equate "best interest" with "lowest cost," even when the cheapest products may not be in the client's best interest. Second, it appears to prohibit offering proprietary products, meaning I can't even offer them when they are in the best interest of the client. Third, it seems to have a bias against commissions, which are usually the most affordable way to pay for financial advice.

Allow me to share a client's story. Bob and Jean were both 55 years old when he lost his job in 2004. He was a software engineer for a small firm. His wife was a leader in a Kenosha—administrative leader in a Kenosha title company. At that time, they did not know what options they had or how to meet their needs in retirement. They called me. We spent time reviewing their situation and what the future might hold.

They needed about $300 a month of additional income to cover their expenses. We set up an income annuity that will pay them $330 per month, every month, as long as either one of them is alive. Today, those payments are still direct-deposited into their bank, same day, every month, and they will continue no matter how long they live, guaranteed.

Under the proposed rule, fewer savers and retirees will have access to such guarantees for the three reasons I mentioned earlier.

First, the proposal implies the cheapest product is always the best product. This could lead advisors to offer the cheapest products rather than the safest. If Bob and Jean had gone with the cheapest company 11 years ago, it is possible that company might not be around today. The cheapest products often come with the weakest guarantees.

Second, the proposal seems to have a bias against proprietary products. For the past 27 years, I have become an expert in New York Life products and solutions. I primarily offer New York Life because they have the strongest, highest financial strength ratings among life insurers. Bob and Jean said they did not want to lose any of their money, but, under the proposal, I could be put in the bind of not being able to recommend a product that is in the best interest of the client, like in this case.

Third, regarding the bias against commissions, I will earn about one-fifth of 1 percent a year of their investment in return for the guidance I provide. You see, Bob and Jean have owned this annuity for 11 years already. Their joint life expectancy is another 25 years. So when a modest up-front commission is spread over the years the saver holds our products, the actual cost is often far lower than other ways of paying for financial guidance.

Clearly, many of the products I provide can be bought online, but people in Kenosha still choose to work with me. With something as important and scary as retirement, people want to work with someone they trust and a company they trust.

In closing, I support the Department's goal of a best-interest standard, but the proposal's unclear standards, biases, and legal risk mean fewer middle-class Americans would have access to my guidance and my company's guarantees.

I thank the subcommittee and would be happy to answer any questions.

[The prepared statement of Mr. Specht follows:]

Chairman Roskam, Ranking Member Lewis, and Members of the Subcommittee, thank you for inviting me testify. My name is Ken Specht. For the past twenty-seven years, I have served as a financial adviser with New York Life in Kenosha, Wisconsin. I appreciate the opportunity to share my perspective on the Department of Labor's proposed fiduciary rule. The views that I will present this morning are my own.

As a financial adviser, my goal is to get to know my clients, build relationships, and help them make decisions over the years that will allow them to achieve financial security. I serve my clients' best interest. And, despite having some serious concerns that are outlined below, I support the goal of the Department of Labor's proposed best interest standard.

When I meet with clients, sometimes in their homes or offices, we talk about their families, their circumstances, everyone's health, current and future needs, and desires. I make clear to my clients that without the right information, I can't provide them with the right individualized advice. There are no cookie cutter plans, just tailored solutions to fit their personal situation. Maybe it's a special needs child. Perhaps there is planning involving ownership of a small business, caring for an elderly parent, or concern about outliving assets. Every case is unique.

Through our conversations, and typically through a series of conversations, I work with my clients to understand their financial needs and desires, identify gaps between their dreams for retirement and their current planning, and assess their risk tolerance, both spoken and unspoken. For example, a retiree's risk tolerance often can be understood not just by what is said or not said, but also by the glances between husband and wife. Without a doubt, the single greatest concern that I hear from my clients is a fear that they will run out of money in their retirement.

One of the most rewarding aspects of my job is the fact that after talking through their concerns and their goals, my clients get motivated to do what's right. Many times the worst decisions are made by those who make no decisions. They don't save, they don't invest and they don't plan. Some have described what financial advisers like me do as "nudgenomics." Without my guidance, most of my clients would struggle to focus on their future needs and would avoid making decisions that are in their own best interest like saving more, buying life insurance, or buying a guaranteed lifetime income annuity that will ensure that they do not outlive their savings.

In other cases, without my guidance and reassurance, my clients would make rash decisions during fluctuations in the market – such as cashing out all their investments during the financial crisis – and losing out on the gains during the recovery. Sometimes my value is evidenced by actions not taken.

In each case, I am committed to serving my client's best interest. Not only is it the right thing to do and the only way that I am comfortable operating – but this is very much a personal business and a long-term relationship business. Nearly all of my clients come from referrals and repeat business. Even my wife was a referral; Judy's parents were clients before I met her. If I don't operate in my clients' best interest, word gets around in a community like Kenosha. Referrals will dry up, and I'm out of business.

Support for Best Interest Standard; Specific Concerns with Department's Proposal

As an adviser with twenty-seven years of experience acting in the best interest of my clients, I wholeheartedly support the Department of Labor's goal of a best interest standard. That is how I operate. But the proposed rule, as written, could hurt middle class consumers – like those I serve in Wisconsin – by cutting off access to affordable advice and a secure retirement. I understand and support the Department's goal in crafting the rule, but simply put, as written it will not accomplish this.

Based on information received from my company and industry trade associations, I have three major concerns with the proposal and the impact it will have on my clients:

1. **The rule seems to equate "best interest" with "lowest cost," even when the cheapest products may not be in a client's best interest.**
2. **It appears to prohibit offering proprietary products, meaning I can't offer them even when they are in the client's best interest.**
3. **It seems to have a bias against commissions, which are usually the most affordable way to pay for financial advice.**

Allow me to share a client story. Bob and Jean were both 55 when he lost his job in 2004. He was a software engineer for a small firm. She was an administrative leader in a Kenosha title company. At that time they did not know what options they had or how to meet their needs in retirement – and were fearful about losing what they had worked so hard to save so close to retirement. They called me; we spent time reviewing their situation and what the future might hold. They indicated they needed about $300 in extra income each month to make ends meet. They used a portion of their savings, about $70,000, to purchase a guaranteed lifetime income annuity, which will pay them $330 per month, every month, as long as either one of them is alive. Today, those payments are still directly deposited into their bank account on the same day each month and will continue no matter how long they live. Guaranteed. Based on their current life expectancy, they will receive payments totaling $147,000 on their $71,000 annuity. If they live longer, they will receive even more.

Under the proposed rule, fewer savers and retirees will have access to that kind of guarantee – for three primary reasons.

1. Proposal Favors Low Cost Products, Even When Not in Best Interest

The Department's proposal, as currently drafted, implies that the cheapest product is always the best product and that cost should be the sole factor when determining whether a product is in a client's best interest. As a financial adviser, cost is always a consideration when I sit down with clients and provide them with recommendations. However, it can't be the only or the determinative factor, particularly when the features, quality and strength of a financial product will determine whether a saver will have a secure retirement or not.

This is especially the case when it comes to guaranteed financial products such as lifetime income annuities. As was the case with Bob and Jean, savers who purchase a guaranteed lifetime income annuity can effectively create their own private pension. Clients like Bob and Jean sleep better at night knowing that they will receive a guaranteed monthly paycheck from the insurance company for as long as they live – regardless of whether there is another economic downturn or even a financial crisis.

Annuities are fundamentally different than other financial products like mutual funds or ETFs where the value rises and falls in relation to financial markets. When purchasing a long term guarantee like an annuity, customers should be focused squarely on the long term financial strength of the company backing the guarantee. If a retiree is going to hand over a significant portion of his nest egg, he needs to be sure it's going to a company that will be there 10, 20, 30 or more years down the line to meet its promises. And the cheapest annuity often is not in a client's best interest. For example, an annuity backed by a AAA rated company may not always be the cheapest, but it's one that you can count on.

Unfortunately, the Department's singular focus on cost fails to appreciate the value of the quality of the guarantee backing up an annuity – and could lead advisers to offer the cheapest products rather than the safest. And if Bob and Jean had gone with the cheapest annuity provider eleven years ago, it's quite possible that the company might not be around today. The cheapest products often come with the weakest guarantees.

2. Bias against Sales of Proprietary Products by Expert Agents

Even though the Department has stated that it does not intend to prohibit the sale of proprietary products, its proposal seems to have a bias against these products. Under the "best interest" standard that is included in the Department's proposed rule, an adviser must provide advice that:

> Reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the retirement investor, ***without regard to the financial or other interest of the adviser, financial institution, any affiliate or other party***.[1]

I agree that advisers must provide advice that reflects the care, skill, prudence and diligence that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the retirement investor. That's what I do every day, and as a licensed agent in Wisconsin, I am subject to strict federal, state and company rules that govern how I do business.

[1] Dep't. of Labor, 80 Fed. Reg. 21,927, at 21987 and 22020 (proposed April 20, 2015) (to be codified at 29 C.F. pt. 2509-10), emphasis added

However, the Department's requirement that I must offer advice "without regard to" any financial interest or other interest that I may have seems to require that I have "no interest" in advising my clients, rather than simply having to act in their best interest. As currently drafted, the "without regard to" phrase in the best interest standard could be interpreted to prohibit the sale of proprietary products altogether. Additionally, the Department's proposal imposes additional requirements that put those that sell proprietary products at a disadvantage.

For the past twenty-seven years I have become an expert in New York Life products and solutions. I primarily offer New York Life products – the products that I know best and am best trained on – because New York Life has the highest financial strength ratings among life insurers. As an agent for New York Life, I am proud to have the company's AAA rating and 170-year track record of keeping its promises standing behind me when I am working with my clients. As a mutual, the company is owned by its policyholders and is focused on meeting their needs rather than those of corporate shareholders.

When I meet with prospective clients, I make clear my affiliation with New York Life. While I sell non-proprietary products when they are appropriate for my clients, I primarily sell New York Life products because, after decades of training, I understand exactly how these products work, and because of the mutuality and financial strength of the company standing behind them.

For example, when working with my clients Bob and Jean, I recommended a guaranteed lifetime income annuity from New York Life, because I knew how fearful they were of losing any of their money and how important it was to them that they have the peace of mind that comes from knowing the company that provides them with monthly payments will be there for as long as they live. But under the Department's proposal, the middle class consumer could lose options like this guaranteed income from the safest company.

When clients decide to work with me, they expect me to offer New York Life products. However, the Department's proposal would suggest that I should be selling other companies' products. When a customer walks into a Chevy dealer, they expect to learn the benefits of a Chevy, not a Ford. But under this proposal, because I sell proprietary products, I'm put into a penalty box.

3. Bias against Commissions

Despite the Department's statements to the contrary, the Department's proposal seems to create a bias against commissions. The "best interest" standard under the rule could be interpreted to mean that I cannot even take into account whether I will get paid when deciding whether to provide advice to my clients. Alternatively, it could be interpreted to mean that I must provide advice for a flat asset-based fee, versus receiving a commission for the products that my clients purchase.

Unfortunately, by creating a bias against commissions, the Department's proposal could limit access to affordable investment advice and guaranteed products for my clients. A commission-based compensation structure is also the only structure that is compatible with annuities, where assets are spent down rather than grown. When I sell an annuity, I receive an upfront commission. When spread out over the duration of the annuity, the cost of the commission is much lower than the 1% annual recurring fee typically associated with managed accounts. For example, the commission that my clients, Bob and Jean, paid for their lifetime income annuity that has provided them with guaranteed income for the last eleven years works out to be 1/5 of 1% per year.

To ensure that middle income savers continue to have access to affordable, individualized advice, it is important that the Department eliminate any suggestion that a fee-based account is preferred over a commission. Without access to commission-based advice, savers like Bob and Jean could lose access to affordable advice, be subject to higher fees and pay more for lifetime guarantees.

Robo-advice Does Not Meet All Needs

Before I conclude, let me take a moment to comment on suggestions by the Department of Labor that savers with small accounts can turn to computer software or "robo-advice" for guidance. While computer software may be a helpful tool for some savers, robo-advisers will never fully replace personalized, face-to-face financial guidance.

Clearly many of the products I provide can be bought online, but people in Kenosha still choose to work with me. Here is why I think that is. We are trained to ask the tough questions and dig for honest answers. We don't just talk, we listen. A computer algorithm cannot assess the emotion of a person clicking through an online questionnaire. When I sit down with my clients, I can sense their hesitation and their unspoken fears, and I can ask the right questions to understand if they have unique needs or circumstances that a computer formula does not capture.

Based on my experience, people also want to have a local adviser whose name and face they know, whom they can depend on for help next week, next year and in the next decade. Websites and 1-800 numbers may offer cheaper advice, but with something as important and scary as retirement, people want to work with someone they trust and a company they trust. Humans may not be the cheapest, but we offer our time, expertise, and personalized guidance and care. And what is clear to me after twenty-seven years in the business is that a one size fits all approach to investing is not in a client's best interest.

Conclusion

In closing, I want to again state my support of the Department's goal of a best interest standard. As I mentioned at the outset, I serve the best interests of my clients everyday – and have for the past twenty-seven years. No one in the industry wants to see advisers misleading clients. Bad actors diminish the collective trust that clients place in advisers and create problems that good advisers must spend time correcting. However, the combination of vague standards, unfounded biases and heightened legal risk inherent in the rule means fewer savers would have access to my guidance and my company's guarantees. I would like to thank the Subcommittee for its time and would be happy to answer any questions.

Chairman ROSKAM. Thank you, Mr. Specht.
Ms. Owen.

STATEMENT OF PATRICIA OWEN, PRESIDENT, FACES DAYSPA

Ms. OWEN. Thank you, Chairman Roskam, Ranking Member Lewis, and Members of the Subcommittee, for the opportunity to testify today. I am Patricia Owen, president and owner of FACES DaySpa on Hilton Head Island, South Carolina. I am here representing the U.S. Chamber of Commerce, of which I am a member of its Small Business Council.

FACES DaySpa opened in 1983 as a retail cosmetic store but has since evolved into a day spa where our business is primarily service-oriented. As such, human capital is the most vital resource to my company. I currently employ 25 people, of which two-thirds work full-time. To compete for good talent, I offer affordable employee benefits, including paid training, employee discounts, supplemental health insurance plans, and a retirement savings plan.

As the owner of a small business, I focus on the core operations of my business and use outside professionals to help me with other functions for which I don't have the time or expertise. For example, I use a CPA firm to assist with tax issues, an attorney to assist with legal matters, and a financial advisor to help me with my retirement savings plan.

Most of my employees are considered millennials. In other words, they are young and in the early stages of their career. Therefore, saving for retirement is not a priority and not on the forefront of their minds.

I consider myself a second mother to my employees and want to ensure they are thinking about their future. So, several years ago, I implemented a 401(k) plan where I provided a 50-percent employer match. My financial advisor helped me set up the plan, educated me on a range of investment options appropriate for my employees, and provided general investment education to my employees.

Today, if any employee has questions about their 401(k) account, they can call an 800 number and get quality, personalized education on investing their savings. Also, I encourage all employees, even those who aren't eligible or don't participate in the plan, to participate in investment seminars my financial advisor conducts for my company to help educate them on saving for retirement.

Unfortunately, the financial crisis hit in late 2008, and, like many small businesses, we were significantly impacted, so I was no longer able to provide the employer match. I made this difficult decision to avoid laying anyone off.

I have recently considered reimplementing the employer match; however, the potential of higher costs for small businesses emanating from the impending fiduciary rule at the DOL has caused me to hold off on this for now. If the rule moves forward as proposed, it is unlikely that I will be able to absorb both the higher costs resulting from the DOL rule and provide a 50-percent match to my employees. It is possible that I may even need to drop the plan altogether.

The current participation rate for those eligible for our 401(k) plan is less than 50 percent. This percentage is noticeably lower than the 75-percent participation rate when I did offer a matching contribution.

The Chamber has submitted several comment letters to the DOL enumerating many ways in which the proposed rule is unworkable. In my testimony, I would like to highlight three issues that will have a particularly negative impact on small-business plans.

First, the sellers carveout discriminates against small businesses and will decrease access to much-needed guidance.

Under the proposal, there is a carveout for advisors that are selling or marketing materials. However, this carveout does not apply to advisors to small businesses. The DOL seems to believe that small-business owners like me are not as savvy as large businesses and therefore need additional protections.

When I talk to my financial advisor, I am aware that he is providing a service for a fee and selling a product. If I were not able to discern when I am involved in a sales discussion, I would not be able to run a successful business.

Second, the changes to the education carveout will restrict access to investment education for both small-business owners and their employees. My employees value the investment education provided to them, specifically providing investment recommendations on various asset classes. This information allows them to make informed investment decisions. Many of my employees cannot afford to pay for investment education separately and might be discouraged from investing in the plan at all if the company did not provide this benefit.

Third, the best-interest contract exemption will increase the cost of services to small businesses and possibly eliminate access. There is some question about whether advisors to small-business plans are even able to use the BIC exemption, but, even assuming they are, there will certainly be additional costs associated with these changes. As a business owner who relies on outside professionals to manage my plan, any additional costs imposed by the regulation will be passed on to me.

In conclusion, I am very concerned that the DOL proposal will not achieve its goal of better protecting workers and retirees but will instead make it harder for small-business employers and employees to access financial advice and to increase their retirement savings.

Thank you for the opportunity to testify today. I look forward to any questions you might have.

[The prepared statement of Ms. Owen follows:]

Statement of the U.S. Chamber of Commerce

ON: The Department of Labor's Proposed Fiduciary Rule

TO: Subcommittee on Oversight of the U.S. House of Representatives Committee on Ways and Means

BY: Patricia Owen, President, FACES Day Spa

DATE: September 30, 2015

1615 H Street NW | Washington, DC | 20062

The Chamber's mission is to advance human progress through an economic, political and social system based on individual freedom, incentive, initiative, opportunity and responsibility.

The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system.

More than 96% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

Besides representing a cross-section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on issues are developed by Chamber members serving on committees, subcommittees, councils, and task forces. Nearly 1,900 businesspeople participate in this process.

Thank you Chairman Roskam, Ranking Member Lewis, and members of the Subcommittee on Oversight of the House Committee on Ways and Means for the opportunity to testify today on the U.S. Department of Labor's proposed fiduciary rule.

I am Patricia Owen, President and Owner of FACES Day Spa in Hilton Head Island, South Carolina. I am here representing the U.S. Chamber of Commerce, where I am a member of its Small Business Council.

FACES Day Spa is a premier, award-winning day spa that provides a variety of services specializing in skin care, stress relief, beauty, and overall wellness for men and women of all ages. I opened FACES Day Spa in 1983, originally as retail skin care and cosmetics store, but as of 2000, transformed it into a day spa where our business is primarily service oriented. As such, human capital is one of the most vital resources to my company. I currently employ 25 people, of which two-thirds work full-time. Hilton Head Island is a vacation destination where there is significant competition for workers in the hospitality industry, especially among spas. In order for me to compete with the larger hotel chain spas and other small businesses for good talent, I offer a variety of affordable employee benefits, including paid training, employee discounts, supplemental health insurance plans, and a retirement savings plan. As the owner of a business, I am focused on the details of my core business function – strategic planning, marketing and training – and use outside professionals to help me with important business functions that I don't have the time or expertise to deal with on an everyday basis. For example, I use a CPA firm to assist with accounting and tax issues, an attorney to assist with legal matters, and a financial advisor to help me with my retirement savings plan.

Most of my employees are considered "millennials." In other words, they are young and in the earlier stages of their work life. Therefore, saving for retirement is not a priority, and not on the forefront of their minds. Because I consider myself a "second mother" to many of my employees and want to ensure they are thinking about their future, I implemented a 401(k) plan in 1997 where I provided a 50% match to what each plan participant contributes. My financial advisor helped me set-up the plan, educated me on a range of investment options appropriate for my employees, and provided general investment guidance to my employees. Today, if any of my employees have questions about their 401(k) account, they can call an 800 number and get quality, personalized assistance on how to invest their savings.

Unfortunately, the financial crisis hit in late 2008, and like many small businesses that cater to the hospitality industry, we were significantly impacted, and I was no longer able to provide the match. I made this difficult decision to cut back on this benefit to successfully avoid laying off anyone. I have been rebuilding and growing my business since then and have recently considered re-implementing the matching contribution. However, the potential of significantly higher costs for small businesses emanating from the impending fiduciary rule at the Department of Labor has caused me to hold off on re-instituting the match for now. If the rule moves forward as proposed, it is unlikely that I will be able to absorb both the higher costs resulting from the Department of Labor rule and provide a 50% match to my employees. It is possible that I may even need to drop the plan altogether.

In the meantime, I encourage all employees – even those who aren't eligible or don't participate in the plan – to participate in the investment seminar my financial advisor conducts for my company to help educate them on saving for retirement and ways to meet retirement goals. The current participation rate for those eligible for our 401(k) plan is less than 50%. This percentage is noticeably lower than when I did offer a matching contribution. At that time, the participation rate was nearly 75%. Accordingly, any new costs imposed on small businesses will have a huge trickle-down effect on the savings rate.

Since the impact of the financial crisis has subsided, my company is now on stable footing and growing again, and I want to be able to attract new employees through competitive benefit packages. Providing retirement benefits has been important to help my current employees and to attract new ones. However, I am very concerned that the proposed rule will prevent my ability to do so.

Earlier this year, the Chamber submitted a comment letter to the Department of Labor enumerating many ways in which the proposed rule is unworkable.[1] In my testimony, I would like to highlight three issues that will have a particularly negative impact on small business plans like mine:

1. The seller's carve-out discriminates against small businesses and will decrease access to much-needed guidance.
2. The changes to the education carve-out will restrict access to investment education for both small business owners and their employees.
3. The Best Interest Contract Exemption will increase the costs of services to small businesses and possibly eliminate access.

The seller's carve-out discriminates against small businesses and will decrease access to much-needed guidance. Under the proposal, there is a carve-out for advisors that are selling or marketing materials ("Seller's Carve-Out").

[1] The Chamber's comment letter is attached to this testimony.

However, this carve-out does not apply to advisors to small businesses. The DOL seems to believe that small business owners like me are not as savvy as large businesses and, therefore, need additional protections. The validity of this rationale is based on faulty assumptions, and does not justify discriminatory treatment. I am aware that that my financial advisor is providing a service for a fee and selling a product when I work with him. I would not be able to run a successful business if I were not able to discern when I am involved in a sales discussion – especially if it follows a basic disclosure that an advisor is selling a proprietary financial product, that the advisor is paid to sell the product, and the advisor is not providing fiduciary advice. This disclosure, similar to that the Department requires in the large plan carve out, is easily understandable to any recipient.

The assumption that small plans, participants and IRA owners cannot understand the difference between sales and advice runs counter to my real world experience. The Department can protect participants, IRA owners and small plans with the same kind of disclosures that it requires of large plans under the large plan carve out, but without eliminating our right to choose the services and products that best fit our needs.

The changes to the education carve-out will restrict access to investment education for both small business owners and their employees. While the Proposal expressly permits education to be provided to plans, participants, and IRAs, the redefinition of asset allocation models that reference the plan's investment options as fiduciary advice will significantly disrupt plan sponsor efforts to educate their plan participants and retirees about investment options. Many small businesses, including mine, rely on trusted third parties to provide investment education to their employees. These efforts include providing asset allocation models that provide a recommendation on investments in various asset classes based on a plan participant's age, expected retirement and risk tolerance. However, under the Proposal, any party who provides specific investment options for each asset class would be deemed an ERISA fiduciary. This significant modification from current rules, which allows for such information on a non-fiduciary basis, would harm investors, and particularly harm small business plan participants that likely have access to fewer resources.

My employees value the investment education provided to them – specifically, providing investment recommendations in various asset classes. This information allows them to make informed investment decisions. Many of my employees cannot afford to pay for investment education separately and might be discouraged from investing in the plan at all if the company did not provide this benefit. By disallowing any party to make the link between asset classes and specific investment options, the

Department of Labor is forcing plan participants into the tenuous position of figuring out how to invest their own retirement savings at the risk of making poor choices.

The Best Interest Contract Exemption will increase the costs of services to small businesses and possibly eliminate access. Because advisors to small businesses are not carved out of the fiduciary definition, they must change their fee arrangements or qualify for a special rule called an "exemption" in order to provide services on the same terms are before.[2] The reason the DOL regulatory package causes such significant change is that a fiduciary investment advisor under ERISA generally has engaged in a prohibited transaction if the advisor recommends investments that either pay the advisor a different amount than other investments or that are offered by affiliates (for example, the advisor is connected with the insurance company that offers the investment). There are certain exceptions to these rules, called "prohibited transaction exemptions," but as DOL has proposed the new rules, the exemptions generally won't help financial advisors who are working with small businesses to set up plans. Therefore, it may be illegal for those advisors to get commissions or to recommend certain investments.

This problem is highlighted in services for SEP and SIMPLE IRAs. One way advisors might try to comply is by charging a flat fee for their SEP or SIMPLE IRA services. Even though FACES Day Spa offers a 401(k) plan rather than a SEP or SIMPLE IRA, I can attest that other small businesses may never have offered one if the fees had been too high. Consequently, it is extremely important to consider the negative impact that increased costs will have – particularly in the small business plan market.

In conclusion, for the reasons stated above, I am very concerned that the Proposal will not achieve the Department's goals of better protecting workers and retirees, but will instead make it harder for small business employers and employees to access financial advice and to increase retirement savings. I appreciate that the DOL is looking to work with the industry to resolve our concerns. However, I am very concerned that the current timeline does not allow enough time for proper discussions. If the final rule does not properly resolve the issues raised above, the

[2] However, the new exemption proposed by DOL may not apply to small business plans. It does apply to individual owners of IRAs, but it is not clear whether this exemption is available for retirement plans – including SEP and SIMPLE IRAs - that are being offered by the employer. Further, even if it does apply, the new exemption – called the Best Interest Contract ("BIC") Exemption – would itself substantially increase costs for advisors due to its many conditions and requirements.

unintended consequences will have substantial negative repercussions on my employees, as well as the employees of many other small businesses.

Thank you for the opportunity to testify before you today, and I look forward to any questions you may have.

Chairman ROSKAM. Thank you, Ms. Owen.
Mr. Silvers, bring us home.

STATEMENT OF DAMON SILVERS, DIRECTOR OF POLICY AND SPECIAL COUNSEL, AFL–CIO

Mr. SILVERS. Thank you, Mr. Chairman, and good morning.

Good morning, Mr. Chairman and Ranking Member Lewis, Members of the Subcommittee. My name is Damon Silvers. I am the policy director and special counsel for the AFL–CIO, which is a federation of 56 national and international labor unions, representing 12.2 million working people in America.

The rulemaking we are discussing today affects everyone in America who saves for retirement or hopes to save for retirement. In the last 30 years, we have largely changed our system for providing retirement income from one where employers contribute, professionals manage retirement assets, and employers bear the risk of investment losses to one where, as we just heard, employers do not contribute, individual employees manage their own assets and bear the risk of losses.

One of the many things wrong with this system is that almost none of us, including myself, have the expertise to manage our own money or to effectively oversee money managers, and too many in the financial sector who seek to give working Americans advice have a profound financial conflict of interest affecting that advice.

Nowhere is this more true than in the area of the transition from 401(k) plans and other employer-associated plans to IRAs in the lump-sum process. For union and nonunion workers alike, IRAs are the largest and fastest-growing form of retirement savings, with rollovers from employer-sponsored plans expecting to approach $2.5 trillion over the next 5 years. This explains why, contrary to the testimony of the previous witnesses, protections for the movement of money from ERISA funds into IRA rollovers is essential to protecting the retirement security of working Americans.

Now, often what we hear here in Washington is the idea that financial markets are level playing fields where information is free and universal and the best of all possible outcomes will prevail in this best of all possible worlds. This is nonsense. Capital markets are all about information advantages.

There are two kinds of actors in capital markets: those who follow information in the market in realtime, have powerful analytic tools to understand the information as they receive it, and the ability to exploit it—big banks, mutual funds, hedge funds, proprietary trading funds, the people who stand behind all of the witnesses here representing the financial sector are those kinds of people. And then there are rest of us, you and I and tens of millions of other working Americans who are trying to save for our retirement, who have none of those resources, none of that information, none of that power.

Given the complexity of the products on the financial market today, there is no way an ordinary consumer can fully unpackage the cost of what he or she is being sold or the incentives of the, quote, "advisor" who is urging he or she to buy these products.

There are two fundamental decisions all investors in retirement savings plans have to make: asset allocation—debt, equity, large cap, small cap, international, domestic; and then within asset classes you have to choose specific products.

The asset classes themselves vary in terms of how much fees and how much margin they yield to the investment managers. Actively managed fixed-income funds, for example, generally have lower fees than actively managed equity funds and lower margins. And, within specific asset categories, there are huge differences in how you get basic risk-return tradeoffs. For example, you can invest in actively managed large cap equity for as much as 100 basis points a year in fees, or you can do it through an index fund for less than 10.

Money management firms, with a wide range of products in their offerings, have obvious conflicts of interest, both because their asset allocations that are good for their clients are not necessarily good for those firms and because within each asset class there were lower- and higher-fee products. A sophisticated individual may be able to figure out some of this by looking at prices. There is no way even the most sophisticated individual can understand what the margins are in the products.

And making a mistake here can cripple a retiree's future. The Council of Economic Advisers, which, in my experience, has not been terribly hostile to the financial services sector over time, has concluded that the costs of these conflicts are $18 billion a year—a year—for retirement savers. The impact on an individual is the difference—for a $10,000 investment over a lifetime, ending up with $27,000 rather than $38,000 at the end of the day.

Let me be clear that the issue here is not whether advice is a good thing. Advice is definitely a good thing, but only if it is good advice in the interest of the plan participant.

And, ultimately—and I will close here—we are dealing with money that is taxpayer-subsidized. The tax exemption for retirement security is one of the largest tax expenditures in our system, and we have been told that $17 billion of it a year is simply being handed over to Wall Street. That, in my view, is nothing but crony capitalism. It is inexcusable, it needs to be stopped, and that is what this rule will do.

Thank you.

[The prepared statement of Mr. Silvers follows:]

TESTIMONY OF DAMON A. SILVERS

DIRECTOR OF POLICY AND SPECIAL COUNSEL, AFL-CIO

TO THE HOUSE WAYS AND MEANS COMMITTEE

OVERSIGHT SUBCOMMITTEE

ON THE DEPARTMENT OF LABOR'S PROPOSED FIDUCIARY RULE

September 30, 2015

Good morning, Chairman Roskam, Ranking Member Lewis, and members of the subcommittee. My name is Damon Silvers, and I am the Policy Director and Special Counsel for the AFL-CIO, a voluntary, democratic federation of 56 national and international labor unions that represent 12.2 million working people. We at the AFL-CIO work every day to improve the lives of people who work for a living. We help people who want to join together in unions so they can bargain collectively with their employers for fair pay and working conditions and the best way to get a good job done. Our core mission is to ensure that working people are treated fairly and with respect, that their hard work is rewarded, and that their workplaces are safe. Further, to help our nation build a workforce with the skills and job readiness for 21st century work, we operate the largest training network outside the U.S. military. We also provide an independent voice in politics and legislation for working women and men, and make their voices heard in corporate boardrooms and the financial system.

The rulemaking we are discussing today affects everyone in America who saves for retirement or who hopes to save for retirement.

In the last thirty years, there have been dramatic changes in how, and from where, working people in America build and receive retirement income, with the responsibility for retirement investing increasingly falling on the individual rather than her employer and professional asset managers. One of the many things wrong with this system is that almost none of us have the expertise to manage our own money or to oversee money managers effectively—and too many in the financial sector who seek to give us the advice we need have a profound conflict of interest affecting their recommendations.

Nowhere is this truer than in the area of Individual Retirement Accounts ("IRAs"), which are the single largest and fastest growing form of retirement savings, outstripping both private-sector defined benefit and defined contribution plans. A key projection in the Department of Labor's Regulatory Impact Analysis accompanying the proposed rule is that IRA rollovers from employer-based plans are expected to approach an astronomical $2.5 trillion over the next five years.[1]

Even workers who are fortunate enough to have accrued a defined benefit pension—and these are disproportionately union workers—may be confronted with whether to take a lump sum distribution that they invest in an IRA, and how rolled over assets should be invested. Today, many pension plan participants—one-in-four in traditional defined benefit plans and nearly all participants in hybrid plans[2]—are given the option of a lump sum distribution when they retire or separate from employment in addition to the default annuities required by law. In some cases, decisions about benefit form—whether to take a lump sum or whether to take a qualified joint and survivor annuity[3]—can impact eligibility for other valuable benefits, such as retiree health benefits.

Numerous accounts have appeared in the media following the same story line—an adviser convinces a retiree to take a lump sum distribution so the adviser can invest that money; and the retiree loses out in the end.[4] We have even seen entire groups of union members targeted by financial advisers who encouraged them to take lump sum distributions from their pension plans so that the adviser could manage the money without any apparent regard as to what was in each worker's best interest.

Often what we hear here in Washington appeals to the idea that markets are level playing fields; information is free and universal; and the best of all possible outcomes prevail in the best of all possible worlds. But capital markets are all about information advantages. And there are two kinds of participants in the capital markets. First, there are those who follow information in the market in real time, and have powerful analytic tools to understand the information as they receive it—big banks and mutual fund companies, hedge funds, proprietary trading funds. And then there are the rest of us—you and I and the tens of millions of people here in America who are trying to save for their retirement. Given the complexity of the financial products on the market today, there is no way an ordinary consumer can fully unpackage the costs of what he or she is being sold, or what the incentives are of the person doing the selling or the advising.

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1 *Regulatory Impact Analysis* at p. 3, citing Cerulli Associates, "Retirement Markets 2014: Sizing Opportunities in Private and Public Retirement Plans" (2014).

2 Wiatrowski, William J., Bureau of Labor Statistics, "The Last Private Industry Pension Plans: A Visual Essay," *Monthly Labor Review* (Dec. 2012) p. 2, 16, *available at* http://www.bls.gov/opub/mlr/2012/12/art1full.pdf.

3 Even if a participant settles on an annuity, payment options can have significant implications, particularly for surviving spouses.

4 *See, e.g.*, Gibbs, Lisa and Ian Salisbury, "4 Disastrous Retirement Mistakes and How to Avoid Them: Advisers Touting Sunny Scenarios in Hopes of Snagging Your IRA Rollover Can Imperil Your Retirement," *Money*, *available at* http://time.com/money/3546592/ira-rollover-mistakes-retirement/.

The wrong asset allocation can cripple a retiree's future. And so can investing in high fee products when lower fee products with the same performance characteristics are available. And in the aggregate, the money involved is huge.

The prominence of investment advisers in rollover decisions[5] and the harm incurred from conflicted advice is well-documented. IRA holders receiving conflicted advice can expect their investments to underperform by an annual average of 100 basis points over the next 20 years, and that the underperformance associated with conflicts of interest in the mutual funds segment alone could cost IRA investors more than $210 billion over the next 10 years.[6] The White House Council of Economic Advisors (CEA) has concluded that conflicts of interest overall cost retirement savers $17 billion a year. On an individual level, this means that a $10,000 investment, over 35 years, would grow to just $27,000, rather than $38,000 without the high cost of conflicted investment advice.

Mitigating financial advisors' conflicts of interest will serve to improve the dramatic and very worrisome $7.7 trillion gap between what American households have actually saved today and what they need to have saved today to maintain their living standards in retirement.[7] Assertions that reforms that address harmful conflicts of interest will increase costs for Retirement Investors are fundamentally misleading. Retirement Investors are paying huge costs for conflicted advice; the costs are just hidden. Bringing these costs out into the open will create genuine choice and help prevent overpaying. Consider that every single working American with a 401(k) account could pay $200 a year for investment advice and the net cost would not be as much as conflicted advice is costing the minority of 401(k) participants who receive it, according to the CEA study.

Let's be clear about what this rulemaking is about. It is not about whether investment advice is a good idea. Of course it is—but only if it is advice that is in the investor's best interest. The question for members of Congress in evaluating this rulemaking is: should we put the onus on your constituents to protect themselves from the costs of conflicted advice or should we create a set of rules for fair play?

Further, despite the better security traditional pensions provide to plan participants, investment decisions by plan trustees and fiduciaries can also be compromised by conflicts of interest. The Regulatory Impact Analysis shows how advisers on whom plans rely to guide investment decisions "calibrate" their behavior so as to avoid fiduciary status,[8] and pension plans using

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5 54.5 percent of IRA investors with rollovers consulted a professional financial adviser as their primary source of information; sixty percent consulted a professional adviser in some capacity regarding a rollover decision. *Regulatory Impact Analysis* at p. 54.

6 *Regulatory Impact Analysis* at p. 211.

7 Testimony of Alicia Munnell, Director of the Center for Retirement Research at Boston College, "Bridging the Gap: How Prepared are Americans for Retirement?" Senate Special Committee on Aging, March 12, 2015, *available at* http://www.aging.senate.gov/imo/media/doc/Munnell_3_12_15.pdf.

8 *Regulatory Impact Analysis* at p. 19.

consultants with financial conflicts of interest earned 1.3 percentage points less per year than other plans.[9] This is not an insignificant cost given the role of investment performance in a plan's ability to fund the long-term cost of promised benefits, and how plans' historical investment performance, broadly defined, informs federal legislation regarding the funding requirements for defined benefit pension plans.

Last, it is important to remember that retirement savings are tax-preferred savings. Most retirement contributions, both those made by employers and those made by workers, are government subsidized, with those subsidies valued at more than $130 billion for 2015 alone.[14] Whatever you think of that tax subsidy, we probably all agree it should be benefitting America's workers and retirees, not simply accruing to Wall Street's bottom line. Financial institution representatives, who characterize the DoL proposal as an unjustified interference with their long-standing business models, mistakenly overlook the fact that the success of their retirement business overall is a product of, and dependent on, government subsidy.

The enormous sums found by the Labor Department and the CEA to flow from Americans' retirement money to financial institutions and advisers as a result of conflicted advice is unconscionable. It is a direct transfer from the American public to Wall Street, and to allow it to continue is crony-capitalism. The least we can do is require financial advisers to have an absolute duty of loyalty to their retirement investor clients and create basic rules ensuring advisers and financial institutions do not have financial incentives to give retirement investors advice that is not in their best interests.

We applaud the Department of Labor for initiating this important and long-overdue rulemaking and urge it to move forward to a final rule as soon as possible. Thank you for your consideration of our views.

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9 *Regulatory Impact Analysis* at p. 8, citing U.S. Government Accountability Office, GAO-09503T, *Private Pensions: Conflicts of Interest Can Affect Defined Benefit and Defined Contribution Plans* (2009); *available at* http://www.gao.gov/new.items/d09503t.pdf.

Chairman ROSKAM. Thank you, Mr. Silvers.

I want to thank the panel.

Mr. Meehan.

Mr. MEEHAN. Thank you, Mr. Chairman.

Mr. Silvers, are you a cynical guy by nature?

Mr. SILVERS. I have never been asked that question in a hearing. Of course not. I am highly idealistic. That is why I do the work I do for the salary I get paid.

Mr. MEEHAN. So do you think that every investment advisor starts with the premise of "how can I rip off this client" versus those who often have relationships with people, as was indicated, some even family-based relationships, in which the objective is, you know, I do this for a living, I get enjoyment out of helping people, where the advice is given on the basis of what can I do best to help people.

Why do you believe that that isn't the motivating factor?

Mr. SILVERS. Congressman, in my experience and, I suspect, in yours, we do not make the laws of this Nation with the best of us in mind, nor with the worst of us. We make the laws of this Nation with people in mind who live in the real world of economics and incentives and having to bring home paychecks for their own families.

Mr. MEEHAN. Well, let me talk to you about that, because you couldn't have reached a better point right now. Because when I go out and I talk to the people in my communities, the one group that feels the greatest sense of frustration right now—and you, as a person associated with organized labor, should appreciate this—are people who are thinking they are living in a world of wage stagnation. They are working harder than they have ever worked before, and they don't think they are getting ahead.

So that is the daily wage that they get, but some people actually take that wage and they invest in their future, looking down the road when we will have a more difficult period and maybe towards their pension.

Now, you have heard testimony and I have heard it again and again and again from the people who say, "I would and am capable today of going to that person below $100,000, the average American, and I would give them investment advice, but if you put all of these restrictions on my ability to do it—not the least of which, I can be sued—I won't take that client. I don't need to. There are plenty of big fish out there for me to make my living on the $100,000."

Why is this not something that is going to be a disincentive for those struggling Americans to actually have the advice of somebody who has their best interests in mind to make that little improvement in their own financial statement?

Mr. SILVERS. Congressman, if it is really true that investment advice will be withdrawn if it is not allowed to be conflicted, then that advice is kind of by definition—isn't it?—advice that is not in the person's interest and it is not free. It is simply hidden and a rip-off.

And if you are going to talk about wage stagnation, what we are witnessing here is an illustration of why we have wage stagnation in the United States. And it is because the winners systematically rig the rules, corrupt the system, and make it impossible to ensure that the public processes work for the benefit of average working Americans and not for Wall Street.

Mr. MEEHAN. Well, my experience in the real world, Mr. Silvers, is that the people who are out there working in this industry don't wake up every morning looking to rip people off.

Mr. Campbell, I, as a former prosecutor, am concerned about two things. One is the creeping incursion right now of the Department of Labor into areas in which they are making rules but they don't have the capacity to actually police those rules, both under the code and resource-wise. So what we are doing is creating a circumstance in which we have rulemaking but no real ability for oversight.

In fact, what I see is the potential that what we are doing now is we are now outsourcing this oversight to private attorneys. I am an attorney, and I think there are a lot of good things done by attorneys. There are also some bad things, and if you want to see cynicism, start with some of the people in that profession. Just start suing.

So let me ask you a question about that. Is there overreach here and is it appropriate for the Department of Labor to be turning to the enforcement of this to any measure of private attorneys that can just find a way to bring a lawsuit?

Mr. CAMPBELL. Well, I think you raise an excellent point, sir. First of all, I disagree that the Department actually has the authority, specifically with respect to ERISA plan participants, to create this alternative remedy to ERISA's exclusive remedies by virtue of allowing these State law class actions for breach of contract.

But, secondly, I echo your concern. I think it is a very troubling aspect of the Department's proposal, and I think you said it very well, that they are outsourcing enforcement to the plaintiff's bar.

As you say, there are certainly times when folks need attorneys and there are times when lawsuits are appropriate, but the way the BIC exemption is structured, the good-faith compliance efforts of advisors and financial institutions based on what are inherently subjective decisions—the conditions they have to comply with have inherently subjective decisions—now subject them to class action in State court, where an enterprising attorney could say, well, you said the appropriate standard was X, it is actually X minus five, therefore we are going to litigate and see where that gets us.

Mr. MEEHAN. Thank you, Mr. Chairman. Thank you for your indulgence, and I yield back.

Chairman ROSKAM. Mr. Lewis.

Mr. LEWIS. Again, Mr. Chairman, I want to thank you for holding this hearing today.

And I want to thank each of you for taking the time to be here.

My first question is for the entire panel. Do you believe that advisors for retirement savers should be required to take the best interests of their clients into account in providing investment advice?

And I want you to provide me with a simple yes or no answer. Just yes or no.

Mr. CAMPBELL. Yes, sir.

Mr. STEVENS. Absolutely.

Ms. VANARSDALE. Yes.

Mr. SPECHT. Yes.

Ms. OWEN. Yes.

Mr. SILVERS. Yes.

Mr. LEWIS. Very good. Thank you very much. That is the first time I have seen something like this in a long time.

Mr. Silvers, some people argue that the proposed rule will result in less advice being provided to small savers—for example, those with account balances of $25,000 or less. What is your response to that?

Mr. Silvers.

Mr. SILVERS. You are asking me, right, Congressman?

Mr. LEWIS. Yes.

But if you want to respond—go ahead, Mr. Silvers.

Mr. SILVERS. All right.

As I was saying to your colleague a moment or two ago, if it is true that investment advisors are providing advice to small account holders only because they are able to do it in a conflicted fashion, that tells you that the reason that they are doing it is because they are able to squeeze the fees out of steering people into higher-priced products.

That is a terrible thing for our country to let that happen. And if, by bringing the real cost of that advice to light, we are able to lower it to a more reasonable level or to simply make the conflict go away by requiring—and this, I think, is the whole point of the best-interest contract letter—by ensuring that conflicts are disclosed and mitigated, that is clearly a better outcome than bleeding small investors' accounts out behind their backs, which is essentially the implications of the argument that the financial services sector is making.

Mr. LEWIS. Mr. Silvers, just a followup. Could you explain, what is the key benefit over time that retirement savers should expect from this proposed rule?

Mr. SILVERS. The key benefit over time should be to lessen dramatically the extent to which investors are getting advice designed to steer them into unnecessarily high-fee products and to get their asset allocation to reflect the investor's interest rather than the interest of the people giving them the advice and getting compensation from the big firm they work for on the side.

The consequence of those things, as I discussed in my testimony, is likely to be a dramatic increase in the amount of money that working Americans have when they actually have to meet their expenses in retirement.

Mr. LEWIS. All right.

Now, Mr. Silvers, some have criticized the education exception. They argue that it does not allow retirement advisors to mention the actual investment options available under the retirement plans.

Mr. SILVERS. Congressman, this is an issue of really whether or not the plan involved has a limited menu. If you have a limited menu of options and, as part of education—which is not supposed to be steering anyone to a specific product—if, as part of education, the advisor shows the investor the full range of options available in each asset category, that is clearly education. You are not steering them; you are just showing them all the options that they have.

But if you are talking about an IRA or a rollover, the options are limitless. And so, if you are picking one option—if the advisor is picking one option, say, the one that they get paid to steer you to, and pointing that one out to you, that is not education. That is not even advice. That is sales masquerading as advice, masquerading as education. And that should not be allowed under that exemption.

Mr. LEWIS. Thank you very much.

Would others like to respond?

Mr. STEVENS. Congressman, I would just say that there are interactions in this marketplace that range across a huge spectrum.

In my testimony, I talk about my son rolling over, in a conversation with a mutual fund firm, an hour long, in which he had all sorts of options that were described to him. He was moving from one job to a second job and to another city. The interactions there were not fiduciary in nature. There was no pretense of providing advice, but there was tremendous amounts of information and help and education that he was getting to get to the right place.

Those kinds of interactions in call centers, on the Web, and in investor centers across the country are also going to be disrupted as a result of this rule. Because the BIC exemption simply doesn't work.

Mr. LEWIS. Thank you, Mr. Chairman. I yield back.

Chairman ROSKAM. Mrs. Noem.

Mrs. NOEM. Thank you, Mr. Chairman.

As a Member of Congress who has been a small-business owner, my number-one concern is how this impacts small businesses across the country, because 99 percent of employers in the United States are small businesses. This regulation makes it much harder for those employers to help their employees save for retirement because it has increased compliance costs. It also will create restrictions to what they have available to them.

So what is even more troubling to me, which Mr. Silvers alludes to, is the deception and coercion of trying to convince people to throw their money down the tube; and further, this regulation exempts the larger employers and larger employer plans, which is where I would think that deception and coercion would have more of a tendency to happen, rather than the small businesses that would really be restricted.

This regulation doesn't even address those large employer plans. It seems as though the administration thinks that large corporations can make good financial decisions but that small employers and employees can't.

Ms. Owen, you are an employer. I know that today it appears that the government can make better decisions about your employees' retirements than they can, but I want you to talk specifically about how this hurts your business and how it hurts your employees.

Ms. OWEN. Well, it definitely hurts my employees because having access to the advice of our financial person even encourages them to start saving for retirement. They are 25 years old. They don't foresee that at some point in their life they are going to want to retire. They are living for the moment, more or less. And just having him come in, which he does on a regular basis when our new people that have been hired are eligible, just to educate them on the benefits of saving for retirement is the first step.

But besides that, it hurts me as a small business owner because I am competing against, major corporations, major hotels, major resort spas for employees, and they, of course, do have deep enough pockets to have retirement plans. So I need to be able to offer something to compete with them so that I can hire the same quality people and stay in business and be successful.

Mrs. NOEM. What is interesting to me is that, as a small employer, you have skin in the game.

Ms. OWEN. Absolutely.

Mrs. NOEM. It is your money.

Ms. OWEN. Absolutely.

Mrs. NOEM. You care that it is successful and actually benefits your employees because you want them to stay, and it is your money that you have got involved as well.

Ms. OWEN. Right.

Mrs. NOEM. When the government makes decisions and rules and regulations, they are using other people's money. It is bureaucrats deciding they know better than you do. It is not even their money that they are playing around with, they are just saying that you don't know how to manage your money correctly and help your employees be successful, which bothers me.

Mr. Campbell, you have written about how this rule will eliminate some of the plans that are the most popular with small businesses. Could you speak to that a little bit? Specifically, do you think this regulation specifically helps and favors larger businesses?

Mr. CAMPBELL. Well, I think you are very correct to point out the problem with the large plan carveout that the Department provided. It said that plans with more than 100 participants or more than $100 million in assets could continue to receive advice of their choosing, from whichever types of providers they felt were appropriate, but it denies that same ability to small businesses and to individuals, therefore treating every IRA owner alike, no matter how different their circumstance might be. And, in essence, the Department said that this size was a proxy for financial sophistication, which I think makes no sense on the face of it.

But in terms of the effect on small business, yes, I recently wrote a report where we discussed how this proposal would create concerns, as you just described, for small businesses making decisions and increase costs and what effect that would have on the availability of advice, particularly looking also at some of the IRA-based, employer-provided plans, like SEPs and simple IRAs, and how this would affect those. There is actually some ambiguity, I think, as to what the rule would actually do for some of those plans, and that is something that comments have sought clarification on from the Department.

But I think it is very clear that advisers will have to take a number of steps that will be expensive, that will be costly, that will change their legal liability risk, that will change the kind of insurance they have to purchase. All of those costs ultimately get passed on to the end consumer, which is the plan participants and the small business owners.

Mrs. NOEM. Thank you.

Mr. Chairman, my biggest concern about this regulation is that it specifically is targeted at small businesses. It is going to drive up costs and keep employees from being able to invest in their future while creating a carveout for large employers and giving them special treatment, and that is exactly the opposite thing that should be happening today.

I yield back.

Chairman ROSKAM. Mr. Doggett.

Mr. DOGGETT. Thank you, Mr. Chairman.

This is an important hearing about retirement security, and it is also a story about how Washington does or does not respond to the challenges that working people across this country face.

While I am very pleased to hear Chairman Roskam affirm the importance of the contingency fee system so that working people can have their day in court when they are abused, and I am pleased to have an industry representative here, summoned by our Republican colleagues, who affirms the importance of the Social Security system as an important pillar of retirement security, which we don't often hear in this room, there are concerns that I have about the overall issue of an estimated $17 billion to $18 billion each year that Americans lose because of conflicts of interest.

I appreciate the testimony of each of the witnesses here. I rather expect that you are the leaders in your profession and that you have helped the security of hundreds, if not thousands of American families, and I applaud you for your efforts to do that. I don't think you wake up every day trying to rip some people off, but I think, as in any profession, there are some people in this business who do that, and there are many more not intending to rip people off but simply motivated by the system of incentives that is in play here that encourages and incentivizes conflicts of interest.

Now, whether the administration has come up with the best answer and the appropriate answer, I am not sure. What I do know is that today, in evaluating this answer, we have five people here on behalf of the providers of this service and we have one person here on the side of the retirees and the consumers of those services, and that is about the standard ratio in this place.

And, also, I haven't found that the administration was really in a race to solve this problem, which is another difficulty we have here in Washington, because if you look at what occurred here, it was way back in 2010 that this rule was proposed. Every witness we have today had a chance to comment on it. Over 300 people did. And after those comments, instead of acting, the administration withdrew the proposal. It may well have been, having looked at it some, may well have been well justified in removing it because it was not the right way to proceed.

And then we went from 2011, 2012, 2013, 2014, finally to this year, and the administration proposed another answer, with many people having said they don't want anything to be done in this area. They want to leave the situation just like it is. And maybe it is not $17 billion or $18 billion that is lost every year. Maybe it is only half that. Maybe it is only $4 billion or $5 billion a year. But it is a big enough loss to families across this country that there ought to be some meaningful response to it.

And so this year we had almost 3,000 comments, including, I expect, from some of the individuals that are here. They have had an opportunity to be heard there. And now we are at a point in the regulatory process when the Department of Labor cannot come here this morning and defend its own rule because the comment period has ended, we can't hear those arguments, but what we can know at this point in the regulatory process is that the objections that are being raised here today, that were raised over the last several years, can be considered in the development of the final rule.

So I am for a final reasonable rule that takes into consideration objections that have been raised, but sees as its principal responsibility, as ought to be the principal responsibility of this Congress, to protect retirees against conflicts of interests and ensure that they get top-quality services. There are companies that focus their attention on poor, more economically disadvantaged customers, and they seem to be able to comply with a reasonable standard to avoid conflicts of interest.

Mr. Silvers, are you familiar with some of those companies that already are out there, seeing their focus on working families?

Mr. SILVERS. In the last 10, 15 years, as there has been increasing awareness of the risks posed by conflicts of interests in investment advice, there are a wide range of firms that offer conflict-free advice in a variety of manners.

But I think what is really important here is, is that, if you actually look at the rule, my fellow witnesses who are in this business, I very much suspect, if this rule goes through more or less as you are urging, that my fellow witnesses who are actually in the business of providing advice will be doing so happily to all of their clients afterwards.

Mr. DOGGETT. Thank you very much.

And the problems, as you see it out there, are pervasive and deserve a reasonable response through the regulatory process, not prejudiced by congressional interference.

Thank you. And I yield back.

Chairman ROSKAM. Mr. Kelly.

Mr. KELLY. Thank you, Mr. Chairman.

Thank you all for being here, both the people who actually are in this business, and, Mr. Silvers, thanks so much.

One of the recurring themes is always: I am from the government and I am here to help you. I am kind of interested because we are talking about fiduciary responsibility, and I looked at this, and I said: Okay, fine, best interests, I understand that. However, nobody ever questions Social Security to find out if they are operating in the best interests of the people they represent and the funds that they sit on.

I was looking at the numbers, and there is, if I am right on this, and correct me if I am wrong, $7 trillion in IRAs right now, $7 trillion.

Ms. Owen, my dad started our business in 1953, little one car showroom with about 12 employees. In 1970, when I graduated from college, he called me and said: "Listen, I want to start a pension program." And I said: "I have no idea what you are talking about."

He said: “No, you don’t. But I want to make sure that the people we work with every day for our mutual benefit, that they have something to look forward to, because I really don’t think that Social Security and winning the lotto is a great retirement plan. So I am going to offer that to them.” And we have had participation since 1970 because he was looking ahead.

Now, he didn’t go to the government to ask what he thought they should do. He went to people that actually did that kind of work. We are in the automobile business, it is very complicated, so we consider ourselves as transportation consultants. We try to help people.

But, Mr. Silvers, you said this is very complicated, but what we really want to do is go after the people who actually sell these products and explain these products because it is not right that they get paid for doing that. I would never go to a doctor that says: “There is no fee for my service. I am just doing it out of the goodness of my heart.”

We are talking about people’s financial stability. Now, I have watched this happen for so long now, and I will tell you this. There is an old saying: If you can’t convince them, confuse them. Try and make it seem like there is some boogeyman out there, somebody is out there every day trying to undermine the great people of this country and trying to take advantage of them, use the Gruber effect any time you can. Always make it look like they are so unintelligent, they are so stupid they can’t possibly plan for their own future.

If you believe that, then I think you have missed the mark, because the ladies and the gentlemen I represent in Pennsylvania’s Third District are all blue collar people who very work very hard, and they work very hard for one reason and one reason only, their kids and their grandkids, and it is a way of saying thank you to the people before them that made it possible for them.

This is very upsetting to me, that all of a sudden the government has to step in like they do with health care and say: You know what? You don’t know how to care of yourselves. Let us do it for you. Just happens to be about $7 trillion there that we want to get our hands on. You want to get the fox in the hen house again, and you want to tell these people: Look, because you are so stupid, we will help you.

You know what? I don’t think they are stupid. When I look at a model that is $19 trillion in the red, I don’t know of any of us that would go to the United States Government, the Federal Government, and ask to be their business consultant, how they would save their business. Are you kidding me?

We go through this all the time. I believe this: The people that do what I do in the private sector always think that if I can somehow arrive at a model that allows the people I work with every day—not my employees, my associates, my team members, that are all trying to get to the same place—if I can make it each day for them to get up and say, “I can’t wait to get there because they are helping me put a roof over our head, food on the table, clothes on the backs of our kids, and preparing for our future,” that is what they do. I am fed up with the Federal Government trying to stick their nose in places where it doesn't belong. Hell, they can't keep themselves in the black. They never have.

Now my question to any of you is this. What is it about this government that would make anybody think that them getting involved and talking about best interests is a good thing? Please tell me that we are acting in the best interest of every single American with the way we are operating this company and telling them to have faith in the future. I don't think that all of us can say they are acting in the best interest, because we can't print our own money, the Federal Government can, if we did it, it would be counterfeiting, but that is okay, at least at this level.

Is there anything any of you see as an upside to this proposal? We have confused people to the point where they actually think they can't get out of bed by themselves anymore. Not the people I represent and not the people who raised me. Anybody. What is it about this that is so—just a shaft of light from the heavens that somehow the Federal Government can keep you safe? My God, the running footage doesn't show that. Does anybody speak up for these people?

Mr. STEVENS. Congressman, I would say this. From the beginning of this process, almost 6 years ago now, the ICI, on behalf of the mutual fund industry in the United States, was very supportive of the idea of DOL modernizing its fiduciary standard for investment advice and services. It was a good project. Had it been pursued in an appropriate way, we wouldn't be having these hearings, this wouldn't be so controversial.

What they have come with after 4 years, with enormous amounts of input, is far worse than the current system—far worse—and it will be very, very damaging.

Mr. KELLY. Okay. Well, thank you all for being here, and please——

Mr. SILVERS. Congressman, you forgot Social Security, Medicare, food safety, the Coast Guard, lighthouses. The entire fabric of civilization is what you are criticizing.

Mr. KELLY. Mr. Silvers, thanks for being here.

Mr. SILVERS. Thank you.

Chairman ROSKAM. Mr. Rangel.

Mr. RANGEL. Thank you, Mr. Chairman.

I was just thinking, when I marched with John Lewis those 54 miles from Selma to Montgomery, I had no confidence that my government intended to bring some equity into the voting system or the civil rights system. And I asked them: Why did you put your life on the line to do it? And you told me you had faith in America. I was doing it for the press conference that concluded. And you were right, I can't imagine where I would be today without the Federal Government and civil rights and the hope that we, this great country, cannot become a better country. So whatever we dislike, we are here in this Congress to be able to say that we represent 700,000 people, we want change.

Now, Mr. Chairman, I know that under political rules which Democrats and Republicans have there is a tendency to bring witnesses based on those that support the position that the majority has. But in this particular case, where everybody wants to protect the workers from being given advice where the adviser is going to have a conflict of interest, it doesn't appear to me that this panel represents a fairness in those who support and oppose.

So I guess I have to ask, is there anyone sitting here, besides Mr. Silvers, that believes that giving advice to an investor should have a fiduciary relationship to avoid conflicts of interest? Do you believe that there should be that high standard?

Mr. STEVENS. If I could respond, Congressman Rangel, the fiduciary standard is the highest one known to the law.

Mr. RANGEL. You bet your life.

Mr. STEVENS. It grows out of a relationship of trust and confidence. And when any financial adviser enters into or invites that relationship of trust and confidence, they absolutely should be held to a fiduciary standard.

Mr. RANGEL. But they are not. But they are not. Under existing law, companies are not held to that standard.

Mr. STEVENS. If I might just add.

Mr. RANGEL. Yes.

Mr. STEVENS. That relationship of trust and confidence does not arise in every single interaction that characterizes our 401(k) or individual retirement account servicing or information or help or assistance. And that is the issue. We need a clear line for where there is and where there is not that kind of relationship.

Mr. RANGEL. Listen, I don't care how limited you may be in this concept, but it seems to me, if I am making a living on commissions, or as a result of my advice I stand to increase my earnings, the first thing I have to do is to believe in my product. And so it could very well be that I am selling what I think is best and I am making a heck of a profit, and I certainly am not violating fiduciary relationship if I truly believe this is the best for the client.

Now, somebody came up with the idea that investors, people who go into the markets like they are going to a room with no light on and they are depending on people who make a living out of giving advice, and all we are saying is that, if you deliberately give advice that you know you are going to make a profit, and that would be the standard, is there anyone that is opposed to that?

Mr. CAMPBELL. Congressman Rangel——

Mr. RANGEL. You know, I don't want to do what Mr. Lewis has done, but I don't want you to try to mumble about whether or not this basic concept that you shouldn't deprive—somebody said from the White House—pardon the expression—that investors lose $17 billion a year because their advisers are doing the wrong thing, not making mistakes, but doing the wrong thing.

Now, I am a lawyer, as so many others, and there are times that I am ashamed of my profession because of a handful of people that would rather get a fee than to do the right thing, and I wish we had a higher standard than fiduciary relationship. But, you know, it is not fair to defend this thing with Mr. Silvers representing workers and all of you saying give us a break.

None of you have come and talked about the theft that has taken place in violating people's rights when you know the tremendous change we had from defined benefits. Everyone would say: When I retire, this is what I expect every month. Now they say: When I retire, it depends on the market. And they have no idea whether the advice is good or bad.

But under the system now, all of you can make a commission based on the advice that you give, and we here believe that is totally, totally unfair. I think the panel balance is unfair. But, you know, you are not helping yourselves or helping us to make a judgment. You may say that this is too strict, but all of the years that we have had this, have you put out any papers to advise us how we can make certain that the advice that you are giving isn't based on a conflict of interest? I haven't heard anything.

Chairman ROSKAM. The gentleman's time has expired. We will leave it at that rhetorical question.

Mr. Holding.

Mr. HOLDING. Thank you, Mr. Chairman.

Mr. RANGEL. It wasn't rhetorical.

Mr. HOLDING. Thank you, Mr. Chairman.

In my brief tenure in Congress, I have heard consistently about this issue, folks that visited me at home and folks that visited me here in Washington, professionals, and everything that I have learned from them, my constituents, is reflected here in today's panel of witnesses. So it leads me believe that the administration in their efforts here, they are ignoring facts in favor of ideology.

I think it is important to remember that administrative agencies don't have rulemaking power on their own. They can only act in accordance to a congressional delegation. Of course, when Congress delegates that authority, you know, we assume that the agencies will all rely on facts and not politics.

So the administration thinks we need this new fiduciary rule because a White House study claims that biased financial advice leads to a loss of $17 billion in investment savings every year. Yet, what this study completely ignores—and it should be obvious—is that financial advisers might actually provide good advice, and that would explain why so many people continue to use them.

So to Mr. Campbell and Mr. Stevens, don't you think it is true that financial advisers might actually provide, and often do provide, good advice that increases people's savings?

Yes, Mr. Campbell.

Mr. CAMPBELL. Yes, sir, I do. And I think one of the other faults in that study that the Council of Economic Advisers cites is they don't take into account the other value that advisers provide. For example, encouraging workers to save earlier and to save more, which is the number one determinate in your retirement outcomes, actually, is the amount that you contribute and how early you contribute.

Mr. HOLDING. So, Mr. Stevens, you would agree that people can actually make good choices about their financial decisions?

Mr. STEVENS. Yes, they can.

Mr. HOLDING. People have that ability.

Mr. STEVENS. And I think they do, Congressman. I will give you evidence of that.

In 2008–2009, at the worst of the market, we went out to well over 3,000 U.S. households and asked them how they felt about their defined contribution plans. Many of their accounts were down 45 percent. The poll results were really striking. Three-quarters of them remained confident even then that these arrangements were going to help them achieve their retirement and 90 percent or more liked the fact that they had control over them, that they saved every 2 weeks, that they had got deferral tax treatment. That was at the worst point of the financial crisis.

So I think millions of Americans who participate in the system would not recognize my colleague Mr. Silvers' description of it as riddled with corruption and rip-offs to them.

Mr. HOLDING. Do you agree with the view that this proposed rule would also limit people's choices?

Mr. STEVENS. It would limit choices. It would limit services.

Mr. CAMPBELL. Absolutely, I would agree with that. Yes, sir.

Mr. HOLDING. It would give the regular folks out there fewer choices on how they can invest their money. So the administration assumes that people can't make good choices, so it is taking those choices away. That is the end result that we have here.

Mr. CAMPBELL. Yes, sir. I believe that is correct.

Just as an example, I have an IRA account that uses commission-based compensation. I intentionally chose that because I don't trade frequently, and that is, in fact, the best option that is in my best interest.

But I think one of the likely effects of this proposal would be to force more and more advisers into a fee-based compensation model, which would not be in my best interest if I have to convert my IRA account to that, and also is contrary to the reverse churning investigations that are a priority for the SEC, which looks for exactly this, moving people from commission-based accounts to fee-based accounts because it makes the adviser more money.

Mr. STEVENS. In addition, it requires the person to pay twice, and that is one of the things we need to understand about this proposal. By pushing people out of commission-based accounts, having already paid commissions and expecting to receive services for the payments of the commissions they have already made, into fee-based accounts, the people are going to be made to pay twice.

Mr. HOLDING. Right. Right.

Thank you, Mr. Chairman. I yield back.

Chairman ROSKAM. Mr. Crowley.

Mr. CROWLEY. Thank you, Mr. Chairman. Thank you for holding this hearing today as well. I am pleased that we are doing this timely, as well, given the DOL's expected rules announcement.

The number of Americans who have access to a traditional pension plan who are very often represented by organized labor has been shrinking drastically over the past 20 years. So, first, let me thank the AFL–CIO for being here and for their work in defending the right of a pension for their membership and, through that work, for all Americans as well.

A pension is not a lottery-winning check, but a small promised stipend earned after a lifetime of work. I see no reason to shame people who work for decades for wanting a small level of financial protection in their retirement years. But these traditional pensions are being offered less and less to workers, particularly to those workers not protected by organized labor. The result is the responsibility for saving for a worker's retirement has moved away from the employer and on to the employee in the form of 401(k)s and IRAs.

I have put forward a package of savings ideas that I call Building Better Savings, Building Better Futures that would give workers and families the tools they need to build wealth and save for retirement at every stage of life. So I am glad we are talking about how to help people save, which includes managing their savings.

As Mr. Silvers said in his testimony, many of us don't have the expertise to manage our money perfectly. That is why we need financial advisers who are looking out for our best interests. I think we all have the same goal of ensuring that financial advisers are giving advice in their customers' best interest while preserving the customers' access to valuable retirement products. The issue is how we get to that point so that we have a final rule that is workable in achieving what is our shared goal. A number of questions remain outstanding on how to make this rule work, questions that need to be addressed before a final rule is issued.

I understand that because of the timing of the comment period that we are in right now, that the Department of Labor could not be a witness today. But I do look forward to the Department responding to a letter, led by Representative Gwen Moore and signed by myself and more than half of the House Democratic Caucus, about some of the concerns within the proposed rule.

Mr. Stevens, we have heard that, if this rule is finalized as is, a number of brokers have said that they would stop providing investment advice to savers with smaller accounts, which was brought up earlier. I have been told this is because chief risk officers and legal counsel are concerned that there is too much ambiguity in the proposed fiduciary definition and too many compliance burdens in the proposed BIC exemption. For example, requirements for a contractual certification that can't be met, which leads to too much risk of a class action litigation.

Could you comment briefly on this? Then I have one other question.

Mr. STEVENS. I think what you are hearing is an accurate reflection of sentiment that is very broad and very deep. In fact, I would say, Congressman Crowley, that my analysis of the BIC exemption is that it is so freighted with requirements—voluminous disclosures, a triparty contract that has to be finalized even before there is any dialogue, and now new liabilities under State law and potential class actions—that it almost seems as if the Labor Department never intended for that exemption ever to be utilized.

We have urged in our comments a very significant streamlining of that. In fact, I want the subcommittee to know, in all of our comments we simply haven't said "no." We have provided extensive recommendations to the Labor Department about how its rule could be improved and made workable, and we did so in that area as well.

Mr. CROWLEY. Let me reclaim my time.

On the flip side, the retirement middle market is a $7 trillion market. How can any broker or firm just give up on this market? Wouldn't brokers just adjust to the new rules?

Mr. STEVENS. What you are going to see are new business models. But if you would consider the IRA market, there are over 12 million households that have an IRA of $25,000 or less. Now, these would be young workers. They might be people of lower income.

They might be people of less financial sophistication. The range of assistance they get under this model is not going to be what they enjoy today. In fact, Secretary Perez says, well, they will just have to rely on robo-advisers, which is an automated or Web-based service. Not necessarily going to work for 12 million Americans.

Mr. CROWLEY. Let me follow up with Ms. VanArsdale and Mr. Specht on that issue of robo-advisers. We are hearing about them, that they are being billed as the financial brokers of the future that can provide unbiased information while serving as fiduciary.

Could you talk about your services and how they differ from what robo-advisers do?

Ms. VANARSDALE. I think that robo-advisers might be okay for some people. What I would like to see, though, is that people have a choice and that our clients can choose if they want to have that type of advice where they go online or where they research or where they make a decision with a phone call and go in and make a decision on a fund or how to invest in something.

What my bigger concern is, is that, for people that aren't comfortable with computers, that can't even get in to know how to rebalance their current 401(k)s, who is going to help them do all of those things? That is a concern. But, more importantly, it really is, when the market does go down, to have people perhaps make an incorrect decision about moving out of the market when we might have a recovery.

When is the right choice or what are the questions that aren't being asked are bigger concerns.

Chairman ROSKAM. Mr. Specht, just quickly since you were asked specifically.

Mr. CROWLEY. Thank you, Mr. Chairman.

Mr. SPECHT. I work in a blue collar community. I have many union workers, my wife. Some of them have defined benefit plans, those real old things called a pension, and a lot of times they are very, very good. A lot of times they are funded properly, they are going to give an income to people. We have a Social Security system which will give an income to people.

When I sit down and work with people I don't know what their needs are. The robo-adviser, to directly answer the question, isn't going to see, when I am sitting with a husband and wife and they look at each other and they have a question, they are not going to see that, a robo-adviser or a questionnaire that you fill out online isn't going to see that. And that is one of the things, one of the benefits that I can provide working in their best interests.

Mr. CROWLEY. Thank you, Mr. Chairman.

Chairman ROSKAM. Mr. Renacci.

Mr. RENACCI. Thank you, Mr. Chairman.

I want to thank the witnesses for their testimony and for being here.

You know, I always tell people that so many rules here in Washington are made by people who have never had to live within the rules they make. I think this one is one of those rules.

It is interesting, because I grew up in a blue collar union neighborhood and family, and I don't think any of my neighbors thought like Mr. Silvers thinks. My neighbors and my dad trusted their investment adviser, and, yes, they had their ups and downs, but they also had trust, and they moved forward, and they did fine.

I also started a business, and I actually started a 401(k) for all of my employees. I had close to 3,000 employees at one point in time. I actually met with the employees, and I told them, and many of them weren't making a lot of money, but I said: "If you put a little bit away, if you put a bit away, we will match it, and it will grow, and someday you will have some dollars down the road for a retirement account."

I still always remember the classic, the one guy came to me and said: "You know, Mr. Renacci, but that is one less beer I am going to have on Friday."

I laughed, and I said: "Yeah, but you are going to have a lot more beers when you are 60 years old and you have some more money."

So these are the kind of stories that I remember. I remember where these individuals put a little bit of money away, we matched it, they had the ability to get investment advice from advisers, and my biggest concern is this rule won't allow those things to happen anymore. I still have people come up to me 10, 15 years later and say: "I still have an account. It is still growing." I said: "Keep that in mind."

Because I used to tell them the story about when I was 20 years old. I put $100 away. That $100 today is still in that same account, and it has $39,000 in it. I say: "It can be the same thing for you if you do the right thing and you listen."

Now, there are some bad guys out there. Those are the ones I think Mr. Silvers talked about. Maybe that is the ones he runs into more often than I do. However, there are some good investment advisers out there too. My concern is this is going to take away from those small accounts that we are talking about.

It is interesting, my colleague Mr. Crowley talked about a letter that the Democrats have signed onto. I think this issue is something that is bipartisan. We agree there are some concerns with this rule. One of the things in their letter says: In order to have a successfully implemented rule, it is vital that the proposal doesn't limit consumer choice and access to advice, have a disproportionate impact on lower or middle-income communities, or raise the cost of savings for retirement.

Mr. Campbell and Mr. Stevens, will this rule that we are talking about do just that?

Mr. CAMPBELL. As proposed, I believe it would. As Mr. Stevens explained in great detail, the BIC exemption has a tremendous number of requirements and difficulties, making it questionable whether it can even be used as it is proposed. That would cause a lot of financial advisers to have to change their business models. They are looking at additional expenses. They are looking at additional insurance policies. There are all sorts of expenses associated with that, which get passed on to, particularly, you know, the end consumer, the adviser, the individual, or the plan.

Mr. RENACCI. Mr. Stevens.

Mr. STEVENS. If I might just comment, it certainly would, and I think the Labor Department essentially acknowledges this. Secretary Perez has over and over talked about new models of servicing IRA investors emerging, and he keeps talking about robo-advisers. We find this new model to be promising. We always support innovations. And for some of the millions of households perhaps it is going to be good.

But, Congressman, it is ironic to me, this is the same Labor Department which has never authorized retirement plan sponsors or service providers to deliver plan documents by email. Why? Because of some vast digital divide.

I would say also the Consumer Federation of America, AARP, and, to my knowledge, the AFL–CIO have also opposed electronic delivery of documents, whether DOL or SEC. Why? Because of a vast digital divide in America. But that divide apparently disappears when it comes to putting millions and millions of Americans into robo-advisory relationships. Something here doesn't make sense to us.

Mr. RENACCI. I would agree.

And, again, that is what I said. I think this is something my colleagues on the other side and us, we all agree, we have got to make sure that this middle America, those people that have less than $100,000 in savings, don't have some of these fees.

Are most investors, especially those that are not wealthy, really better off with a fee-based account? I don't know who wants to answer that.

Mr. SPECHT. A fee-based account is going to take money out of your pocket—you, the investor's pocket—up front, where, the example I gave earlier, a commission-based account if the product or the service or solution is correct, will spread costs and drastically reduce those costs over the timeframe.

Mr. RENACCI. Well, I would just tell you—and, again, I know I am running out of time—I was also a CPA. So, when people came to my office, I used to say to them: "Don't pay up front, because when you pay up front, you never know what you are going to get later." That is an example of this rule.

And I yield back.

Chairman ROSKAM. Well, we have two first-time callers, long-time listeners who are joining us on the committee today. And we are so pleased to welcome Mr. Neal.

Mr. Neal, you are recognized.

Mr. NEAL. Mr. Chairman, with all due respect, you were in high school when I joined this committee.

Thank you, Mr. Chairman.

Just a couple of brief comments.

As we have moved away from the defined benefit and defined contribution, it seems to me that the consumer relies more and more on sophisticated information. The concern here is that we not drive away the individual at the lower end of the scale that needs that advice.

Wealthy people are always going to find a way to secure the necessary advice to get the best interest rates, to get the best investments, and they are going to be able to do that. But trying to make sure that we have an integrated approach, allowing people across the spectrum to secure this advice, ought to be part of our primary goals. Everybody agrees on this panel and that panel we need to get this right. That is the point that is in question here today.

So, Mr. Chairman, before I ask a couple of questions, might I say to you, since we agree on client first, we agree on transparency, we agree on the notion of addressing the conflict of interest position, if necessary, perhaps we could work on a legislative solution. Is that something that you might be prepared to entertain?

Chairman ROSKAM. Absolutely, Mr. Neal. Yeah, I think that what is being demonstrated today, the nature of the concern, and the subtext of all of these things, there is a theme, and the theme is there is a legislative remedy that is right here. I leaned over to Mr. Lewis during some of the discussion, and I said: "I think that this is an area where we can really work together all the way around."

So I will commit to work wholeheartedly with you in good faith, and look forward to a good bipartisan product.

Mr. NEAL. Thank you, Mr. Chairman.

Mr. Chairman, is there any member of the panel that disagrees with the notion that the client should be first? Would you also state that rather than a nod?

Mr. CAMPBELL. I agree.

Mr. STEVENS. I absolutely agree, Congressman.

Ms. VANARSDALE. One hundred percent.

Mr. SPECHT. Absolutely.

Ms. OWEN. Yes.

Mr. SILVERS. Yes.

Mr. NEAL. And, secondly, could I ask this question as well? Does anybody want to volunteer the sort of advice that they offer to a client in these instances? We heard earlier from a couple of the panelists. But how does that work when you talk to—generally, the client, I assume, is approaching you and there are a series of products that are involved.

Mr. Specht, maybe you want to take it.

Mr. SPECHT. Each individual circumstance is unique, because your particular needs, I don't know what they are. Your particular needs, your particular needs, I don't know what they are. The only way to find that out is to have a communication, to work together. It is the only way it will work.

There are a multitude of products and solutions that may fit depending on the circumstances. And I am held to—whatever word you want to call it, standard or whatever—on a daily basis. Every time I work with a prospect or a client, there is something that is put in place, they are going out and checking the competition to find out what might be available—we usually talk about that up front—and I am always on the block to make sure: "Yeah, you are still doing a good job." They want to make sure. And what is interesting is they keep coming back to do repeat business.

Mr. NEAL. Thank you.

Thank you, Mr. Chairman.

Chairman ROSKAM. Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman.

One of the biggest problems with this fiduciary rule is how it limits access to investment advice. Millions of people rely on financial advisers, not just to enroll them in plans but also to educate them and help make good decisions on saving for their future.

My question right now is to Ms. VanArsdale and Mr. Specht. You both are financial advisers, correct?

I would just like to know what you have to do right now to give advice to your clients.

Ms. VANARSDALE. Well, I think, as I talked about in the testimony, the first thing is listening, understanding, and finding out what is important to the client, but then also sharing—and I know we have talked a lot about commissions and a lot about the products that we sell—but I think that part of the conversation that we haven't talked about is helping people understand how to reduce debt, how to save money in the bank, how to pay off college loans, how to help people understand that it isn't a—this is a piece of the pie. This is not the only part of what we do on a daily basis.

So I think it is much broader than just talking about, oh, you want an open—"Oh, sure, bring me your money and let me put that right into this investment and this is the best choice." That is way down the road.

Mr. SMITH. Would, you think this rule would make it much harder for people to get financial advice?

Ms. VANARSDALE. I think that it is cutting it up in pieces that makes it very difficult to go in and look at a holistic approach and to understand what is really important at a bigger—at a higher level for all clients, but especially, you know, our younger, newer investors who really just need some help and guidance to get started.

Mr. SMITH. To me, it appears like the administration is just trying to make a one-size-fits-all approach for financial advice and products, and as with everything else, that typically doesn't work very well.

I, personally, would like to talk about the role which impacts millennials. I am one of the Members very close to the millennial generation. Some would argue I am part of the millennial generation, but these are young people I am talking about. These are individuals who are just starting out in the workforce. They have fewer savings and investments than folks that are closer to retirement.

You know, we as a society want to encourage more people to save, to prepare for retirement. How do you think this rule affects millennials?

Mr. SPECHT. I can give you an example. I have a client that called me one evening and said that his son telephoned him and said: "Hey, I got a great job offer from a new company." He was young, out of school, first job. He had a 401(k). And he said: "Hey, Dad," the way the father was explaining to me, he said, "Hey, Dad, I am changing jobs. I talked to the HR director and they said I have to take my 401(k) with me. What does that mean?"

The father called me, and I explained to him what that meant and said: "Let's talk with this young individual." He would not have known unless he would have been able to talk to someone.

Mr. STEVENS. Congressman, could I answer that if there is time?

Mr. SMITH. Sure.

Mr. STEVENS. Because, in my testimony, I describe—I am the father of four boys, and one of them is a millennial. He just finished his first job, had a 401(k) balance, going to another job across the country. He said: “What do I do.”

And I said: “Why don’t we get on the phone with one of America’s great mutual fund firms, and they can talk to you about that.”

He spent an hour with a call center representative, who described all sorts of options—what a rollover IRA was, what the advantages of that in the context of a working life where he might be working at many different places. After that hour, which was at no cost to him, he decided that he was going to put his money in a target day fund with that firm, which would automatically rebalance over a long working life. He got to a great place. But I will tell you, that conversation could not take place the way that it did if this rule were adopted.

Mr. SMITH. Mr. Chairman, I would like to enter into the record this. It is by the Insured Retirement Institute, and the title is, “Will Millennials Ever be Able to Retire?” In this, it provides that the generation that needs more financial advice than anyone are, of course, the millennials. Sixty-two percent believe that they need easy access to a financial adviser to plan for their future and their retirement.

Ms. Owen, I would like to ask you, you employ, I would say, numerous millennials.

Ms. OWEN. Yes.

Mr. SMITH. How do you think this rule affects your employees?

Ms. OWEN. Well, I think it will greatly affect my employees. We kind of enticed them into savings when we started the 401(k) plan. Obviously, if your employer is going to hand you money, all you have to do is match it, you are going to do it. But without us even approaching this, I can tell you, you know, they are young, they are getting married, they are having babies, they are going out at night, they have no interest at all in savings of any kind, especially for retirement, because it is so far in the future.

So if it is harder for me to offer this plan or more expensive for me to offer this plan and I can’t do it, I am fairly sure that they will not.

Mr. SMITH. Thank you, Mr. Chairman.

Chairman ROSKAM. On your document in entered into the record, without objection, so ordered.

[The information follows:]

WILL MILLENNIALS EVER BE ABLE TO RETIRE?

NEW RESEARCH REVEALS THE SURPRISING TRUTH ABOUT RETIREMENT BY GENERATION IN THE UNITED STATES

September 2015

Research Presented By:

Insured Retirement Institute
and The Center for Generational Kinetics

IRI

THE CENTER FOR GENERATIONAL KINETICS

AUTHOR'S FIRST WORD

"Millennials are now the largest generation in the U.S. workforce.

Although they share the same workplace as Generation X and Baby Boomers do, this study uncovered that Millennials hold *very* different views and beliefs about retirement than other generations.

Discovering what Millennials truly think about retirement — and the steps they've taken or *not* taken — is critical for employers, families, financial service providers and policymakers to know to ensure this generation's needs are met and that they can achieve financial security in retirement.

The research found that Millennials are not nearly as prepared as they need to be, with some notable exceptions, and the findings show that if we don't act now to prepare Millennials for retirement, they may reach retirement age and have no option but to keep working well into their 80s."

-Insured Retirement Institute and
The Center for Generational Kinetics

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WELCOME FROM THE AUTHORS

SEPTEMBER 2015

Welcome to our 2015 study on Millennials and retirement by generation.

We undertook this study because there is little known about Millennials' attitude and readiness for retirement and how this is similar to or differs from other generations in the workforce.

Uncovering this data is critical not only for Millennials but also for the stakeholders who will be affected by the actions of Millennials, such as their employers, parents, children and policymakers. It also is important for financial services providers to better understand this generation to better address their unique needs.

Not since the Baby Boomers entered the workforce decades ago have we had such a large generation coming of age. Millennials are a diverse generation, almost 80 million strong, possessing more college degrees than any previous generation in the United States. At the same time, Millennials have come of age through a challenging recession, record-breaking levels of college debt, and the pervasive fear that Social Security might not be there for them.

This research has never been more important, as stakeholders need to know and be prepared for what Millennials are thinking and doing (or not doing) about retirement. The actions of Millennials will not only affect their generation but the generations before and after them.

Whether you come to this research study as an employer, financial services provider, policymaker, family member or a Millennial yourself, there are insights that will specifically help you identify and bridge the retirement divide between generations.

The Insured Retirement Institute (IRI) and The Center for Generational Kinetics are excited to partner on this groundbreaking research and even more excited to share with you what our national study found.

To schedule a media interview about the study and its findings, please contact Andrew Simonelli at asimonelli@irionline.org or 202.469.3009.

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WHAT MILLENNIALS REALLY THINK ABOUT RETIREMENT (WHEN THEY DO)

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MILLENNIALS DO THINK ABOUT RETIREMENT

Retirement is a hot topic filled with assumptions across generations.

Have Millennials, the generation known for being raised by helicopter parents, even thought about retirement? Have they taken any real steps toward retirement — or do they see the Bank of Mom and Dad as their fountain of post-work freedom?

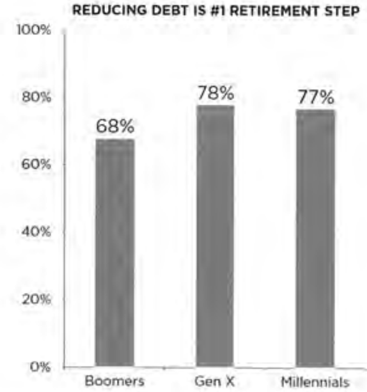
Our research findings debunk the myth that Millennials are not thinking about retirement. In fact, Millennials are more than just thinking about retirement; many are actively preparing for it right now. However, the way in which Millennials are preparing for retirement is different from that of previous generations.

The study found that 68% of Millennials *are* saving or investing for retirement. However, this is a different approach from that of previous generations that commonly expected and relied upon some form of a pension to prepare for and provide income in retirement. Instead of a pension, nearly half (48%) of all Millennials in the United States have a 401(k).

While we are not sure whether Millennials have been auto-enrolled into their 401(k) or have actively made the choice themselves, what is clear is that they do not see traditional pensions in their future.

Going even further, the study found that rather than saving and investing for retirement, the number one step Millennials are taking to actively plan for retirement is by reducing their debt (77%).

REDUCING DEBT IS #1 RETIREMENT STEP



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AWARE OF THE NEED, UNSURE OF THE APPROACH

But before we celebrate the finding that Millennials are *thinking* about retirement now, the study revealed that Millennials' retirement *plans* are not well formed.

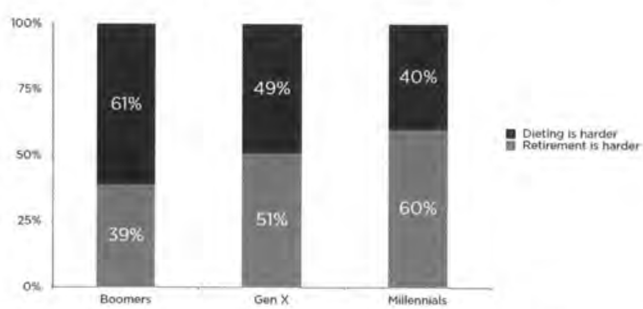
In fact, the study found that retirement feels like an overwhelming prospect for many Millennials. As a result, Millennials approach retirement with an array of methods that range from the "non-approach" of doing nothing, to that of desperation such as buying lottery tickets!

Going further, the study found that 60% of Millennials think it is harder to plan for retirement than to stick with a diet and exercise plan.

This means that although retirement may be on Millennials' minds, when the study specifically asked if they are "actively preparing" for retirement, the answers are very different from what we found when asking if they "save" for retirement.

Only 29% of Millennials in the study describe themselves as actively preparing for retirement. In fact, 15% of Millennials list winning the lottery as part of their retirement strategy, and 11% expect to be gifted money for retirement.

The combination of not taking action, taking actions that do not accumulate resources for income in retirement such as paying off debt, and that more than one in ten expect to be given money for retirement shows that this generation is largely not on track to attain financial security in retirement.



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RETIREMENT FEELS OUT OF REACH

Millennials do not feel like they can rely on traditional retirement safety nets. This insecurity about retirement is compounded by the belief among Millennials (50%) that they will need to take care of their parents financially as they get older. What a role reversal for those Millennials raised by helicopter parents!

Adding to the sense of retirement's feeling out of reach, the study found that 65% of Millennials in the United States believe Social Security will provide them with no meaningful income in retirement.

Diving deeper into the data, the majority of Millennials believe they will not be able to retire when they want to, with 28% believing they won't be able to retire at the age they want, and an additional 28% believing they will *never* be able to fully retire.

With a majority of the generation thinking they will never be able to retire at the age they want, it is easy to understand why so many have not taken steps to prepare. Of course, this could become self-fulfilling, as inaction will force many to postpone their retirement.

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WHAT MILLENNIALS ARE DOING ABOUT RETIREMENT NOW

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RETIREMENT REALITY GAP

We asked Millennials how much money they think they would need to retire. Their answers to this question revealed that Millennials are painfully unaware of the reality of what retirement costs. The numbers they cited were not realistic and far below what they will need.

This "retirement reality gap" between the perceived financial resources Millennials will need to retire and the real financial resources needed to retire highlights the need for Millennials to seek financial advice and education now.

The study found that 70% of Millennials believe they will spend less than $36,000 per year in retirement. Contrast that with Bureau of Labor Statistics data that shows average annual expenditures for those age 65 - 74 were $46,757 in 2013! In other words, Millennials think they will spend 30% less per year in retirement than what retirees actually spend today. That is not a likely scenario.

Who can help Millennials bridge the retirement reality gap? Financial advisors.

Unfortunately, when it comes to getting sound professional financial advice, Millennials don't see a financial advisor as someone to go to now but rather someone to go to later — specifically when they are at or very near retirement (62%), when they receive an inheritance (73%) or when their debt is out of control (61%).

Although a financial advisor can help a Millennial with each of those situations, it would be wiser for Millennials to seek out financial advisors at earlier crucial life moments when they can help them develop a plan to meet their long-term financial goals. However, these traditionally big life moments scored much lower on motivating Millennials to seek out a financial advisor, specifically getting married (42%), having a child (45%) or getting promoted at work (30%).

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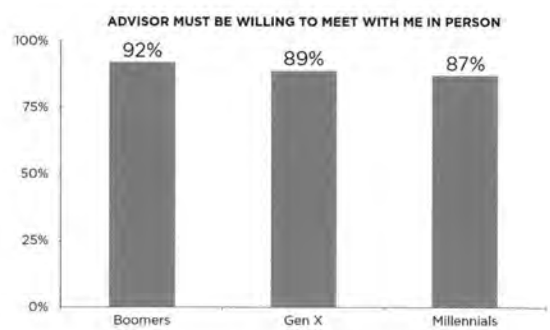
SEEKING FINANCIAL ADVICE

When we looked at whom each generation goes to for financial advice, there was a clear result: **the older you are, the less likely you are to go to your parents for financial advice and the more likely you are to work with a financial advisor.**

The study also found that Millennials in America have strong expectations and beliefs when it comes to interacting with financial advisors.

A vast majority of Millennials (88%) rated fee transparency as an important component to working with a financial advisor. A close second was a financial advisor's being highly rated (87%), and the third most important consideration was the financial advisor's being a college graduate (80%).

Most surprisingly, 87% of Millennials said that it was important for the advisor to be willing to meet with them in person! This was unexpected considering that this is the generation known for FaceTime, text messaging and all things virtual. It seems when it comes to their finances, they at least appear to be more like other generations than one might assume.



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WHAT THIS MEANS LONG TERM

The findings about what Millennials are and are not doing to prepare for retirement indicate that there is a considerable opportunity for the financial services industry to reach Millennials. One of the first and biggest hurdles to overcome is making this demographic aware of what financial advisors do and how they can help Millennials. This is especially important because only 38% of Millennials say they know exactly what a financial advisor does.

The findings seem to indicate that Millennials are open to working with financial advisors. In fact, **a majority of Millennials surveyed (62%) would like to be walked through every step of the retirement planning process, but that high need for help is not followed by action**. In fact, other findings from the study show that Millennials by and large are not seeking out financial advice.

Are robo-advisors the solution for Millennials? The study found that only 19% of Millennials say they are likely to use a robo-advisor. At this point, it appears that working with a human is the stronger preference of Millennials, particularly in light of their desire to be walked through the planning process.

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BECAUSE YOU KNOW WE HAD TO ASK...

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OPRAH VS. BUFFETT: WHO DO MILLENNIALS CHOOSE?

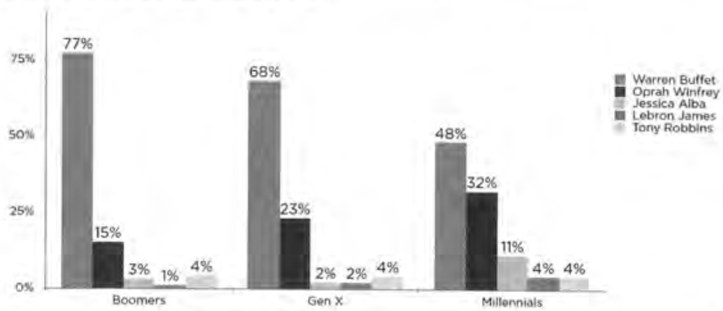
Which celebrity would Millennials prefer to have as their financial advisor?

Older generations would overwhelmingly select Warren Buffett as their financial advisor, as indicated by 77% of Baby Boomers and 68% of Generation Xers. But for Millennials, it was a much closer affair.

While 48% of Millennials would pick the Oracle of Omaha to be their financial advisor, media icon Oprah Winfrey came in strong second with 32% of Millennials saying they would prefer to work with her. A titan of business herself, she has built a billion-dollar-plus empire from the ground up.

But what does this mean for financial advisors and financial services firms looking to cater to the needs of Millennials? It should not be a surprise that Warren Buffett would be the preferred celebrity of choice. He is, after all, best known for his investing acumen and stock-picking prowess. But certainly there is a significant percentage of Millennials that are looking for something else. What makes Oprah different from other celebrities, such as Jessica Alba and Lebron James, who too have established wildly successful brands?

While it may only be conjecture, Oprah established herself as a household name during 25 seasons as host of her talk show, which was oftentimes an education platform. And remember, 62% of Millennials surveyed would like to be walked through every step of the retirement planning process. It could be that those Millennials who prefer Oprah to be their advisor, think she could best meet this need.



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THE END OF HELICOPTER PARENTING?

There is much conversation in the media and pop culture on the phenomenon of helicopter parenting. This is personified as the mom and dad who constantly save their children from consequences, make sure they wear their helmets at all times, hire tutors (or do their homework "with" them), and definitely help their Millennial children well into their 20s and even 30s. In fact, we all know someone in his or her late 20s whose car insurance, phone bill or other bills are still underwritten (and cosigned) by the Bank of Mom and Dad.

Surely this trend of helicopter parenting would be passed from one generation to their kids, right?

It seems that even Millennials recognize the downside of being saved from consequences and always having a financial safety net, because of all the generations we surveyed, Millennials were the number one generation to say they were going to cut off their own kids financially at age 18!

What does this mean for retirement? On one hand, Millennials are staying on their parents' balance sheets much longer than previous generations, which will likely affect their parents' ability to retire. On the other hand, if Millennials do cut off their kids financially at age 18, those same Millennials will have an easier financial path to their own retirement.

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TAKE ACTION STRATEGIES

FOR MILLENNIALS

The biggest generation since the Baby Boomers, Millennials gain a head start on retirement if they act now. Here are three actions Millennials should take based on the study's findings:

1. Save every month, even if it's a seemingly small amount. A little each month goes a long way over time. It's possible to set up an IRA for as little as $25 per month. While this may seem like a drop in the bucket, over years and, in your case, decades, this can grow to a substantial amount that significantly affects your retirement lifestyle.
2. Don't just save, but invest. As you progress in your career and your earnings reflect your growth, continue to save and invest proportionally with each of your earnings increases. This means if you get a $2,000 raise at work and historically save and invest 5%, keep saving and investing 5% even though you have more total income than before. Even better, increase the percentage you save if you can do so without accumulating additional debt.
3. Meet with a financial advisor or several financial advisors. Financial advisors are trained to help people make better financial decisions. The sooner you meet with a financial advisor – or interview several and choose the one who best fits your needs – the sooner you can benefit from expertise that only comes through experience and financial education.

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TAKE ACTION STRATEGIES

FOR EMPLOYERS

Small actions go a *long* way toward helping your Millennial employees prepare for their futures and see you as a valued ally in the process. Here are three strategies to take based on the study's findings:

1. Auto-enroll employees in a 401(k) and offer some type of match. This is the number one way to get Millennials to take action toward their retirement and to demonstrate that you are helping them reach their retirement goals.
2. Provide on-site financial education workshops that meet the needs of young adults in addition to others. To meet the needs of young adults, make sure your workshops include how-to advice for people who have never saved or invested before.
3. Host cross-generational conversations in which those closest to retirement age share their own hard-earned financial lessons with Millennials. This is one of the best ways to humanize retirement for Millennials so they take action now.

FOR POLICY MAKERS

Helping Millennials understand and prepare for retirement is critical given that they will be largely responsible for saving for their retirement years. The better job we do as a nation to prepare Millennials to take action now to prepare for retirement, the easier it will be for the generation and our country as Millennials age. Here are three actions to take based on the study's findings:

1. Engage Millennials and explain that planning for and being able to retire is easiest when you start early.
2. Share the idea that saving and investing a few dollars a week can lead to a dramatic difference in lifestyle when you're ready to retire.
3. Get leaders, influencers and celebrities talking about actions Millennials should take now to help themselves become financially sound.

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RESEARCH CONCLUSION

The national study revealed that contrary to popular opinion, Millennials are already thinking about retirement and that a meaningful percentage are planning for it now.

The study also found that Millennials believe traditional sources of retirement planning and retirement income, including traditional pensions and Social Security, will not be viable options to support them in their own retirement.

Although Millennials did not seem confident in knowing how to fill this retirement gap, they at least know they need to do *something* if they want to one day be able to retire comfortably or at all.

We learned that Millennials do want transparency when it comes to those who can help them with their finances and might need even more detailed help than any previous generation.

At this juncture, we are poised for a broader, important cross-generation conversational about retirement.

It's time for a candid conversation with Millennials about retirement and explaining to them how to tie this to the actions they can take today – by learning from other generations before them.

One thing is certain when it comes to Millennials and retirement: we now know that Millennials are the generation most willing to cut off their own children financially at age 18!

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ABOUT THE STUDY'S AUTHORS

THE CENTER FOR GENERATIONAL KINETICS

INSURED RETIREMENT INSTITUTE

The Insured Retirement Institute (IRI) is the leading association for the retirement income industry. IRI proudly leads a national consumer coalition of more than 30 organizations and is the only association that represents the entire supply chain of insured retirement strategies. IRI members make up the major insurers, asset managers, broker-dealers/distributors and 150,000 financial professionals in the United States. As a not-for-profit organization, IRI provides an objective forum for communication and education and advocates for the sustainable retirement solutions Americans need to help achieve a secure and dignified retirement.

Learn more at www.irionline.org.

THE CENTER FOR GENERATIONAL KINETICS

The Center for Generational Kinetics is the number one Millennials research and strategy firm. The Center's team of PhD researchers and on-site speakers help companies and organizations solve tough generational challenges with Millennials, iGen and emerging generational trends. Each year The Center works with over 125 clients around the world from car manufacturers and hoteliers to insurance, healthcare and technology. The Center's team is frequently quoted in the media about the effect of generations on everything from education to retirement.

Learn more at www.GenHQ.com .

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RESEARCH METHODOLOGY

This research study was led by the Insured Retirement Institute and The Center for Generational Kinetics. The survey was administered to 1,110 U.S. adults, ages 18–65,

with a 10% oversample of Millennials, ages 20-37 and weighted to the current census data. Participants were screened to be U.S. citizens.

The survey was conducted online from August 4, 2015, to August 7, 2015, and has a confidence interval of +/-3.1%.

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Chairman ROSKAM. Mr. Larson.

Mr. LARSON. Thank you. Thank you, Mr. Chairman, and thank you, Mr. Lewis, for allowing us the opportunity to speak here this morning as well.

I have thoroughly enjoyed the discussion. I think it is an important area, something that I refer to as the "Tulio Russo rule." I am sure that no one on the panel and perhaps most here on the dais have not heard of Tulio Russo. But Tulio Russo was my mother's debt agent, and he used to go in a Federal housing project door to door and collect his debt.

He would do so, and my mother trusted Tulio because he would sit in her living room and make sure, with a family of eight children, that she was setting aside her $2.25 a week, with the idea in mind that that would, in the event something happened to my father, cover our expansive mortgage in Mayberry Village. But she trusted Tulio Russo, and he was a human, compassionate face that gave advice.

So the issue here, it seems to me, is that—Mr. Silvers, I think, has provided excellent testimony. He is not the enemy here today, he is actually an ally to make sure that everybody gets this right, but does it in a way that we don't overstereotype and pretend that everybody is Bernie Madoff, on one hand, but, on the other hand, make sure that we recognize everything that is important about a human transaction.

I certainly am very resistant of robos, though I am sure that they have some use and value, but not nearly as much as Tulio Russo. And what is good about the example of Tulio Russo is that I can't imagine Mr. Russo ever talking to my mother and saying: "Mrs. Larson, before I can talk to you, sign here on the dotted line."

And so, from a real practical and pragmatic standpoint, that is what we are talking about here today. And so it may need—and I commend the chairman and Mr. Neal for, perhaps, a legislative remedy in these complex days—sometimes writing legislation helps clarify—not always—but sometimes it helps clarify a situation here.

And what we are talking about here is the difference between information and knowledge—a knowledge that, in my humble opinion, is better distributed when individuals who are certified and recognized in their States are allowing the opportunity, as Mr. Neal spoke about, to speak to people in desperate need of financial literacy.

I think there will come a time when we will recognize that the AFL and the CIO and the AFL–CIO and financial institutions and people that are entrepreneurially involved will lock together in terms of requiring financial literacy in the workplace and disseminating that information in a very important and critical manner so that everyone gets to make a choice, everyone has the opportunity to avail themselves of their Tulio Russo.

And so, Mr. Chairman, I am a signer to Gwen's letter. I appreciate the opportunity to speak here today.

I applaud Mr. Silvers for always recognizing what we should be aware of in terms of various conflicts of interest. But I also commend the professionals who day to day go about their business and understand the importance and viability of that human contact and disseminating to people like my mother what an important financial decision this is.

Mr. Renacci talked about the value of compound interest. It is true all across the board. We are closer on this than we are farther apart. It is just a matter of doing the right thing and getting this done right. And if it requires legislation, so it be it.

Thank you, Mr. Chairman and Mr. Lewis, for allowing us the opportunity to speak.

Chairman ROSKAM. Thank you, Mr. Larson.

Mrs. Black.

Mrs. BLACK. Thank you, Mr. Chairman, for allowing me to sit in on the committee. It has been a very interesting conversation today. I must say, as a healthcare worker, this is not one of my areas of expertise, and I have certainly learned a lot today. Certain words have continued to come up—"choice" being one of those, "trust" being another.

I appreciate, Ms. VanArsdale and Mr. Specht, as you talk about the clients that you have worked with and given us some real-life situations of how you can really make a difference on a human level in helping them to make those decisions.

One thing that has not been talked about is cybersecurity. Mr. Stevens, you talked a little bit about the cybersecurity and perhaps the breaches when you have all this private information that is out there, and we have seen a lot of that lately, even within the government programs that have not protected people's personal information. So that is a huge concern, but have you seen anything out there about if we were to foist this on people that didn't have connectivity?

I happen to represent an area of my district, about 50 percent of it is very rural. We are having one heck of a time getting connectivity for the folks that live in my district, and most of these places that are very rural, it is the blue collar worker that would be affected. So if they are forced into this system where they have to use a robo rather than a human, I really worry about what happens to them. Have you seen anything out there in your study of the issues related to that?

Mr. STEVENS. I have not seen anything specific to that, Congresswoman, and, obviously, there may be parts of the country where high-speed Internet connectivity is not available, and that would be very much a disabling reality for people.

My comments were more directed towards the appropriateness or desirability from a personal point of view of interacting on a Web-based platform or algorithmically or some fashion rather than the kinds of personal interactions that others on the witness table here have talked about in their own businesses.

Maybe that is going to be good for some. But, again, I go to this figure. There are more than 12 million U.S. households—and, no doubt, many in your district—where the IRA balance is $25,000 or less and where a fee-based account is, for all intents and purposes, not going to be feasible. And so the question is, how are those people going to be served?

Mrs. BLACK. Thank you.

I guess I am also trying to really put my finger on the actual problem here, because it doesn't seem to me that something is really broken that we have to fix. It seems that there has been almost a forcing of something to happen that really isn't broken.

Mr. Campbell, can you help me? Can you put your finger on something to say: "Look, this is really broken, and we have to do this now because people are being hurt"?

Mr. CAMPBELL. Well, I think, in every human endeavor, there are going to be some bad actors and some bad apples. And I wish, instead of taking this comprehensive approach of redesigning the entire system of retirement advice, the Department had, instead, focused on identifying and going after those bad apples, which is part of what its enforcement program is intended to do.

One of my concerns about the approach they have taken is that, as I mentioned in my prepared testimony, best interest and the standard they are actually putting out here are two very different things. The standard they are putting out captures all sorts of normal and useful activity where there is just a structural difference in price from one product to another. You know, an adviser to a 401(k) plan might charge 25 basis points for that whole plan, but when they talk to one individual with an IRA, they can't provide it at that lower cost. It has to be a higher cost. It is just a different product.

The Department's proposal would make that a conflict of interest that would be prohibited simply because there is this differential in cost. And so I think the approach they have taken, to the extent there is a problem that needs to be resolved, isn't addressed by this approach.

Mrs. BLACK. So the old axiom, "If it ain't broken, let's not fix it," and giving people an opportunity and choice, I think are two of the things I am taking out of here today besides the human factor, which, being a nurse, I think that is so ultimately important.

Thank you, Mr. Chairman, and I yield back the balance of my time.

Chairman ROSKAM. Thank you, Ms. Black.

Just a couple questions in closing.

It seems that one of the things that we are seeing is that, under the proposed rule, the government would be pushing folks into these Secure Choice plans. There is a sensitivity that I have, coming from Illinois—and you know just what a complete goat rodeo the Illinois pension system is—do you have an opinion as to what ends up happening, and isn't it sort of a false sense of security that is being communicated?

And so, Mr. Stevens, I hand this to you. If somebody is being told, "hey, come on in, it is all fine, and we are going to put you out of this private-sector savings plan and we are going to put you into this Secure Choice," isn't that really an overcharacterization, and isn't it really less secure than most people think? Ought we be cautious about putting people into the so-called Secure Choice plan if it is just going to be run by State and local officials?

Mr. STEVENS. Chairman, I think you have your finger on something that is extraordinarily important. And, again, it is puzzling to us, because what we have been talking about in the DOL fiduciary rule, as in the context of 401(k)s and IRAs, a massive overhaul of the system with tremendously strict new regulations being proposed; whereas the project that apparently the DOL is now endeavoring in the rules that Brad described in his testimony is to deregulate State-administered plans so that they won't have, presumably, the same degree of ERISA protections.

They raise questions with respect to the Federal securities laws, too, and how they will apply—governance issues, all sorts of very, very fundamental things.

But we very much worry that if we have a patchwork quilt of State-administered plans with fewer requirements, employers will say, especially in this highly litigious environment we live in, "Well, you know, to heck with the 401(k)s. I am just going to go into the State-administered plans," and the retirement system, which has been so very successful, that we have built up over many years now—and I think we need to recognize that the successes and strengths of that system will be put at risk. And that, it seems to me, deserves the attention of this committee.

Chairman ROSKAM. Okay. So break that down a little bit. So Ms. VanArsdale's clients, my constituents in Chicagoland, I am speculating, but here is my speculation. I think that, based on all of the drama and all of the real consternation and anxiety around the Illinois pension system, my hunch is that if you had clients that said, "I would rather be into some other more secure private-sector program than living precariously on all the politics around the Illinois pension system," they would rather be in a more secure system. Is that fair?

Mr. STEVENS. I would assume that is certainly the case, yes.

Chairman ROSKAM. Yeah.

Ms. VanArsdale.

Ms. VANARSDALE. I think the fear that that has been created because of all the conversation in Illinois has just—if we told the clients that we had to go into a State program that were not State employees, they would move.

Chairman ROSKAM. Right. Right.

Ms. VANARSDALE. I mean, the State, it is slightly embarrassing, and they are scared. They were told something for 34 years; if you do this and you follow these rules, this is what you are going to have on this day. And now, 4, 5, 6 years out before retirement, it is changing.

Chairman ROSKAM. It wasn't called Secure Choice, but it was presented as a secure choice. And, as it turns out, that was a false presentation, that was a pretense, and it is anything but secure.

Mr. Campbell, I just want to follow up just quickly, and it was a point that Mr. Stevens just made. It is my understanding that California has now said that they are going to be moving forward under their own program in anticipation of the DOL initiative here.

Can you walk through what Mr. Stevens mentioned a minute ago? That is, that they are proposing to do it without ERISA protection? Isn't there just an irony there that just is incredible? Can you speak to that?

Mr. CAMPBELL. Yeah, I think that is one of the things that I think Congress should look at closely when DOL comes out with this proposed rule, is exactly what type of latitude are they providing to the States. Is it simply an on-off switch, that, no, we are saying that ERISA won't apply to these, and, therefore, the protections that come with ERISA don't apply?

If you look at the program in California, also called the Secure Choice program, there is, I think, some ambiguity as to exactly what, at the end of the day, the State may end up doing. It starts out as a payroll deduction IRA approach, but it is not clear that it would end there. There may be guaranteed investment returns, and then that raises questions of, well, how are those returns guaranteed? Who is guaranteeing them? Are these funded promises? If they are funded, funded by whom? Who is making the investment decisions behind those funds?

These are all questions that the ERISA structure has clear answers for and a clear history of protecting workers. Again, I am not suggesting that States don't have good intentions or may not be trying to do things that they think are in their citizens' best interests, but I think there are some real questions Congress should look at before it allows an agency, by regulation, to essentially do away with the ERISA preemption that has protected workers for over 40 years.

Chairman ROSKAM. That is good insight.

I know I speak for everybody on the panel when I thank every one of you for your time today. It has been productive and insightful. You sense from, I think, all of the members that we are interested in getting to a remedy here. And you also sense that some cooler heads, I think, can prevail, and there are some creative and interesting things that we can do.

So, on behalf of all of us here at Ways and Means Productions, we would like to thank our writers and directors.

We have received numerous comments and concerns from CBOE, IABA, State Farm, ACLI, fraternal organizations, and really a wide range of people. And the insight and input has been very, very helpful.

So, with the requisite words that everybody is supposed to say at the end of a hearing, the hearing is adjourned.

[Whereupon, at 12:05 p.m., the subcommittee was adjourned.]

[Submissions for the record follow:]

Business Roundtable

Statement for the Record

Business Roundtable

Before the

Subcommittee on Oversight

Committee on Ways and Means

United States House of Representatives

Hearing on

"The Department of Labor's Proposed Fiduciary Rule"

September 30, 2015

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Business Roundtable, an association of chief executive officers of leading U.S. companies, represents member companies with over $7.2 trillion in annual revenues and nearly 16 million employees. Business Roundtable member companies provide retirement, health and other employee benefit coverage to more than 40 million American employees, retirees and their families.

On behalf of the more than 200 CEO members of Business Roundtable, we commend the Subcommittee for holding this hearing on the Department of Labor's proposed fiduciary rule. As advocates for smart regulation, America's business leaders support all efforts to make the federal regulatory process more transparent and open to public engagement, which will yield higher quality data, more complete and objective cost-benefit analyses and smarter, less burdensome rules. This hearing and others like it are critical to achieving those goals.

Rules and regulations exist to protect people, but a regulation can only be effective if it is carefully designed to fit the problem it is meant to solve. The Department of Labor's proposed changes in the interpretation of the Internal Revenue Code and the *Employee Retirement Income Security Act* (ERISA) fail to meet that objective. To the contrary, the complex and prescriptive proposal likely would lead to serious unintended consequences that could result in significant economic disruption and harm to the retirement security of millions of participants in retirement and other employee benefit plans.

The Labor Department's goal is to ensure that financial professionals act in the best interests of retirement plan participants when providing investment advice to a retirement plan or its participants. We wholeheartedly agree that the plan participant's interests must come first but that will not be accomplished if, as the Labor Department has proposed, complex and burdensome barriers are erected that will essentially deny retirement plan savers access to important information about and assistance with investment alternatives and services.

The Labor Department's proposed definitional changes are too broad and too subjective, and its proposed exemptions are too narrow and would raise the costs of saving for retirement. For example, the proposed regulations' new investment advice fiduciary standard would apply to activities, interactions and relationships that should not be considered "investment advice" under ERISA or the Internal Revenue Code. Important investment education that our member companies currently provide to retirement plan participants would be unnecessarily limited, and the complex new rules and byzantine proposed exemptions have the potential to sweep plan sponsors and their employees into unwarranted litigation.

Business Roundtable and many of our member companies have filed extensive comments with the Labor Department on these and many other issues. An overriding concern is that the proposed regulation would not leave sufficient room for activities that are designed to help and encourage individuals to save, invest and plan for retirement. In fact, financial education and planning assistance are among the most beneficial services that many thousands of employers and financial advisors across the United States offer to their employees and clients.

Overall, the Administration needs to go back to the drawing board on its proposal and seriously evaluate the availability of less burdensome alternatives.

Among the thousands of comments filed on the Labor Department's proposal, almost 200 members of Congress (from both sides of the aisle) have expressed serious concerns. A September 24, 2015, letter to Labor Secretary Thomas Perez from almost 100 House Democrats emphasized that the Labor Department should "consider options for convening a small working group of industry professionals and consumer advocates to aid with the finalization of the Rule."

We strongly agree. Broad and complex regulatory reinterpretations can cause great disruption in existing relationships and practices, particularly when they involve changes to a long-standing definition. While some change may be appropriate, a wholesale reengineering transformation of this magnitude and importance requires time and warrants an especially robust discussion among stakeholders. Critically, in the instant case, interested parties should be provided with the opportunity to evaluate and comment on the changes that the Labor Department will have to make before its fiduciary regulation can be finalized.

A letter from Subcommittee Chairman Roskam to the Labor Department concluded by emphasizing his belief that "there is a great opportunity for Congress to work with DOL and others in establishing new standards for the benefit of consumers in retirement services." As shown by the broad bipartisan support for substantial revision to the Labor Department's proposal, there is a better way forward that not only offers better advice to all retirement savers, but also eliminates the unintended harmful side effects.

Thank you for your attention to this important matter. On behalf of Business Roundtable, I stand ready to work with you and the Administration on a solution that works best for our employees and all retirement savers.

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CONGRESS NEEDS TO SET "FIDUCIARY" DEFINITIONS ASIDE & PUT CONS THAT VIOLATE FIDUCIARY WHERE COPS CAN FIND THEM

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The Committee On Ways and Means hosting a hearing on the Department of Labor's proposed fiduciary rule is frightening.

The DOL has chosen to freezer tray definition of the word, *"fiduciary."* This conversation of *"fiduciary"* has less to do with a definition of a word or market performance than it has to do with what happens after the crime of Breach of Fiduciary, 401k, broker, brokerage, investment advisor, financial consultant, arbitrator, mediator even lawyer have been discovered.

Wikipedia defines "Fiduciary" as *"A fiduciary is a person who holds a legal or ethical relationship of trust with one or more other parties (person or group of persons). Typically, a fiduciary prudently takes care of money or other asset for another person. One party, for example a corporate trust company or the trust department of a bank, acts in a fiduciary capacity to the other one, who for example has entrusted funds to the fiduciary for safekeeping or investment. Likewise, asset managers —including managers of pension plans, endowments and other tax-exempt assets— are considered fiduciaries under applicable statutes and laws.[1] In a fiduciary relationship, one person, in a position of vulnerability, justifiably vests confidence, good faith, reliance, and trust in another whose aid, advice or protection is sought in some matter.,[2] In such a relation good conscience requires the fiduciary to act at all times for the sole benefit and interest of the one who trusts."*

Advisors are *"fiduciaries"*, there should be no question of that. Freezer tray? The term describes how Congress tends to compartmentalize and freeze out co-morbidity criminal fiduciary behaviors. Congress must expand the reach of this conversation to all aspects of the financial industry- broker, dealer, investment advisor- and, to insurance, too. Someone in Congress decided to include Insurance under the umbrella of the Securities Commissions. Why? I have a good answer that I never could have thought of.... Because the insurance companies invest clients premiums to make *"what if"* money. Hearing that, was the first time I understood the role of AIG in the market crash of 2008. The *'house'* so to speak was gambling with client entrusted paid premiums, so *"fiduciary"* extends to the Insurance industry, too, in this Congressional conversation.

The best interest clause is not assumed or presumed, it is a requirement of someone who takes on responsibility of someone else's *"other,"* in this case, money.

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It does not occur to consumers that someone they know, read about or were introduced to can argue no legal obligation to trusting oversight of hard earned savings. Lawyers hired by thieving financial consultants- brokers, dealers, investment advisors- do a bang up job of arguing for accused clients, that no *"fiduciary"* obligation existed, an argument making one wonder what planet the lawyer got their legal degree from.

It is not in the nature of the trusting financial advisor client to hand over entrusted hard earned dollars needed for retirement to some stranger just because *'they are a nice guy.'* Hard earned cash is handed over because a pitch has been made to the consumer with the representation of there being a return, a performance of *"fiduciary."*

There are no effective requirements and laws in place that will help a consumer know better and faster if the customer is being played by a con.

1- There is no law telling a financial consultant they must print their Financial Consultant number on ever document, business card, emails, court filings the financial consultant uses in the course of engaging new, past or potential clients
2- There is no law making it illegal for a financial consultant to not put their fingerprints on their U4, and other documents under the oversight of F.I.N.R.A. the only S.R.O. that the S.E.C. has approved of despite Congress allowing for multiple S.R.O.s to be created
3- There is no law stating that a financial consultant must disclose all potential, past and existing customer complaints to potential, past and existing clients
4- There is no law requiring a financial consultant provide potential, past and existing clients to the S.R.O. under a criminal penalty
5- There is no law requiring a financial fiduciary to give the client the fiduciaries passport, driver's license, DOB and all other data relevant for I.D. theft
6- There is no law requiring a financial fiduciary to give the client statements each month. The law says quarterly
7- There is no law requiring a financial fiduciary to turn over to a client, on demand, a cover to cover copy of a client's file just as one would get from the client's doctor if requested
8- There is no law requiring the S.E.C. to bring in to their loop, A.S.A.P. a quarterbacking to all agencies ie consumer, F.T.C., F.C.C. if the fiduciary has a radio show, the securities commissions, if the fiduciary is charged
9- There is no law requiring the S.E.C. and commissions have the fiduciary's clients notified A.S.A.P of the charges against the fiduciary (a) by requiring pop up alerts on the clients website at login, text messages and snail mail letters too.
10- There is no law requiring that consumers be told to file a police report with local enforcement. What the consumer is told, over and over and over again is (i) file an internet complaint with the F.T.C and/or 'we cannot advise you, we cannot give you legal advice, go consult an attorney"

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What the consumers have to contend with, in issues of financial fiduciary, is F.I.N.R.A. a pet project of now Senator former Congressman Ed Markey, as implemented sending complaining clients back in to the clutches of the industry the client is seeking justice from. Congressional poster boy on issues of "Fiduciary," is the late Senator Lautenberg, seat filled by Senator Corey Booker (D-NJ). Senator Lautenberg had fiduciary trust in someone.

Bernard Madoff. 401K or otherwise, does it make a difference when the end game, ends the same, fleeced, spirit broken.

Some securities commissions have hyperlinked to F.I.N.R.A. The FSC, financial securities committee stated they do not authorize private business.

Oh, yes they did, intentionally or unintentionally, Congress did, F.I.N.R.A. a big part of Congress' fiduciary problem. F.I.N.R.A. is where fiduciaries go when they want to get away with a financial crime. Lawyers? They have an even sweeter way of getting away from fiduciary fraud. Lawyers threaten a complainant with defamation litigation or have others make calls on the lawyers behalf, off the written record.

As with many industries, people have been forced to hyphenate careers. In the financial industry, a 401(k) financial consultant can also be cross licensed as a broker, a dealer, and investment advisor and a baker and a candlestickmaker, as the expression goes.

F.I.N.R.A., the only broker-dealer regulator that the S.E.C. approved, even though Congress provided for competition, structured a sweet set up that confuses a customer's legal complaint. F.I.N.R.A. has no oversight of Investment advisor complaints. That said F.I.N.R.A. boasts on its website to having 99.9% handling of investment client complaints in F.I.N.R.A.'s dispute resolution forum. There are over 70 F.I.N.R.A.'s dispute resolution forums around the country and, even, M.O.U.'s signed with Canada, Honk Kong, England and other countries.

A client who signs with an investment advisor is led to believe they are handling an investment advisor, not knowing their fiduciary will claim to be a broker and a client of a brokerage, hence, according to F.I.N.R.A. when legal push comes to financial shove.

It is a sweet deal for the financial consultant. The claim against the financial consultant is hid from public and law enforcement knowledge.

It is not a sweet deal for the client. Their claim against the financial consultant is hid from public and law enforcement knowledge where it could alert other harmed and potential clients of this bad fiduciaries crimes and alleged crimes.

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F.I.N.R.A. alleges that F.I.N.R.A. has no responsibility to confirming if a forced arbitration is in the correct forum. The correct forum for a complaint against an investment advisor is the courts or a J.A.M.S. or Fed Arb dispute resolution forum.

Congress in a strange moment created Brokercheck for F.I.N.R.A. to hide crimes behind. Congress did not require that Brokercheck state, in letters that should be large enough to be read by seeing impaired people, that F.I.N.R.A. is a 501(c)(6) business league non-profit that the I.R.S. requires to collect dues from the business league members. Congress does not require the F.I.N.R.A. broker check to state, in large letters on page 1, that the information is provided by the F.I.N.R.A. dues paying member and is not vetted out by F.I.N.R.A., that civil and other actions against and by the financial fiduciary and may not be truthful, factual or complete. Congress did not require the S.R.O. to require its 'member' to file all those relevant documents in to the public record for review. Those documents are not see in F.I.N.R.A. arbitration and mediations. F.I.N.R.A. case managers and arbitrators have a success rate of not compelling Discovery of the F.I.N.R.A. member being sued, while at the same time forcing financial and personal exposure of the investment client who thought they had fiduciary oversight, in to the F.I.N.R.A. record that is then shared in the financial network even with the firm or financial consultant the client was complaining against.

F.I.N.R.A., where fiduciaries run to for cover, is the Vegas of the financial world. What goes in to F.I.N.R.A. does not come out.

What good is the balance and check to fiduciary if the financial advisors history is hidden, if the voting record of the arbitrators and mediators is hidden, if the case decisions by arbitrators and mediators are not published. W.I.P.O., the world intellectual property organization, publishes its list of arbitrators, mediators and their decisions online. The S.E.C. publishes its proceedings online. Why doesn't Congress force the same of F.I.N.R.A. that is approved by the S.E.C., after all F.I.N.R.A. claims quasi government status at the same time alleging that F.I.N.R.A. is authorized by an act of Congress.

The point to take away is that with all the minutia that Congress is nitpicking on here, what needs to be addressed is how this rogue private entity is what the investment client is being misled in to. To hell with arguing *"fiduciary standard"* if where that argument takes place is in a forum that has been deceiving Congress for years, testifying before Congress, lobbying Congress, all in the name of investor protection.

Scenarios alluded to above are not hypothetical. I learned the hard way about being a trusting client entrusting my life savings to a fiduciary. I learned the hard way that fiduciary is a debate term for lawyers after monies are stolen. I learned the hard way that a client's loss, a client's suffering from being betrayed is not a thought of consideration in the process. I learned the hard way that as great a loss of funds stolen is how a client is left feeling- broken trying to figure out

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what they didn't see, what they should have asked, and how did this happen to me, what is wrong with me.

I learned the hard way that even if one asks all the right questions there is always one more question the client did not know to ask after all, F.I.N.R.A., S.I.P.C., N.A.S.A.A., P.I.A.B.A. even the S.E.C. give false sense of representation hence a misplaced sense of trust. Ask clients the meaning of the words a member of FINRA and SIPC on the financial statement form. Clients assume those words are a Good HouseKeeping Seal of Approval. No. I learned the hard way all those words mean are just that, they are a member. There is no intent the firm or financial consultant is honest.

I learned the hard way that F.I.N.R.A. does 'clean' up backgrounds of financial consultants to whom life savings are entrusted.

I learned the hard way that F.I.N.R.A. on the way out of a F.I.N.R.A. proceeding, if the investor wants to get pennies back on their lost dollars sought, seeks expungment of claims against a fiduciary financial consultant who is misled in to the F.I.N.R.A. D.R.S. process.

I learned the hard way that F.I.N.R.A. on the way in to a F.I.N.R.A. D.R.S. proceeding that F.I.N.R.A. requires a confidentiality agreement of the proceedings, a silencer with a penalty if the proceedings "confidence" is violated.

I learned the hard way that F.I.N.R.A. misleads the court of the legal oversight of F.I.N.R.A. Dispute Resolution. One would hope the Courts actually did diligence to read paperwork and do research as to case precedence or correctness. They do not, partially blamed on how burned the courts are with cases. Part of the problem is F.I.N.R.A. is writing its own rules. Let me explain. A recent appellee to the D.C. court showed the court that F.I.N.R.A. says that F.I.N.R.A. D.R.S. is compliant to the F.A.A., the Federal Arbitration Act. The Federal Arbitration Act states it is relevant to Maritime Law. The A.B.A. had not been asked the question before to think about it.

I learned the hard way to think about things like that. As shared with the A.B.A. and others, financial fiduciaries are licensed on state by state, hence should be adjudicated under State Law, under the U.C.C., the Universal Commercial Code that does provide for investment consultant disputes. Financial fiduciaries are not licensed federally.

I learned the hard way that F.I.N.R.A. has distorted Congress' intentions of the Investment Protector Act of 1933. Any and all D.R.S. that F.I.N.R.A. has overseen have hidden crimes by fiduciaries away from law enforcement, FINCEN and Congress.

Congress can get a grasp of those numbers. F.I.N.R.A. won't produce them. Some, not all, F.I.N.R.A. disciplinary actions are locatable here, *http://www.finra.org/industry/disciplinary-actions,* at least until as far back as 1996. The complaints that are expunged, going through the

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F.I.N.R.A. process or the ones that F.I.N.R.A. states happened by circumventing the F.I.N.R.A. process, without F.I.N.R.A. knowing, can still be found. There are ways.

Try looking up Bernard Madoff. Madoff was a fiduciary, too. F.I.N.R.A. stated in 2009 that F.I.N.R.A. had no idea of Madoff's crimes. Bernie said "they did." Mr. Madoff told the truth http://www.centerforcopyrightintegrity.com/congress-created-madoff.html *"They knew"* Madoff was selling No Product as far back as 1963.

Problem was and still is that Congress wrote the laws that makes this conversation over *"fiduciary"* moot. Congress set benchmarks of $25,000 and $100,000 of fines along with temporary disbarment for crimes you and I got to jail for, for crimes far greater than the cigarette selling that put Eric Garner *"I cant breathe"* in to the system. Mr. Garner was fingerprinted, had his mug shot taken, was locked up, lost his right to vote, had to check the box when he came out of prison then saw recidivism as his only option to making a living while Madoff and the others that F.I.N.R.A. did not turn in to law enforcement were recidivis, too, stealing from clients until they, too, like Madoff turned themselves in or like Wolf Of Wall Street got caught for something that led to their financial crimes being discovered.

The death of Eric Garner lies on Congress. Cops would rather go after Madoffs than Eric. Congress has a fiduciary to, acknowledging that telling the S.E.C. to send cases to the U.S. Attorney without understand the S.E.C. system is plain dumb.

The S.E.C. like Congress is neutered. Congress and the S.E.C. lack the power to lock thieving fiduciaries up for crimes perpetrated against trusting people. Congress needs cops.

Congress needs to understand the S.E.C. is run like a business. Meetings are held to discuss what case has potential to be sexy and look good in the public eye. Then of those cases, the S.E.C. attorneys are limited with what information they get access to, moreso, when the people that are wronged are under the misbelief that F.I.N.R.A. has weight behind a F.I.N.R.A. award that the Courts, blindly see as binding and authentic when it is not, harming persons that F.I.N.R.A. shut down. Congress needs to get a grasp on what is real in the world.

The legal fiduciary lacks too. One would think lawyers actually dug documents. They don't. Investigators do. Lawyers look at case precedence. As do judges. Lawyers, well, there is that breed that races cases around the country hoping some paper shifting gets a case settled, fast, before on to the next case. The fact is that despite F.I.N.R.A.s website stating lawyers must conform to local rule, F.I.N.R.A. has fanned that falsehood letting lawyers who are not licensed in the local jurisdiction the consumer case against the fiduciary has been assigned to commence interstate communication to argue the matter, possibly settle the matter, all the while not being licensed under local law.

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The greater tragedy is that most local bar associations, U.S. attorneys, city attorneys, law enforcement, legislators. etc who all have fiduciary to their residents have never heard of F.I.N.R.A.

The even greater tragedy is that across the country all local securities commissions are misled to believe that F.I.N.R.A. is government not a business league, a private non profit business, the *"New NASD Holding Co."* is how it is described in publicly filed papers.

The greatest tragedy is the team that wrote the Counts up against Madoff did not know of the priors that F.I.N.R.A. had in the F.I.N.R.A. record.

Congress needs to know the waste of the investment of time into parsing "fiduciary" before the crime has happened. Criminals always find, yet another way, to break the laws. Congress needs to invest time into mitigating harm to clients breached by a fiduciary. It is like getting robbed a second time when lawyers and others use the law to keep matters out of the Courts, fingering clients as the bad one, publicly shamed in records. I learned the hard way.

A breached person needs a simpler way to cut through the rabbit holes we are sent through, rules that cannot run more than x pages, rules that are written in simple plain English a 5th grader can read. That is what the fiduciary breacher counts on, the lawyer who wanted quick settlement counts on, the business league the breacher and the lawyer belong to. They count on the supposed safeguards like ethics committees to protect them to. Do you want to know the definition of an ethics committee? It is a .org, a (dot) org, a non profit most likely itself a business league that collects business from its members in order to subsist. The harmed investor/ 401K owner is not their concern nor allegiance.

The fiduciary that needs to be implemented here is not the definition of this word *"fiduciary"* applied only to 401K's but the interpretation of the word *"fiduciary"* as it needs to be reviewed- from the top, Congress, all the way down the food chain to the guy working the register at the corner market. The same fiduciary he owes to his customer is the fiduciary Congress owes to consumer, 401K customer or otherwise.

In a day of ICANN exploding TLD's across the global market, in these days that the internet is facilitating the online crimes the National Association of State Secretaries and the International Securities commission are warning of, abuses ie. .forex, .payday, maybe even .fiduciary, Congress has got to wake up to grasping the problem is not the words some vested lobbyist focused Congress in on. The problem is once the thievery is discovered, how the victim seeks justice. Do away with F.I.N.R.A. and write as the rule change what I tweet, LINKEDIN, and Facebook, people... *"If someone steals your wallet or car you call the cops, so why wouldn't you call the cops if someone (fiduciary) steals your hard earned savings retirement money."*

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I am the lady who crossed the political divide to protect others like me and Frank and Eli and Kevin and others daily increasing breached by Fiduciary list,
Carrie Devorah
The Investor Behind Bill H.R. 1098, the Investment Clients Protection Act of 2015

Thank you Congressman Keith Ellison, Thank you Senator Franken

CUNA
Credit Union National Association

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[illegible]

September 28, 2015

The Honorable Paul Ryan
U.S. House of Representatives
1233 Longworth House Office Building
Washington, D.C. 20515

The Honorable Peter Roskam
U.S. House of Representatives
2246 Rayburn House Office Building
Washington, DC 20024

The Honorable Sander Levin
U.S. House of Representatives
1236 Longworth House Office Building
Washington, DC 20515

The Honorable John Lewis
U.S. House of Representatives
343 Cannon House Office Building
Washington, DC 20515

Dear Chairmen Paul and Roskam and Ranking Members Levin and Lewis:

The Credit Union National Association (CUNA) applauds the House Ways and Means Oversight Subcommittee for holding a hearing to examine the Department of Labor's (DOL) proposed regulation defining a "fiduciary" of an employee benefit plan, which adds brokers and advisers providing advice to Individual Retirement Accounts (IRA) to the definition. CUNA represents America's credit unions and their more than 100 million members.

CUNA supports the broader goal of protecting investors and encouraging all advisors to act in the investor's best interest. After careful review, we believe the rule as proposed may cause more harm than good and leaves credit union members with fewer options and more confusion. As such, we urge Congress to consider how the DOL's proposed rule may affect a consumers' ability to participate in retirement and savings plans. We look forward to the Committees review of the rule as you explore the possible harmful impact the rule may have on the ability of low- and middle-income working American families to invest and save.

Even though in most instances compliance with the DOL's proposed rule should not sit at the credit union level, we have concerns this rule could impact credit unions and their members. Credit unions offering investment services have arrangements with third party brokers in which they clearly outline the duties and responsibilities of each party in the arrangement. The third party offering retirement or IRA services in most situations will be responsible for their own compliance with applicable laws and compliance standards because they sell their products directly and separately to members. However, under the DOL's proposed rule questions remain about whether the proposed rule could sweep in credit unions and their employees because of their interactions with these third parties. Such interactions may occur because credit unions are required to conduct due diligence to ensure any third party arrangement and practice has proper controls in place, and they must have reasonable belief that the third parties' practices are compliant. Due to the rules overly broad scope, we have significant concerns that credit unions could be included into some of the newly proposed requirements. One example of how credit unions could be affected by the rule is if the credit union and a broker dealer share employees.

This is concerning to us because the compliance burdens for those who will qualify as ERISA fiduciaries are significant, and small or medium size credit unions could be hesitant to engage in any activity that may require compliance with this complex and expansive proposed rule. This could preclude credit unions from offering investment services through a third party, which is not in the best interest of credit union members or middle-class families. We urge Congress to examine how the DOL can more narrowly tailor the definition of "investment advice" to ensure that credit union employees, who are only tangentially involved in providing investment services are not covered by the rule.

Dozens of other industries also share our concerns about the proposed rule. This is evident by the four days of hearings at the DOL, the volume of additional information and written testimony submitted after the regular comment period, and the concern other Congressional committees and Members of Congress have expressed. Despite commendable efforts by the DOL to create rules which will improve the consumer experience when investing, it is clear that the strong opposition, fears voiced, and the unanswered questions posed about the proposed rule must be more closely examined and addressed before the agency can move forward with a rulemaking. We appreciate the efforts by Congress and the Oversight Subcommittee to urge DOL to make important changes to its proposed rule before moving forward.

Discouraging Credit Unions from Offering Investment Services is Detrimental to Consumers

While the impact of this rule on financial institutions and their customers or members is only a small part of the debate over this rule, it is significant for the many Americans who look to these institutions for support in learning about retirement and savings options. We urge Congress to consider how credit unions and other financial institutions will be impacted by the rule.

CUNA is particularly concerned about the impact this proposed rule will have on credit unions because they often serve a different demographic than some of the conglomerate investment firms. When providing investment services to their members, credit unions aim to help American families of all means receive information about saving for retirement and planning for their future. While many large investment firms seek high net-worth clients, credit unions seek to provide services to their members in all financial situations to make it easier for these individuals to map out financial plans.

As member based institutions, credit unions strongly agree with the DOL that our members deserve the best possible service when seeking information about retirement plans or IRA distributions. Rules written by any regulatory agency focusing on proper retirement planning of consumers should encourage and promote retirement savings—rather than potentially impeding the ability of credit unions, or other financial institutions, to provide these products and services. As illustrated by hundreds of comments requesting a redraft of the proposed rule and the four days of contentious hearings at the DOL, the rule is full of complexities and unworkable solutions that must be resolved to assure that the very people this rule is intended to help are not inadvertently harmed.

As outlined in our attached comment letter, CUNA encouraged the DOL to examine how the following could negatively affect credit union members' access to retirement and other investment services:

- The overly broad consideration of what is considered "investment advice"
- The overly prescriptive requirements surrounding what constitutes compensation
- The problematic "sellers carve-out"
- How "the Best Interest Contract Exemption" will work at financial institutions.

Regulatory Overlap is Problematic for Credit Unions

The proposed rule creates regulatory overlap in its current form, which was even voiced by other regulators at both the Financial Industry Regulatory Authority (FINRA) and the Securities and Exchange Commission (SEC) in comment letters to the DOL. Credit unions are already supervised by the National Credit Union Administration and the Consumer Financial Protection Bureau if they have $10 billion or more in assets, and state-charted credit unions are regulated at the state level. Furthermore, FINRA and the SEC already require specific licenses and compliance with certain laws for registered brokers, insurance agents, and investment advisors in credit unions. Any additional oversight in this area is unnecessarily duplicative and could be burdensome to credit unions who are already facing a multitude of regulatory hurdles. CUNA believes H.R. 1090, the Retail Investor Protection Act, would be a step in the right direction in alleviating regulatory overlap to assure better collaboration with the SEC.

The responsibilities associated with being an ERISA fiduciary would require expensive and time-consuming compliance training for credit unions, during a time when they are facing an unprecedented number of regulatory burdens. We believe it is important that credit unions are able to offer a full range of products and services to their members, including products to help families save for retirement and other purposes, without being swept into a rule aimed at financial advisors. Any ambiguity and uncertainty in this area could cause financial institutions to exit or not join this market.

The reduction of any unnecessary regulatory hurdles, either intended or unintended, is important for the livelihood of credit unions. Thank you again for holding this hearing, and considering CUNA's concerns.

Sincerely,

Jim Nussle
President & CEO

Insured Retirement Institute

Testimony of Catherine Weatherford

President and CEO, Insured Retirement Institute

Hearing on "Department of Labor's Proposed Fiduciary Rule"

House Ways & Means Subcommittee on Oversight

U.S. House of Representatives

September 30, 2015

On behalf of the Insured Retirement Institute (IRI), I welcome the opportunity to submit written testimony to the members of the House Ways & Means Subcommittee on Oversight for the hearing titled "Department of Labor's Proposed Fiduciary Rule." We thank the subcommittee for examining the U.S. Department of Labor's (DOL's) proposed fiduciary rule and its consequences for retail investors and retirement savers, especially those who are young and just beginning to save for their retirement, as well as its potential impact on our nation's economy. In particular, we are concerned the DOL's proposal will limit consumers' choices and access to beneficial financial products such as annuities.

IRI is the only national trade association that represents the entire supply chain of the retirement income industry. IRI has more than 500 member companies, including major life insurance companies, broker-dealers, banks, and asset management companies. IRI member companies account for more than 95% of annuity assets in the United States, include the top 10 distributors of annuities ranked by assets under management, and are represented by more than 150,000 financial professionals serving over 22.5 million households in communities across the country. IRI and its members therefore represent not only their own views, but also those of their clients on Main Streets across America. As such, IRI is uniquely positioned to comment on the implications of the proposal for manufacturers, distributors and consumers of annuity products that provide guaranteed lifetime income.

As Americans are living longer and facing greater obstacles to saving for retirement, the role of guaranteed investment products in helping consumers achieve a financially secure retirement has never been more important. Annuities are the only financial products that guarantee lifetime income throughout retirement. Considering the retirement reality in America – defined by the unsure footing of Social Security and the near disappearance of pension plans – it is clear that Americans planning for retirement must have a second form of guaranteed retirement income.

IRI and our members support a best interest standard for financial professionals who provide personalized advice or recommendations to plans, plan participants and beneficiaries, and IRA holders. We believe the vast majority of financial professionals already act in their clients' best interest, and recent IRI research found that nearly all consumers agree. The proposal, however, would impose unworkable requirements that would significantly impair the ability of most Americans to prepare for a financially secure retirement. In this testimony, I will first discuss how the proposal could make it harder for Millennials to prepare for retirement, before describing the issues we have identified with the proposal more broadly and the changes we have requested that the DOL make to the proposal to address those issues.

<u>Impact of the DOL Proposal on Millennials</u>

While the proposal would harm all retirement savers, the public debate on this issue to date has been primarily focused on retirees and pre-retirees. We are also concerned, however, about the proposal's impact on Millennials, who are now the largest generation in the U.S. workforce. IRI and the Center for Generational Kinetics (CGK) released a new research report this week on the retirement outlook of the Millennial generation. The report is based on a study conducted in August 2015 through a survey of 1,110 Americans aged 18 to 65, with a 10 percent oversample of Millennials, ages 20 to 37. A copy of the research report has been submitted into the hearing record by Congressman Jason Smith (R-Mo.).

The study debunks the myth that Millennials are not thinking about retirement, but also confirms the perception that Millennials are not doing enough to prepare for a financially secure retirement. The study found that, while 68 percent of Millennials say they are saving for retirement and 48 percent have a 401(k)-type retirement plan, only 29 percent are actively planning for retirement. Debt reduction was the most frequently cited step Millennials are taking to prepare for retirement, with 77 percent of Millennials trying to reduce their debt. While this is a positive step, Millennials clearly need help right-setting expectations, determining goals, and building financial plans. Unfortunately, by effectively banning the commission-based brokerage model that currently serves Americans with small to moderate savings, the DOL proposal will deprive Millennials of access to this much-needed and much-wanted financial assistance.

The study also showed that Millennials want this help, with 62 percent expressing a desire to have an advisor to walk them through every step of the retirement planning process, 87 percent said it is important that an advisor be willing to meet them in person, and only 19 percent are likely to use a robo-advisor, which Labor Secretary Thomas Perez has often touted as an alternative to human advisors. Based on this study, it is clear that Millennials – arguably the generation most comfortable with new technology – recognize and value the personal attention only a human advisor can provide, and are not prepared to entrust their financial planning needs to a website.

Other key findings from the report include the following:

- More than a quarter of Millennials are banking on either winning the lottery or receiving gifted money to fund their retirement years – 15 percent and 11 percent, respectively.

- When it comes to expenditures in retirement, 70 percent of Millennials think they will spend less than $36,000 per year – 30 percent less than the current national average, $46,757, for those aged 65 to 74.

- The majority of Millennials, 56 percent, believe they will not be able to retire when they want to, with half this group thinking they will never be able to fully retire.

- About half of Millennials, 48 percent, would pick Warren Buffett to be their financial advisor, and 32 percent would choose Oprah Winfrey. By contrast, 77 percent of

Boomers selected Buffett and 15 percent picked Winfrey.

- Half of Millennials believe they will be financially supporting their parents as they age.
- Millennials are more likely than Boomers and Generation Xers to cut off their children financially at age 18.

IRI's Requested Changes to the Proposal

As noted above, IRI and its members believe the proposal will deprive consumers of access to valuable financial assistance and guaranteed lifetime income products designed to help them achieve their goals. We explained these concerns in discussions with the DOL and in our public comments and testimony[1], and provided DOL with specific language to address these concerns and make the proposal workable. The following is an overview of IRI's requested changes:

Changes to Definition of "Fiduciary" and Carve-Outs

1. The definition of "fiduciary" should apply only when there is a "call to action" by the adviser, consistent with the approach taken under FINRA rules.
2. New carve-outs should be provided for (i) recommendations where there can be no reasonable expectation that the adviser is providing unbiased and impartial advice; and (ii) companies that issue annuities, insurance or investment products but do not provide investment advice about their products or represent themselves as fiduciaries.
3. The "seller's exception" should be available for recommendations to plans of all sizes, as well as individual plan participants, beneficiaries and IRA owners.
4. The platform provider carve-out should apply to IRAs and annuities.
5. The investment education carve-out should permit advisers to identify specific investment options in connection with asset allocation models.

Changes to Best Interest Contract Exemption and PTE 84-24

1. Sales of variable annuities to IRAs should be restored to the scope of the existing prohibited transaction exemption (PTE) for insurance and annuity products (known as PTE 84-24).

[1] IRI submitted written comments to the DOL on July 21 and September 24, provided oral testimony during the DOL's public hearing on the proposal on August 10 and August 11, submitted written testimony in connection with the DOL's public hearing on August 17, and submitted written testimony for the record for a joint hearing held by two subcommittees of the House Financial Services Committee on September 10.

2. "Best Interest" should be defined, under both the proposed "Best Interest Contract" exemption (the BIC exemption) and PTE 84-24, to make clear that advisers and firms must always put their clients' interests first, but would not be required to completely disregard their own legitimate business interests and would be permitted to continue receiving commissions.

3. Commission-based compensation and other standard and customary compensation practices should be expressly permitted under the BIC exemption.

4. "Insurance Commission" should be more broadly defined, under both the BIC exemption and PTE 84-24, to ensure that advisers are not inadvertently prohibited from receiving customary employee benefits.

5. Consistent with the approach taken in PTE 84-24, the "reasonable compensation" standard under the BIC exemption should consider both the value of services and the costs of the guarantees, benefits and other features provided by the product.

6. The "best interest" and "reasonable compensation" provisions would provide effective consumer protection, the warranties required under the BIC exemption, including the warranty limiting the use of incentives and differential compensation, serve no useful consumer purpose but create significant litigation risk for advisers and firms, and should therefore be removed.

7. Selling proprietary or a limited range of products should be expressly permitted under the BIC exemption. The additional conditions included in the proposal for advisers who sell proprietary or a limited range of products would significantly impair the viability of this valuable business model but provide no additional consumer protection, and should therefore be removed.

8. The exceedingly burdensome and expensive point of sale, website and annual disclosure requirements should be replaced with disclosure regimes already in place under existing DOL, SEC and state insurance rules.

9. The BIC exemption should not require that clients sign a "best interest contract" so long as the adviser and the firm make a legally binding commitment to act in their clients' best interest before executing any recommended transaction.

10. The BIC exemption should include a mechanism to enable fiduciaries to correct inadvertent failures to comply with the conditions of the exemption.

11. All of the conditions applicable to variable annuities under the BIC exemption should be consolidated in a separate section of the exemption.

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12. The proposal should provide meaningful grandfathering relief for (a) "sell" or "hold" recommendations and owner-initiated transactions with respect to annuities issued under current rules, and (b) transactions based on recommendations made prior to the effective date of the final rule.

Administrative and Procedural Issues

1. The proposed eight-month implementation period should be extended to three years to provide adequate time to develop the necessary compliance processes.

2. The DOL should revise its Regulatory Impact Analysis to include consideration of (a) the proposal's impact on the variable annuity industry and its customers, and (b) the impact on the capital markets and the potential systemic risk to the national economy if the proposal results in an overconcentration of retirement savings in passively managed index funds.

3. The DOL should publish a revised version of the proposal for public comment before finalizing the rule to ensure its changes sufficiently address the legitimate concerns raised by IRI and others.

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Thank you for the opportunity to share our views and new research. IRI would welcome the opportunity to provide any additional information, assistance or to further discuss these issues with members of the subcommittee.

NFIB
The Voice of Small Business.

September 30, 2015

Chairman Roskam, Ranking Member Lewis, and members of the Ways and Means Subcommittee on Oversight, thank you for the opportunity to provide a statement for the record on the hearing on the Department of Labor's Proposed Fiduciary Rule. The National Federation of Independent Business (NFIB) is the nation's leading small-business advocacy organization, representing small-business owners across the country.

On July 21, 2015, NFIB submitted comments to the Employee Benefits Security Administration (EBSA) in response to the notice of proposed rulemaking for the "Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice."

NFIB believes that the proposed fiduciary rule will have a substantial impact on small businesses. Our concerns are outlined in the attached comment letter, which we are submitting for the record.

NFIB
The Voice of Small Business.

July 21, 2015

Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

RE: RIN 1210–AB32 – "Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice" and associated proposed exemptions

These comments are submitted for the record to the Employee Benefits Security Administration (EBSA) on behalf of the National Federation of Independent Business (NFIB) in response to the notice of proposed rulemaking for the "Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice" and associated proposed exemptions (proposed rules) published in the April 20, 2015 edition of the *Federal Register*.

NFIB is the nation's leading small business advocacy association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents about 350,000 independent business owners who are located throughout the United States.

NFIB believes that these proposals are likely to have a substantial impact on small businesses. We are concerned that the changes to the definition of fiduciary could substantially transform the way in which financial service providers deliver services to small businesses and their employees. This could result in providers no longer being able to offer these services to small businesses in an affordable manner. Consequently, it is the employees of these small businesses – the very individuals these rules purport to benefit – that stand to lose access to retirement benefits. In addition, if small businesses cannot offer retirement benefits they will be less competitive with larger businesses, thus hurting innovation and job opportunities for everyone.

Why small businesses need access to affordable retirement plans

NFIB believes that simplification of the regulations and reduction in the costs associated with retirement plans are important to American small business. For small businesses, employee benefit decisions are based on two principles: 1) what can the business afford, and 2) what do the employees want. The point is simple: employee benefits are not free.

If the business can afford the expense of a retirement plan, small business owners have a variety of reasons to offer one. These reasons include: providing their employees with an opportunity to save for retirement, attracting quality employees, instilling worker loyalty and encouragement to stay with the business, rewarding successful employees, and taking advantage of the tax deductions retirement plans offer.

For a small business owner considering whether to offer a retirement plan, the primary threshold that must be crossed is whether or not the business can afford the administrative costs of the plan. And for small businesses, the administrative and start-up costs of a retirement plan are disproportionately higher than they are for larger businesses.

A 2005 study from the U.S. Small Business Administration's Office of Advocacy (Office of Advocacy) found that the administrative cost per participant in retirement plans increased considerably for smaller businesses when compared to their larger counterparts[i]. For example, for companies with more than 500 employees that offered defined contribution plans, the administrative cost of offering a retirement plan ranged from approximately $30 to $50 per participant. However, for companies with fewer than 50 employees, the administrative costs ranged from $106 to $439. As the study notes:

> "There appears to be a rough minimum of administrative costs for [retirement] plans. The average total payment of administrative costs is nearly the same for companies with five and fewer employees as it is for companies with 6-10 employees and is only slightly higher for companies with up to 50 employees."

These higher relative administrative costs are a significant contributing factor in fewer small businesses offering retirement plans. According to the most recent data available from the NFIB Research Foundation, 27 percent of small businesses offer retirement plans[ii]. This is consistent with the offer rate identified by the Office of Advocacy[iii]. In contrast, for larger firms, only 26 percent of workers do *not* report having a retirement plan available to them[iv].

For small employers seeking to attract talented employees to work at their companies, this inherent disparity places small business owners at a competitive disadvantage relative to their larger competitors. Historically, Congress sought to address these disparities in part by creating the Simplified Employee Pension Individual Retirement Accounts (SEP IRAs) and Savings Incentive Match Plan for Employees (SIMPLE) IRAs. NFIB supported the creation of these types of retirement plans because they offer a simpler and more affordable alternative to other retirement plans, such as 401(k) plans, which require additional administrative requirements and regulatory complexity.

These plans are popular with small businesses that offer retirement benefits. Subsequent questions from the NFIB Research Foundation survey found that 40 percent of those with plans offered 401(k) plans, while 41 percent offered either a SIMPLE or SEP IRA (30 percent and 11 percent, respectively).

With about as many small businesses offering SIMPLE or SEP IRAs as 401(k) plans, any changes to the regulatory code that make SIMPLE or SEP IRAs more difficult and costly to offer makes it increasingly likely that these small businesses will drop retirement benefits altogether – thus making it more difficult for employees to save for retirement and more difficult for small businesses to attract the skilled, talented employees they need to grow.

Small business owners wear many hats at their business. According to an *NFIB National Small Business Poll on Business Structure*, 87.5 percent of all small employers do not have at least one employee (excluding the owner) whose only job is personnel or human resources[v], and according to an *NFIB National Small Business Poll on Time Allocation*, 68 percent do not employ a chief financial officer, or the equivalent, someone largely responsible for handling the firm's budget and/or books[vi]. A small business owner's time is his or her most valuable resource, and every additional hour that a small business owner has to spend complying with new benefit regulations is one hour less that they have to spend on growing their business.

NFIB believes the proposed rules will add cost and burden to these plans, for the reasons set forth below.

Proposed rules will limit the ability of small businesses to offer retirement plans

The EBSA's goal with the proposed rules is laudable. The agency seeks to reduce conflicts of interest for financial service providers that lead them to offer products with higher fees that may not be the best fit for the client. As part of this effort, the proposed rules include a revised definition of "fiduciary" status, which triggers certain prohibited transactions. In addition, the proposed rules expand fiduciary status regarding numerous products beyond traditional 401(k) plans. According to the *Federal Register* notice, "[i]f adopted, the proposal would treat persons who provide investment advice or recommendations to an employee benefit plan, plan fiduciary, plan participant or beneficiary, IRA, or IRA owner as fiduciaries under ERISA and the Code in a wider array of advice relationships than the existing ERISA and Code regulations, which would be replaced."

While 401(k) plans are the most popular among small businesses that offer retirement plans, many more find them too expensive and burdensome to offer. Therefore, SIMPLE and SEP IRAs present a more affordable and easier alternative. It is critical that EBSA preserves the viability of these lower cost options. However, this expansive proposal will likely lead to SIMPLE and SEP IRAs being more costly to offer, either in terms of the owner spending more money on setting up the benefit, or in the amount of time a small business owner will spend on setting up the benefit. It is likely that a small business chose to offer a retirement plan because of the lower effort levels required to provide SIMPLE and SEP IRAs. Making these plans more costly to offer will lead to small businesses dropping plans altogether, rather than continuing to use IRAs or converting to 401(k) plans.

Additionally, the proposed rules would make these IRAs more costly for financial professionals to provide for small businesses and increases the likelihood that these providers avoid the small business market. The proposed rules would effectively prohibit providers from offering products to small businesses on which they earn variable compensation or sell products with which they have an affiliation, which is common in the SIMPLE and SEP IRA markets. In addition, even offering a small business a general list of investment products available would be considered by EBSA to be beyond basic information and instead treated as a sales pitch, which would be considered a prohibited activity.

Financial service providers may get around some of these prohibitions with the proposed "best interest contract exemption." However, there are two problems with this proposal. First, it is not clear if this exemption actually applies to SIMPLE and SEP IRAs, or if they only apply to individual IRAs. Second, the requirements of the exemption still impose considerable costs on the broker, which acts as a disincentive for brokers to offer services to small businesses. Accordingly, we have heard from large and small providers alike, including NFIB members, that the exemption is generally unworkable.

This situation is made worse by the "carve out" available to those selling plans to businesses with 100 or more participants. Providers are not prohibited from offering products to these larger plans. The reason is because EBSA believes that larger plans have more sophisticated benefits personnel and can therefore distinguish between general information and a sales pitch. Because smaller plans cannot make that distinction – in EBSA's opinion – small businesses cannot benefit from the exemption. This makes it all the more likely providers will not bother to offer services to small businesses.

In addition to the challenges the proposed rules present to SIMPLE and SEP IRAs, 401(k) plans will also be affected because of the expansion of activities that will now be considered fiduciary in nature, and accordingly, prohibited if fees are paid to providers based on which products are purchased. In the preponderance of cases, the amount of money made by the provider varies depending on what options a small business owner chooses.

Under the proposed rules, if a provider were contacted by a small business owner about potentially setting up a 401(k) or IRA plan for employees, that provider would not even be able to identify a list of a dozen or so investment options that are typical for the industry that small business is in. This is because the proposed rules treat this activity as actual investment advice rather than education.

The circumstance presented above leaves the small business owner in an unpleasant situation. He or she must choose one of two bad options. The first is that the owner would have to select the investment options him or herself. Not only is the owner likely not expert enough to do this well, but by doing so he or she takes on additional liability. ERISA holds fiduciaries to an expert standard, and if he or she is not an expert, then he or she must seek help from one. This leads to the second poor option, which is to search for and retain a qualified independent third party expert to do the selection for a fee.

Neither of these options would be viable for many small businesses. Therefore, the proposed rules would make it exceedingly likely that numerous small companies would forego offering a retirement plan altogether, rather than subject their business to the expensive, complicated, and stressful elements of offering a retirement plan.

The EBSA should not be taking action that reduces the number of small businesses that will be able to offer retirement benefits. According to the Office of Advocacy, small businesses employ about half of all of U.S. private sector employees[vii]. Restricting the ability of these employers to offer a plan to employees would mean large numbers of employees would no longer have access to a retirement plan at work.

Proposed rules are an example of the need for small business regulatory reform

NFIB believes that these proposed rules demonstrate the need to reform the Regulatory Flexibility Act and its amending laws. Currently, agencies are required to perform an initial regulatory flexibility analysis prior to proposing a rule that will have a significant economic impact on a substantial number of small entities. While these analyses are helpful for agencies to realize the cost and impact a proposed rule will have on small business, agencies would get additional benefit from convening a Small Business Advocacy Review panel for rules of significant impact. These panels allow an agency to walk through a potential proposal with small business owners, either in person or via telephone, and receive feedback and other input from those who will be directly impacted by the regulation. These panels are currently required for the Environmental Protection Agency, the Occupational Safety and Health Administration, and the Consumer Financial Protection Bureau. NFIB believes all agencies – in particular the entire Department of Labor – would achieve better regulatory outcomes if required to go through such a procedure.

In this case, EBSA would have benefitted from asking small businesses that offer, or would like to offer, retirement plans how these proposed rules would impact their ability to do so. Perhaps if this was the case, the agency would have crafted proposed rules that better achieve the agency's goal of protecting investors – rather than create regulatory hurdles that will likely reduce the number of small business employees that have access to a retirement plan.

Conclusion

NFIB believes that these proposals are likely to have a substantial impact on small businesses. We are concerned that the changes to the definition of fiduciary could substantially transform the way in which financial service providers deliver services to small businesses and their employees. The result is likely to be that these advisors and providers are no longer able to offer these services to small businesses in an affordable manner. Consequently, it is the employees of these small businesses – the very individuals these rules purport to benefit – that stand to lose access to retirement benefits. In addition, if small businesses cannot offer retirement benefits they will be less competitive with larger businesses, thus hurting innovation and job opportunities for everyone.

NFIB appreciates the opportunity to comment on the proposed rules. Should EBSA require additional information, please contact NFIB's senior manager of regulatory policy, Dan Bosch, at 202-314-2052; or senior manager of legislative affairs, Matt Turkstra, at 202-314-2034.

Sincerely,

Amanda Austin

Amanda Austin
Vice President, Public Policy
NFIB

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[i] Joel Popkin and Company, *Cost of Employee Benefits in Small and Large Businesses*, 2005, SBA Office of Advocacy.
[ii] Dennis, William J., Jr. *NFIB National Small Business Poll: Payroll*. 2006. NFIB Research Foundation.
[iii] Kobe, Kathryn. *Small Business Retirement Plan Availability and Worker Participation*. 2009. SBA Office of Advocacy.
[iv] *Ibid.*
[v] Dennis, William J., Jr. *NFIB National Small Business Poll: Business Structure*. 2004. NFIB Research Foundation.
[vi] Dennis, William J., Jr. *NFIB National Small Business Poll: Time Allocation*. 2012. NFIB Research Foundation.
[vii] https://www.sba.gov/sites/default/files/sbfaq.pdf

ACLI
Financial Security...for Life

Statement for the Record
Committee on Ways and Means
Subcommittee on Oversight
Hearing on "the Department of Labor's Proposed Fiduciary Rule."

September 30, 2015

The American Council of Life Insurers (ACLI) is pleased to submit this statement for the hearing record regarding the Department of Labor's (DOL) fiduciary rulemaking efforts. We thank Subcommittee Chairman Peter Roskam and Ranking Member John Lewis for holding this important hearing.

On behalf of the U.S. life insurance industry, we share the President's view that "retirement advisers should put the best interests of their clients above their own financial interests." In pursuit of this objective, however, the DOL has proposed a rule that will restrict activities that encourage low-to moderate-income Americans to save, stifle the formation of small business workplace benefit plans, and won't assist savers and retirees with securing guaranteed lifetime income throughout retirement.

The ACLI is a Washington, D.C.- based trade association with more than 300 legal reserve life insurer and fraternal benefit society member companies operating in the United States. Its members represent more than 90 percent of the assets and premiums of the U.S. life insurance and annuity industry. In addition to life insurance, annuities, long-term care, and disability income insurance, ACLI member companies offer insurance contracts and investment products and services to employment-based retirement plans including defined benefit pension plans, 401(k), SIMPLE, SEP, 403(b), and 457(b) plans and to individuals through individual retirement accounts (IRAs) and annuities. Our members also are employer sponsors of retirement plans for their employees. As service and product providers, as well as employer sponsors, life insurers believe that savings for retirement, managing assets throughout retirement, and utilizing financial protection products are all critical to Americans' retirement income and financial security.

In September 2011, the DOL withdrew its first proposal to allow additional time for stakeholder input. Almost 200 House and Senate bipartisan Members of Congress had urged the DOL to coordinate rulemaking with the Securities and Exchange Commission (SEC), provide a robust economic analysis, and provide workable prohibited transaction exemptions (PTEs). On April 20th, the DOL proposed a new rule. Unfortunately, this newly proposed rule goes even further than the initial proposal and is supported by an inadequate and flawed economic analysis. The new proposal severely narrows the scope of existing PTEs that have provided workers with access to a retirement savings account and invaluable retirement planning assistance. It proposes a new PTE that, absent significant changes, is not workable.

ACLI submitted a comment letter to the DOL on July 21, 2015, in time for the first comment period. At the same time, over 2,000 other responses were received by the Department. ACLI had also participated in the recent public hearings held by DOL on the proposal in August and reiterated these concerns. On September 24th, ACLI submitted a supplemental letter, which responds to a number of questions our representatives received during the public hearing.

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As leading providers in the small plan formation marketplace, life insurers are concerned that this proposal would impede the important policy goal of expanding small plan coverage. The proposal negatively impacts small plan formation by restricting sales activities that encourage small business owners (with 100 employees or fewer) to start, maintain, or improve their employee benefit plans. The DOL has limited the "sales exception" to exempt certain large plans, while impeding the sales of products and services to small businesses. According to the U.S. Chamber of Commerce, 99% of U.S. employers are small businesses, and they produce 63% of new private sector jobs. The proposal would adversely affect how small businesses can offer 401(k)s and IRAs to their employees – impacting millions of Americans' retirement security. Growing stress on government programs adds to the need for greater incentives for these small businesses to start and maintain retirement plans—not new barriers.

The proposal also would place limits on education activities designed to assist savers with asset allocation and retirement planning. It treats educational materials as "recommendations" if they include references to specific investment products, investment alternatives, or distribution options – including annuities available under a plan or IRA.

Finally, the proposal would likely result in fewer commission-based services in the marketplace, leaving only fee-based and managed account services. Many low and middle income savers access education and information on ways to save for retirement and manage income in retirement through transactional, commission-based services. While fee-based and managed account services may make sense for upper income investors, such services may not make sense for buy and hold investors or those seeking information, education, or advice regarding guaranteed lifetime income through annuities. The DOL claims to provide for commission services through the proposal's "Best Interest Contract Exemption." Unfortunately, the exemption provides no clear path to compliance and would increase legal exposure, the potential for class action lawsuits, and excise taxes. This risk will add to the cost or, more likely, limit the availability of transactional commission-based services.

ACLI would like to thank the Members of the Committee for sharing their concerns about this proposal with the DOL and hope that we can all work together to ensure a durable rule that will not negatively impact individuals, plan formation or the current marketplace for investment education and advice. ACLI would also like to thank members of this Subcommittee, as well as members of the full Committee, that have signed onto letters or otherwise engaged the DOL with regard to stakeholders concerns about the complexities of the proposal . Specifically, we would like to thank Representatives Sam Johnson (R-TX), Kevin Brady (R-TX), Devin Nunes (R-CA), Pat Tiberi (R-OH), Dave Reichert (R-WA), Charles Boustany (R-LA), Peter Roskam (R-IL), Lynn Jenkins (R-KS), Erik Paulsen (R-MN), Kenny Marchant (R-TX), Diane Black (R-TN), Mike Kelly (R-PA), Jim Renacci (R-OH), Pat Meehan (R-PA), Kristi Noem (R-SD), Jason Smith (R-MO), Bod Dold (R-IL), Charles Rangel (D-NY), Richard Neal (D-MA), Mike Thompson (D-CA), John Larson (D-CT), Earl Blumenauer (D-OR), Ron Kind (D-WI), Bill Pascrell (D-NJ), Joseph Crowley (D-NY) and Linda Sanchez (D-CA).

Life insurers are at the forefront of helping people save for retirements that may last decades and providing guaranteed lifetime income that supplements Social Security. Many people first learn of the benefits of annuities and other guaranteed lifetime income products from a life insurance agent or broker. Rollovers provide retirees a way to ensure guaranteed lifetime income with their retirement savings. Unfortunately, today, too few defined contribution plans offer retiring workers an annuity option. We appreciate and support the Administration's initiative that began in 2009 to highlight the importance of guaranteed lifetime income and address regulatory barriers that prevent greater access to lifetime income products for workers.

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Let's continue to work together to expand access to plans, increase retirement savings and education, and facilitate guaranteed lifetime income. The Administration should take a common sense and fair approach, make the substantive changes it claims it will, then issue a proposal that the public can review and comment on before issuing a final regulation. Changes are sorely needed to avoid leaving low- and moderate-income Americans without the education and the advice they want and need. We urge the Administration and Congress to support the following principles to achieve a workable rule:

- A broadly applicable best interest standard based on the DOL's proposal, under which advice provided by financial professionals regarding investments, distributions, and rollovers would be required to be in the best interest of their ERISA plan and IRA customers.

- A workable prohibited transaction exemption under which financial professionals would be permitted to provide investment, distribution, and rollover assistance as long as the assistance is in their customer's best interest and the financial professional's financial incentives are fully disclosed.

- A seller's exception based on the DOL's 2010 proposal under which financial professionals would not be considered fiduciaries if they make it clear that they are selling products or services and not advising an investor.

- A new rule that preserves the current-law rules regarding investment education and, as under the current DOL proposal, extends the education rules to education provided to plan sponsors and IRA owners, and to education regarding distributions and rollovers. Unlike the 2010 DOL proposal, the 2015 DOL proposal would substantially restrict the types of investment education that can be provided without triggering potential fiduciary liability.

We hope to be a partner to the Administration and Congress as we all work toward a common goal—providing financial security and peace of mind for American families.

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