AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

PRINCIPLES FOR ENSURING RETIREMENT ADVICE SERVES THE BEST INTERESTS OF WORKING FAMILIES AND RETIREES

HEARING

BEFORE THE

SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS

COMMITTEE ON EDUCATION AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

HEARING HELD IN WASHINGTON, DC, DECEMBER 2, 2015

Serial No. 114–35

Printed for the use of the Committee on Education and the Workforce

Available via the World Wide Web:
www.gpo.gov/fdsys/browse/committee.action?chamber=house&committee=education
or
Committee address: *http://edworkforce.house.gov*

U.S. GOVERNMENT PUBLISHING OFFICE

97–711 PDF WASHINGTON : 2016

For sale by the Superintendent of Documents, U.S. Government Publishing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

COMMITTEE ON EDUCATION AND THE WORKFORCE

JOHN KLINE, Minnesota, *Chairman*

Joe Wilson, South Carolina
Virginia Foxx, North Carolina
Duncan Hunter, California
David P. Roe, Tennessee
Glenn Thompson, Pennsylvania
Tim Walberg, Michigan
Matt Salmon, Arizona
Brett Guthrie, Kentucky
Todd Rokita, Indiana
Lou Barletta, Pennsylvania
Joseph J. Heck, Nevada
Luke Messer, Indiana
Bradley Byrne, Alabama
David Brat, Virginia
Buddy Carter, Georgia
Michael D. Bishop, Michigan
Glenn Grothman, Wisconsin
Steve Russell, Oklahoma
Carlos Curbelo, Florida
Elise Stefanik, New York
Rick Allen, Georgia

Robert C. "Bobby" Scott, Virginia
Ranking Member
Rubén Hinojosa, Texas
Susan A. Davis, California
Raúl M. Grijalva, Arizona
Joe Courtney, Connecticut
Marcia L. Fudge, Ohio
Jared Polis, Colorado
Gregorio Kilili Camacho Sablan, Northern Mariana Islands
Frederica S. Wilson, Florida
Suzanne Bonamici, Oregon
Mark Pocan, Wisconsin
Mark Takano, California
Hakeem S. Jeffries, New York
Katherine M. Clark, Massachusetts
Alma S. Adams, North Carolina
Mark DeSaulnier, California

Juliane Sullivan, *Staff Director*
Denise Forte, *Minority Staff Director*

SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS

DAVID P. ROE, Tennessee, *Chairman*

Joe Wilson, South Carolina
Virginia Foxx, North Carolina
Tim Walberg, Michigan
Matt Salmon, Arizona
Brett Guthrie, Kentucky
Lou Barletta, Pennsylvania
Joseph J. Heck, Nevada
Luke Messer, Indiana
Bradley Byrne, Alabama
Buddy Carter, Georgia
Glenn Grothman, Wisconsin
Rick Allen, Georgia

Jared Polis, Colorado,
Ranking Member
Joe Courtney, Connecticut
Mark Pocan, Wisconsin
Rubén Hinojosa, Texas
Gregorio Kilili Camacho Sablan, Northern Mariana Islands
Frederica S. Wilson, Florida
Suzanne Bonamici, Oregon
Mark Takano, California
Hakeem S. Jeffries, New York

C O N T E N T S

PRINCIPLES FOR ENSURING RETIREMENT ADVICE SERVES THE BEST INTERESTS OF WORKING FAMILIES AND RETIREES

Wednesday, December 2, 2015
U.S. House of Representatives
Committee on Education and the Workforce
Subcommittee on Health, Employment, Labor, and Pensions
Washington, D.C.

The Subcommittee met, pursuant to call, at 10:00 a.m., in room 2261, Rayburn House Office Building. Hon. David P. Roe [Chairman of the Subcommittee] presiding.

Present: Representatives Roe, Wilson of South Carolina, Foxx, Walberg, Guthrie, Heck, Messer, Carter, Grothman, Allen, Polis, Courtney, Pocan, Hinojosa, Sablan, Wilson of Florida, Bonamici, and Takano.

Also present: Representatives Kline and Scott.

Staff Present: Andrew Banducci, Workforce Policy Counsel; Janelle Belland, Coalitions and Members Services Coordinator; Ed Gilroy, Director of Workforce Policy; Jessica Goodman, Legislative Assistant; Callie Harman, Legislative Assistant; Tyler Hernandez, Press Secretary; Nancy Locke, Chief Clerk; Michelle Neblett, Professional Staff Member; Brian Newell, Communications Director; Krisann Pearce, General Counsel; Alissa Strawcutter, Deputy Clerk; Juliane Sullivan, Staff Director; Olivia Voslow, Staff Assistant; Tylease Alli, Minority Clerk/Intern and Fellow Coordinator; Denise Forte, Minority Staff Director; Christine Godinez, Minority Staff Assistant; Carolyn Hughes, Minority Senior Labor Policy Advisor; Brian Kennedy, Minority General Counsel; Kevin McDermott, Minority Senior Labor Policy Advisor; Amy Peake, Minority Labor Policy Advisor; Saloni Sharma, Minority Press Assistant, Arika Trim, Minority Press Secretary; and Elizabeth Watson, Minority Director of Labor Policy.

Chairman ROE. A quorum being present, the Subcommittee on Health, Employment, Labor, and Pensions will come to order. Good morning, everyone, and welcome to today's hearing.

Retirement security is something many Americans work hard to achieve, but doing so can be very challenging. While many individuals understand the need to plan for retirement, they do not necessarily know the best way to do so.

That is why many workers rely on financial advisors to help them build a foundation for a secure retirement, and why too many others simply retire without the resources they need to remain financially stable.

Men and women who have worked hard all their lives want to enjoy their retirement, spending time with their grandchildren, taking up a new hobby, or finally getting through the to-do list they did not have the time to tackle before, like my garage. They do not want to worry about making ends meet or leaving their loved ones with a significant financial burden.

As policy makers, we should be doing everything we can to ensure workers are able to effectively plan for life after leaving the workforce. Unfortunately, we are here today because a proposal from the Department of Labor is threatening to make it harder for workers to do just that.

The administration has said this proposed rule, known as the "fiduciary rule," will require retirement advisors to put the best interests of their clients above their own financial interests. That, of course, is an admirable goal and one we agree is worth pursuing.

Financial advisors should act in their clients' best interests, and Republicans have long said we are open to modernizing current rules in a way that provides more protections to those seeking retirement advice.

However, as witnesses explained at a committee hearing this summer, the Department's rule as proposed will impose on financial advisors a host of costly new mandates and burdensome regulations that will have far reaching consequences for those most in need of assistance, and as with most well intended Big Government schemes, it is the people who need help who are hurt the most.

Many low- and middle-income families will lose access to some of the most basic retirement advice. These individuals, who already have fewer resources to invest, will no longer be able to seek guidance from trusted financial advisors and could be forced to pay exorbitant fees or fend for themselves online.

Additionally, small business owners will be denied assistance in choosing the best investment options for their employees, leaving many small businesses unable to offer any retirement plan at all.

The proposal is so extreme and unworkable that it is drawing serious concerns from both sides of the aisle. A significant number of Democratic policy makers in both the House and the Senate have written to the Department about the proposed rule, calling its anticipated effects "troubling" and urging the Department to "seek a balanced approach."

This committee sent a letter with a similar request asking for the withdrawal of the proposal and encouraging the Department to work with Congress on a more responsible approach.

Now if this all sounds familiar, there is a good reason. We have been through it before. Nearly five years ago, the Department pursued a similar regulatory proposal, and similar bipartisan concerns were raised.

The difference is the last time around, the Department listened to those concerns, withdrew its proposal, and went back to the drawing board to develop a new, albeit similarly flawed, rule. This time, the Department seems determined to ignore legitimate bipartisan concerns and force its misguided rule on the American people.

That is why I am working along with a number of my Republican and Democrat colleagues on this committee and the Ways and Means Committee to develop a legislative solution that will accomplish what the Department of Labor has failed to do.

Our proposal will strengthen retirement security, but unlike the Department's approach, it will do so without hurting working families and small businesses.

To guide this effort, we developed a set of important principles that our bipartisan solution will reflect, such as protecting access to the retirement advice workers, retirees and small business owners need, and ensuring retirement advisors serve their clients' best interests.

Let me repeat that, their clients' best interests. We believe that financial advisors should look out for their clients' best interests, but we also believe the rules governing financial advice should do no harm to those saving for retirement.

Today's hearing is an opportunity to further explore these principles, to hear what our witnesses believe a workable best interest standard looks like, and to continue to work to introduce a responsible legislative proposal that will help individuals save for their retirement.

I look forward to our discussion and to the work ahead.

With that, I will now recognize the Ranking Member of the Subcommittee, Congressman Polis, for his opening remarks.

[The information follows:]

Prepared Statement of Hon. David P. Roe, Chairman, Subcommittee on Health, Employment, Labor, and Pensions

Retirement security is something many Americans work hard to achieve, but doing so can be very challenging. While many individuals understand the need to plan for retirement, they don't necessarily know the best way to do so. That's why many workers rely on financial advisors to help them build a foundation for a secure retirement. And why too many others simply retire without the resources they need to remain financially stable.

Men and women who have worked hard all their lives want to enjoy their retirement – spending time with their grandchildren, taking up a new hobby, or finally getting through the to-do list they didn't have the time to tackle before. They don't want to worry about making ends meet or leaving their loved ones with a significant financial burden.

As policymakers, we should be doing everything we can to ensure workers are able to effectively plan for life after leaving the workforce. Unfortunately, we're here today because a proposal from the Department of Labor is threatening to make it harder for workers to do that.

The administration has said this proposed rule – known as the "fiduciary rule" – will require retirement advisors to put the best interests of their clients above their own financial interests. That, of course, is an admirable goal and one we agree is worth pursuing. Financial advisors should act in their clients' best interests, and Republicans have long said we are open to modernizing current rules in a way that provides more protections to those seeking retirement advice.

However, as witnesses explained at a committee hearing this summer, the department's rule – as proposed – will impose on financial advisors a host of costly new mandates and burdensome regulations that will have far reaching consequences for those most in need of assistance. And as with most well-intended Big Government schemes, it's the people who need help who are hurt the most.

Many low- and middle-income families will lose access to some of the most basic retirement advice. These individuals – who already have fewer resources to invest – will no longer be able to seek guidance from trusted financial advisors and could be forced to pay exorbitant fees or fend for themselves online. Additionally, small business owners will be denied assistance in choosing the best investment options for their employees, leaving many small businesses unable to offer any retirement plan at all.

The proposal is so extreme and unworkable that it is drawing serious concerns from both sides of the aisle. A significant number of Democratic policymakers in both the House and the Senate have written to the department about the proposed rule, calling its anticipated effects "troubling" and urging the department to "seek a balanced approach." This committee sent a letter with a similar request, asking for the withdrawal of the proposal and encouraging the department to work with Congress on a more responsible approach.

Now, if this all sounds familiar, there's a good reason: We've been through it before. Nearly five years ago, the department pursued a similar regulatory proposal, and similar bipartisan concerns were raised. The difference is that last time around, the department listened to those concerns, withdrew its proposal, and went back to the drawing board to develop a new – albeit similarly flawed – rule. This time, the department seems determined to ignore legitimate bipartisan concerns and force its misguided rule on the American people.

That's why I am working – along with a number of my Republican and Democrat colleagues on this committee and the Ways and Means Committee – to develop a legislative solution that will accomplish what the Department of Labor has failed to. Our proposal will strengthen retirement security, but, unlike the department's approach – it will do so without hurting working families and small businesses.

To guide this effort, we developed a set of important principles that our bipartisan solution will reflect, such as protecting access to the retirement advice workers, retirees, and small business owners need and ensuring retirement advisors serve their clients' best interests. Let me repeat that: their clients' best interests. We believe that financial advisors should look out for their clients' best interest, but we also believe the rules governing financial advice should do no harm to those saving for retirement.

Today's hearing is an opportunity to further explore these principles, to hear what our witnesses believe a workable best interest standard looks like, and to continue our work to introduce a responsible legislative proposal that will help individuals save for their retirement. I look forward to our discussion and to the work ahead.

With that, I will now recognize the Ranking Member of the subcommittee, Congressman Polis, for his opening remarks.

Mr. POLIS. Thank you, Mr. Chairman, for yielding, and I want to thank our witnesses for providing us their time and expertise during this busy holiday season.

Today we are convened again to discuss a very important rulemaking process at the Department of Labor that would change the way financial advisors operate, and potentially the advice that savers receive.

Specifically, we are discussing the principles that would protect savers from conflicted advice and allow good advisors to continue to work in their communities on behalf of their clients.

As we know, the reason we are talking about this issue and why it is so important is the retirement savings gap for Americans is a staggering $14 trillion, with one in five Americans who are approaching retirement age having zero in their private retirement savings.

This is obviously a problem and it must be addressed in a number of ways. This process around financial advice is just one of those aspects to how our nation needs to deal with the retirement savings gap.

The Department of Labor has been engaged in efforts to redefine the circumstances under which an individual is acting as a "fiduciary" when providing investment advice and services to retail investors.

As we all know the history, the Department of Labor retracted a first version of this rule several years ago. They released a new version of the rule earlier this year, and they have begun getting input from a broad spectrum of stakeholders through an extended comment period. I again want to thank the Department for extending the initial comment period.

From that first version of the rule to today, I and many of my colleagues have been following this issue in detail, because it is so important. I have heard from many of my constituents and I have engaged with the Department of Labor and stakeholders through several letters.

As I am sure everyone is aware, the Department of Labor recently closed its comment period during the rulemaking process.

I believe that based on what I have heard, the Department of Labor and Secretary Perez have worked very hard to reach out to stakeholders, and I am optimistic that they will make the changes necessary to create a good rule. However, in order to make sure this happens, I think it is important to include expert stakeholders at every opportunity.

I believe that transparency and an ongoing stakeholder process are vital to the success of this rule for savers and for financial advisors. That is why I along with about 100 of my Democratic colleagues submitted a letter laying out our remaining concerns with the drafted rule. We hope that those are addressed in the final rule.

I recently followed up with a letter signed by 47 Democrats that urged Secretary Perez to continue the transparency and outreach to Congress and stakeholders through an additional comment period as changes are made to the rule, as long as the timeline remains consistent with being able to finalize these rules under the presidency of Barack Obama.

The enormous amount of feedback and the sheer importance of this rule is why I think an additional comment period could be helpful, to help inform a better rulemaking process.

A comment period that is reasonable and constructive would help a better rule emerge, and it would give us a detailed look at what DOL is planning to make with regard to the changes. We are certainly hopeful that DOL will address the issues that have been raised by me and my colleagues, but obviously we will only know when the rule emerges.

In fact, I think as a best practice, all agencies should have the flexibility to utilize the rulemaking system to allow for additional comment periods. Often times, an additional comment period after a second draft of the rule can be more helpful than simply extending the initial comment period, because at least we see where the agency is going with regard to their thought process, and it can remove issues from the table and allow stakeholders to focus on remaining issues.

DOL must take into account the high number of outstanding questions and requests for comments that are proposed in the rule.

To date, there have been multiple letters requesting changes to the proposed rule from members of both parties in Congress and more than 3,500 public comments. That is a very high number for something that sounds as obscure as a fiduciary rule.

Of course, the amount of public interest is a direct result of the economic interest of why it is so important for savers on this issue.

As was shown by my recent vote against H.R. 1090, the so-called *Retail Investor Protection Act,* which would have effectively killed any rule from moving forward, me and most of my Democratic colleagues are not opposed to a rule being implemented. In fact, very supportive of the right rule being implemented. It needs to be done right, address the legitimate concerns of stakeholders, and meet its intended goal.

Helping Americans save for retirement should not be a partisan issue. Whether you are a Democrat or Republican, we are all going to need to retire someday, and we all believe it is essential for individuals to not receive conflicted advice, but we also want to make sure they are still able to receive quality advice.

I think we agree on the intent and spirit of the principles before us, but because they are broad, of course, we are going to have questions about the specific legislation, that I understand might come out of these principles.

Legislation must accomplish the goal of a strong, enforceable, workable regime. The devil is always in the details, as we are finding both in the rulemaking process and I am sure we would also find in the process of drafting a bill.

Our goal should not be a product that prevents an enforceable conflict of interest standard from being implemented but rather furthers it.

I look forward to hearing from our witnesses and discussing the various ideas for updating and improving the rule and legislation around fiduciary responsibility.

I hope this hearing will further an open stakeholder process which leads to a rule that is in the interest of all Americans. I yield back.

[The information follows:]

Prepared Statement of Hon. Jared Polis, Ranking Member, Subcommittee on Health, Employment, Labor, and Pensions

I thank the chairman for yielding to me, and I thank all of our witnesses for providing us their time and expertise during this busy holiday season.

Today we are convened again to discuss an important rulemaking at the Department of Labor that will change the way financial advisors operate, and potentially the advice savers receive. Specifically, we are discussing principals that will protect savers from conflicted advice and allow good advisors to continue to work in our communities.

As we all know the retirement savings gap for allAmericans is far too high. It is a staggering $14 trillion, with one-in-five Americans who are approaching retirement age having zero private retirement savings. There is obviously a problem, and it must be addressed in a myriad of ways. Access to good, affordable financial advice is one important part of the picture.

DOL has been engaging in efforts to redefine the circumstances under which an individual is acting as a "fiduciary" when providing investment advice and services to retail investors for more than five years.

After the Department of Labor retracted the first version of this rule several years ago, they released a new version of the rule in early 2015, and have been getting input from a broad spectrum of stakeholders through a long comment period. From that first version of the rule to today I have been following this issue in extreme detail. I have heard from many of my constituents and have engaged DOL and stakeholders through numerous letters

And as I'm sure everyone is aware, the Department of Labor recently closed its comment period during the rulemaking process.

I believe that DOL and Secretary Perez have worked very hard to reach out to all stakeholders and I am optimistic that he will make the changes necessary to create a workable rule. However, in order to ensure this happens the expert stakeholders should be given another look.

I believe that transparency and an ongoing stakeholder process are absolutely vital to the success of this rule. That is why I, along with almost 100 of my Democratic colleagues, submitted a letter laying out our remaining concerns with the drafted rule. I recently followed that up with a letter signed by 47 Democrats, which requested Secretary Perez continue his transparency and outreach to Congress through an additional comment period and stakeholders as changes are made to the rule.

The enormous amount of feedback and the sheer importance of this rule is why I believe an additional comment period, which will not kill the rule, in order to give a look at the changes DOL is planning to make to the rule is reasonable and constructive. Nothing is perfect on the first or second shot, and bringing stakeholders together for another look can only strengthen the rule. In fact, I believe all agencies should have the flexibility to utilize the rulemaking system to allow for additional comment periods. I hope this can serve as a model for large and complex rule makings moving forward.

DOL must take into account the high number of outstanding "Questions" and "Requests for Comments" they proposed in the Rule, as well as the incredible volume of feedback the Rule has received. To date, there have been multiple letters requesting changes to the proposed Rule from members of both parties in Congress, as well as more than 3,500 public comments, and hundreds of thousands of folks signing their names to petitions. DOL must listen to this feedback, continue to work with stakeholders and make the rule more streamlined while protecting investors and workers.

As was shown by my recent vote against the partisan H.R. 1090, the so-called Retail Investor Protection Act (which would have effectively killed any rule from moving forward), I am not opposed to a rule being implemented. I simply believe it needs to be done right, and the best way for that to happen is to continue the stakeholder process. The near unanimous opposition from my side of the aisle against H.R. 1090 shows that while many of us have concerns with the rule, we believe a new rule needs to be finished and implemented.

Helping Americans save for retirement shouldn't be a partisan issue. Whether you're a Democrat or a Republican, eventually you're going to need to retire. We all believe it is essential for individuals to not receive conflicted advice, but we also need to make sure they're still able to receive advice; period.

Investors must be able to trust the person advising them about the money they need to live after retirement. But on the other hand we must also protect individuals' and small business' access to advice. Mistakes in investments cost billions of dollars to individuals and the economy.

I know that everyone involved in this rule, and all the stakeholders who will be impacted, agree that financial advisors should use a "Best-Interest Standard" and the bi-partisan principals that are the subject of this hearing show this agreement.

I think we all agree on the intent and the spirit of the principals before us. However, because they are broad, I have questions about the specific legislation that I understand will come out the principals. Legislation must accomplish the goal of a strong, enforceable, but workable regime. As they always say, the devils are in the details. Whether it is a rule completed by DOL, or Congressional action, a final rule must work with the majority of advisors who are acting in good faith as well as protect savers. Our goal should not be to prevent an enforceable conflict of interest standard from being implemented.

I look forward to hearing from our witnesses, and discussing the various ideas for an updated rule.

Chairman ROE. I thank the gentleman for yielding. Pursuant to Committee Rule 7(c), all subcommittee members will be permitted to submit written statements to be included in the permanent hearing record, and without objection, the hearing record will remain open for 14 days to allow statements and questions for the record, and other extraneous materials referenced during the hearing to be submitted in the official hearing record.

It is now my pleasure to introduce our distinguished panel of witnesses. First, The Honorable Brad Campbell, counsel at Drinker Biddle & Reath LLP. From 2007 to 2009, he served as Assistant Secretary of Labor for the Employee Benefits Security Administration. He specializes in employee benefits and ERISA Title I issues, including fiduciary conduct and the prohibitive transaction rules. Welcome, Mr. Campbell.

Ms. Rachel Doba is founder and president of DB Engineering, headquartered in Indianapolis, Indiana. DB Engineering is a civil engineering firm that specializes in civil/site, water/wastewater, and transportation engineering services. Welcome to Washington.

Ms. Marilyn Mohrman-Gillis is Managing Director of Public Policy & Communications of the Certified Financial Planner, the CFP, Board. The CFP Board fosters professional standards in personal financial planning through its setting and enforcement of education, examination, experience, ethics, and other requirements for CFP certifications. Welcome.

Mr. Jules Gaudreau is the president of The Gaudreau Group, Inc., an insurance and financial services agency founded in 1921 and headquartered in Wilbraham, Massachusetts. Mr. Gaudreau also serves as president of the National Association of Insurance and Financial Advisors. Welcome, Mr. Gaudreau.

I will ask our witnesses to stand and raise your right hands, please.

[Witnesses sworn.]

Chairman ROE. Thank you. Let the record reflect that the witnesses answered in the affirmative. You may take your seats.

Before I recognize you to provide your testimony, let me briefly explain our lighting system. You have five minutes to present your testimony. When you begin, the light in front of you will turn green. When one minute is left, the light will turn yellow.

When your time has expired, the light will turn red. At that point, I will ask you to wrap up your remarks as best as you are able. I will be fairly strict about that, so try to wrap up when you get to the five minute mark.

Mr. Campbell, you are recognized for five minutes.

TESTIMONY OF BRADFORD P. CAMPBELL, ESQ., COUNSEL, DRINKER BIDDLE & REATH, LLP, WASHINGTON, D.C.

Mr. CAMPBELL. Thank you to the chairman and the ranking member and the other members of the Committee for the opportunity to testify today regarding the principles that should guide legislation, strengthening the retirement advice for ERISA plans, plan participants, and IRA owners.

Before I begin, I would like to indicate that my remarks today are my own views, not those of my firm or of any client or my colleagues. I am just here representing myself rather than a client.

Currently, I am an ERISA attorney in private practice. I focus, as the chairman indicated, on ERISA fiduciary issues and prohibited transactions. From 2006 to 2009, I served as the Assistant Secretary of Labor for Employee Benefits, and head of the Employee Benefits Security Administration, the agency that is promulgating the rule at the Department of Labor that we are discussing.

The bipartisan principles that the chairman and his colleagues have developed I think are a very important step forward in the current debate about how to improve retirement savings advice. I think they offer common sense guidelines that would form a solid foundation for the development of meaningful legislation that protects investors while expanding access to advice.

I also think though that these bipartisan principles highlight some of the very serious policy and technical problems with the Department of Labor's flawed regulatory proposal, that I believe if promulgated as proposed, would in fact harm the very persons that it is intended to protect.

Unlike the bipartisan principles, I think the DOL proposal would actually reduce choices, increase costs, increase frivolous litigation, and therefore reduce the availability of advice, particularly for small plans and small IRA accounts.

In fact, I think the DOL proposal violates nearly every one of the bipartisan principles that we are discussing today. The first is access to quality advice. The bipartisan principles would protect access to investment advice and education for low and middle income workers and retirees, and ensure that small business owners have access to the financial advice and products they need.

This is something that the Labor Department has actually quantified for us, the cost of no advice. In 2011, the Labor Department, in promulgating certain provisions of the *Pension Protection Act*, determined that lack of access to advice cost participants and IRA owners $100 billion every year due to preventable investment errors, and part of the reason there was lack of access was due to the very broad ERISA fiduciary and prohibited transaction rules that prevented access to advisors.

In contrast to the bipartisan principles, rather than mitigating the negative effects, unfortunately, the DOL proposal would actually broaden that problem by more broadly applying those same ERISA fiduciary standards and prohibited transaction rules, exacerbating the difficulty of getting advice to workers.

The bipartisan principles would require advisors to act in the best interest of their clients. By contrast, the DOL proposal, although it is appropriated to phrase best interest does not create a new best interest standard. It instead applies the existing ERISA and fiduciary standards more broadly, and the level fee requirements and the effect of these prohibited transaction rules do not take into account the actual content of the advice. They can in fact actually prevent an advisor from acting in your best interest.

The DOL proposal would prevent essential activities based on structural cost differences between products that do not actually have anything to do with the quality advice.

For example, we can all agree that a rollover for a participant is in that participant's best interest. There could be no dissent on that point. Everyone looked at that transaction and said this makes sense for that participant; this is in their best interest.

Because an IRA is a retail product that typically has a higher fee than a 401(k), the advisor to that 401(k) would be prohibited from doing the rollover, advising the rollover for that participant because they would receive a higher fee. That has nothing to do with conflict. It has to do with structural cost differences. The DOL proposal would nonetheless prevent that.

The best interest contract exemption, which the DOL has proposed to address some of those circumstances, unfortunately does not work as it is proposed. It would apply a large number conditions and would allow new class action litigation risk that does not exist currently, and that render that exemption, as I said, I think, unworkable for many if not most advisors.

The bipartisan principles called for clear, simple, and relevant disclosures of compensation, investment fees, and any conflicts.

By contrast, the big exemption in this part of the proposal has disclosures that are anything but clear and simple. In fact, they are extremely difficult for anyone to try to parse through, for advisors to provide, and for participants to understand.

The bipartisan principles say the law should never deny people the financial information they need to make informed decisions. By contrast, the big exemption in the Department's proposal directly prohibits an advisor from discussing investments that are not on the Government's approved list of investable assets, regardless of whether such information is in the best interest of the participant.

Finally, the bipartisan principles call for policies that preserve investor choice and consumer access in a way that does not pick winners and losers. By contrast, the DOL proposal limits those choices and would definitely result in winners and losers, not just among financial service providers, but also with plans and participants.

The DOL proposal would deny small plans and individuals access to the same types of advisors and information available to large plans.

In closing, I am very much encouraged that Congress has begun to look at this issue, has developed these principles, and I think Congress in fact is the proper institution to address these concerns and to meld the proper changes into the broader framework of financial regulation rather than one agency with a narrow focus on one body of law.

Thank you very much, and I look forward to your questions.

[The testimony 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 Education and the Workforce
Subcommittee on Health, Employment, Labor and Pensions

Hearing on Principles for Ensuring Retirement Advice Serves the Best Interests of Working Families and Retirees

December 2, 2015

Introduction:

Chairman Roe and Ranking Member Polis, thank you for the opportunity to testify today regarding the need to ensure access to quality, professional investment advice for retirement plan participants and Individual Retirement Account ("IRA") owners. I commend the Committee for holding this hearing, as American workers, retirees and their families need better tools and more assistance in achieving secure retirements.

My testimony today reflects my personal views, and not those of any client, of my firm, or of my colleagues. I am not testifying on behalf of any client or any other party.

I am encouraged that a group of bipartisan members of Congress, including the Chairman, recently released a set of principles to guide development of legislation to address this issue. These principles represent an important step forward in this debate, as they not only form a solid foundation for meaningful legislation, but highlight some of the very serious problems with the U.S. Department of Labor's (the "Department") sweeping regulatory package redefining fiduciary investment advice and proposing new and amended prohibited transaction class exemptions (the "Proposal").[1]

Though well intentioned, the Department's Proposal would not only fail to achieve its objectives, but would result in serious, unintended consequences harming retirement savers. It would make it more difficult for small businesses, workers and IRA owners to get the assistance they need. This is not just because the Proposal violates the common-sense principles the Chairman and his colleagues have outlined, but also because Congress, not a single Federal agency, is the proper institution to comprehensively address retirement advice and the wide array of Federal and State laws and regulations already in effect.

The Problem—Lack of Access to Advice Costs Retirement Savers More than $100 Billion Each Year

In 2011, the Department issued a final regulation implementing certain investment advice provisions of the Pension Protection Act of 2006 (the "PPA"). In the economic analysis related to the final rule, the Department identified one of the key problems facing retirement plan participants, the lack of access to professional investment advice. The

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

analysis quantified the losses resulting from a lack of advice at more than $100 billion per year, and determined that these losses were due, in part, to the prohibited transaction and fiduciary rules of the Employee Retirement Security Act of 1974 ("ERISA").[2] In describing these concerns, the Department wrote:

> "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."[3] [Emphasis added]

This finding by the Department that lack of access to advice hurts retirement savers is consistent with the intent of the bipartisan principles to expand access to advice. The principles call for public policies that "protect access to investment advice and education for low- and middle-income workers and retirees," and that ensure "small business owners should have access to the financial advice and products they need to establish and maintain retirement plans and help workers save for retirement."[4]

Unfortunately, the Department's Proposal does the opposite. Rather than mitigating the effects of the prohibited transaction rules in denying advice, the Department expands their scope on the basis that they prevent "conflicted" advice and will result in advice in the "best interest" of workers and IRA owners. In reality, however, the prohibited transaction rules have little to do with "best interest" and can, and in fact do, prevent ERISA retirement plan fiduciaries, plan participants, and IRA owners from receiving advice that is in their best interest.

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

The bipartisan principles lay out some very important, common-sense requirements for legislation revising the standards applicable to financial advice. In addition to those principles discussed above, they would:

1. Require advisors to act in the best interest of their clients;

2. Require clear, simple and relevant disclosure of conflicts, compensation and all investment fees;

---

[2] *See*, The Preamble to the final regulation implementing the Pension Protection Act investment advice provisions, 76 FR 66,151-66,153 (October 25, 2011).

[3] Preamble at 76 FR 66,151.

[4] "Bipartisan House Members Outline Legislative Principles to Ensure Retirement Advisors Protect Clients' Best Interests," November 5, 2015, U.S. House Committee on Education and the Workforce, http://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=399747, last accessed on November 30, 2015 .

3. Preserve investor choice and consumer access to all investment services and products in a way that does not pick winners and losers; and

4. Never deny individuals the financial information they need to make informed decisions.[5]

Unfortunately, the Department's Proposal violates all of these principles. As I will explain in more detail below:

1. Best Interest: What the Department actually proposed is something very different than a "best interest" standard. It is a broader application of the ERISA fiduciary standard and the prohibited transaction rules. 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. For 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 prohibited transaction rules do not take into account those realities and simply prohibit the advice, unless an exemption applies.

2. Clear and Simple Disclosures: The disclosures required by the Best Interest Contract Exemption (the "BIC Exemption") are anything but "clear and simple." They directly conflict with securities laws, and will result in a deluge of information of little value to participants and IRA owners. Further, disclosure alone is not sufficient under the Proposal or ERISA to address a prohibited transaction, no matter how minor or inconsequential the perceived "conflict" may be.

3. Preserve Choice and Access: The Proposal does not preserve investor choice and consumer access, it restricts choice and access. Plans sponsored by small businesses, for example, would not have access to the same advisors and investments as plans sponsored by large businesses. It may not be possible for some advisors to help participants because of proprietary products or similar relationships. The structure of the Proposal and the BIC Exemption will clearly result in "winners and losers" not just among advisors and financial institutions, but also between "big" plans and "small" plans, participants or IRA owners.

4. Do Not Deny Information: The Proposal would deny individuals information needed to make informed decisions. For example, the BIC Exemption is only available for advice regarding certain types of assets. If the exemption is needed for an advisor to provide advice, such as will likely be the case in many rollover transactions, then the advisor is prohibited from discussing assets not on the list, regardless of whether they are in the best interest of the client.

Congress, Rather Than a Single Federal Agency, Should Decide What Cross-cutting Standards Apply to Advice Affecting Nearly $16 trillion in Retirement Savings

[5] Bipartisan Principles Press Release, November 5, 2015.

As the former head of the Employee Benefits Security Administration ("EBSA"), the Department agency promulgating this regulation, I am very familiar with the Department's responsibility under 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 IRAs, 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 regarding the application of the prohibited transaction rules to IRAs, in that it is attempting to leverage this authority to establish a fiduciary standard of care the statute does not provide.

The likely result will be significant unintended consequences, separate from and in addition to the broader policy issues. In my opinion, the controversy surrounding the Proposal, and the comments and testimony identifying a large number of significant technical problems with the Proposal, 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 fiduciary standards can and should apply to IRAs in addition to the existing regulatory regimes already in place.

- 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.[6] 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.[7]

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 commissions 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

[6] *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.

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

2015.[8] It is not clear how advisors pushed towards fee-based accounts by the Proposal would comply with the SEC standards.

- Congress is Best-Positioned to Address These Concerns

Congress is the institution best-positioned to improve access to quality investment advice because it has the authority to comprehensively review and modify the different bodies of law and regulation applicable to different types of financial advisors. The public input into the legislative process would also result in a more open and inclusive process incorporating all relevant viewpoints.

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. No matter how well-intentioned and hard-working the Department may be, retreating again behind closed doors to write a final rule will result in serious technical flaws at the very minimum.

In my opinion, Congress should "tap the brakes" on the Department's Proposal until it has had an opportunity to thoroughly review the issues and develop its own legislation. The bipartisan principles are an ideal starting point for this process.

Unlike the Bipartisan Principles, the Proposal Would Increase Costs and Reduce Access for Small Plans and Small-Account IRA Owners:

Small plans and small-account IRA owners may be most in need of basic investment advice, but they would be least likely to be served by the Proposal due to the increased compliance costs and increased legal liability risks it unnecessarily creates. The bipartisan principles properly focus on ensuring access to advice for these groups.

The Small Business Administration's ("SBA") Office of Advocacy expressed concerns in its formal comment letter to the Department, questioning the Department's economic analysis and criticizing 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."[9]

Strangely, the Department permits large plans with more than 100 participants or more than $100 million in assets to receive the full range of products and services currently available, but would deny the right to receive sales information on a non-fiduciary basis to small plans, and to all participants and IRA owners.

---

[8] *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.

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

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

The bipartisan principles would preserve access by small business and individuals to these services, but would ensure clear and relevant disclosure is provided to prevent confusion about the difference between sales and advice. This approach far better serves the interests of retirement savers than the Department's effort to change the entire regulatory structure governing retirement advice.

The BIC Exemption Does Not Cure the Proposal's Flaws—It Adds to Them

The BIC Exemption is the Department's attempt to permit some advice that the broad prohibited transaction rules otherwise forbid. Though portrayed as the solution to the Proposal's many practical problems, the proposed BIC Exemption actually creates more problems than it solves. The advisor and the participant or IRA owner would sign a contract enforceable in state court that must preserve the right to bring class action litigation. The contract must contain 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 arrangements 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 at least three 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. In 1974, when Congress passed ERISA and created IRAs, it expressly decided not to apply the ERISA fiduciary standard to IRAs. While the Department has authority over the prohibited transaction rules, the Department has no authority to directly establish a fiduciary standard of conduct for advisors to IRAs. As a result, while the Department can regulate how the advisor receives payment to ensure it is consistent with the prohibited transaction rules, the Department cannot regulate the legal standard for the advice that is provided. The Department cannot, in my view, create this standard as a condition in an exemption, when it could not do so directly.

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,[10] 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 according to Sec. 105 of Reorganization Plan No. 4 of 1978. This Executive Order provides the Department the interpretive authority over the prohibited transactions in Sec. 4975, but not enforcement authority.

Conclusion:

To be clear, my concern with the Proposal is not the Department's goals, but with the Department's execution in achieving those goals. As a former regulator, I understand the enforcement concerns that led the Department to begin this initiative. 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.[11]

However, I believe the approach the Department has taken in the Proposal will harm the people it is intended to protect, and that Congress is the proper institution for addressing these complex issues. The bipartisan principles are a bold step in the right direction.

Thank you Mr. Chairman and Mr. Polis 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.

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

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

Chairman ROE. Thank you, Mr. Campbell. Ms. Doba, you are recognized for five minutes.

TESTIMONY OF RACHEL A. DOBA, PRESIDENT, DB ENGINEERING, LLC, INDIANAPOLIS, INDIANA

Ms. DOBA. Thank you, Chairman Roe, Ranking Member Polis, and members of the subcommittee for the opportunity to testify today.

I am Rachel Doba, president of DB Engineering. I am here representing the U.S. Chamber of Commerce, and I also sit on its Small Business Council.

At the outset, I would like to express our strong support for the bipartisan principles discussed to date to ensure that retirement advice serves the best interests of working families, retirees, and small businesses throughout the country.

I would like to extend a special thank you to Chairman Roe for his work on these principles and ongoing commitment to retirement security.

DB Engineering is a civil engineering firm that I founded in 2008. I had my first full-time employee in 2010, and set up a 401(k) plan a year later. I currently have 15 employees, and a 100 percent plan participation rate. The plan has a discretionary match, but beginning 2016, I am moving to a safe harbor plan, which guarantees a contribution of 3 percent of employee compensation and will allow me to provide profit sharing contributions.

Attracting good talent is important for service oriented businesses like mine; one way that we are able to compete is by offering employee benefits, including a retirement savings plan. Retirement security is not just a recruitment tool it is a personal priority.

In order to start my business in 2008, I cashed out my 401(k) account at my former employer to get the needed startup capital. In addition to taking a 10 percent penalty and income tax hit, this withdrawal occurred in the midst of the 2008 financial crisis. I withdrew my savings at the worst possible time.

Had I consulted a financial advisor, I likely would have left as much of the funds as possible in my 401(k) or rolled over to an IRA. That is why the principle stating that public policy should never deny individuals the financial information they need to make informed decisions is so critical.

I have worked with my advisor since 2011. He is a critical part of my team. I trust him to help me with implementing and maintaining my retirement plan, and my employees trust him to provide educational materials that will help them make sound financial decisions.

I am convinced that without our financial advisor, most of my employees would not contribute to the 401(k) plan and would not receive the benefit of matching contributions. That is why another principle stating public policies must protect access to investment advice and education for low- and middle-income workers and retirees is also critical.

While all of the principles being discussed today are important, I want to particularly highlight one of them: small business owners should have access to the financial advice and products they need to establish and maintain retirement plans and help workers plan for retirement.

As a small business owner, I absolutely agree. Limiting options reduces competition, which drives up costs for my small business and passes on costs to employees and me as participants in the plan.

Turning to the Department of Labor's proposed rule, the Chamber has submitted a comment letter outlining the many ways the rule is unworkable. Today, I would like to highlight three issues that will have a particularly negative impact on small business plans.

First, 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 known as the seller's carve-out that does not apply to small businesses. The DOL seems to believe that small business owners, such as me, are not as sophisticated as the large businesses and need additional protections.

I know when I am being sold a product. Otherwise, I would not be able to run a successful business.

Second, the changes to the education carve-out 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 in various asset classes. This allows them to make informed investment decisions. Many of my employees might not invest in the plan at all if the company had not provided this benefit.

By disallowing any party to make the link between asset classes and specific investment options, the DOL is forcing plan participants to figure out how to invest their own retirement savings and risk making poor decisions, like I did.

Third, the best interest contract exemption will increase the cost of services to small businesses and possibly eliminate access.

There is a question on whether advisors to small business plans are able to use the BIC exemption, but, even assuming they are, there are certain to be additional costs associated with these changes. As a business owner who allows on outside professionals to manage my plan, any additional costs imposed by the regulations will be passed on to me.

In fact, this directly contradicts the bipartisan principle of not choosing winners and losers when small businesses will either not be able to use the exemption or will pay more to do so.

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 retirement savings.

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

[The statement of Ms. Doba follows:]

Statement of the U.S. Chamber of Commerce

ON: Principles for Ensuring Retirement Advice Serves the Best Interest of Working Families and Retirees

TO: Subcommittee on Health, Employment, Labor and Pensions of the House Education and the Workforce Committee

BY: Rachel Doba, on behalf of the U.S. Chamber of Commerce

DATE: December 2, 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.

TESTIMONY
ON
PRINCIPLES FOR ENSURING RETIREMENT ADVICE SERVES THE BEST INTERESTS OF WORKING FAMILIES AND RETIREES
BEFORE
THE SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS
OF THE
HOUSE EDUCATION AND THE WORKFORCE COMMITTEE
ON BEHALF OF THE
U.S. CHAMBER OF COMMERCE
BY
RACHEL DOBA
DECEMBER 2, 2015

Thank you Chairman Roe, Ranking Member Polis, and members of the Subcommittee on Health, Employment, Labor, and Pensions of the House Education and Workforce Committee.

I am Rachel A. Doba, President of DB Engineering, LLC based in Indianapolis, Indiana. I am here representing the U.S. Chamber of Commerce of which I am a member of the U.S. Chamber Small Business Council.

DB Engineering is a civil engineering firm focusing on public works projects for the city and state. I started DB Engineering in November of 2008. When I hired my first full-time employee in 2010, I looked into the process to set up a 401(k) plan, which began in 2011. I now have 15 employees. Currently, the plan has a discretionary match but next year I am moving to a safe harbor plan which guarantees a 3% match for all employees and will allow me to provide profit sharing contributions. One way that we are able to compete is by offering employee benefits, including a retirement savings plan. As the owner of a business, I am focused on the details of my core business function—sales, finance, and manufacturing oversight—and use outside professionals to help me with supplemental business functions. For example, I use a Certified Public Accountant to assist with tax issues, attorneys to assist with legal issues, and a financial advisor to help me with my retirement savings plan.

Retirement security is not just a recruitment tool – it is a personal priority. In order to start my business in 2008, I cashed out my 401(k) account at my previous employer to get the needed start-up capital. In addition to taking a 10% early withdrawal penalty and an income tax hit, this action also occurred during a time when the financial markets were in turmoil, so I received even less funds than I otherwise would have. Rebuilding the original balance has been a bigger challenge than I anticipated, and had I consulted a financial advisor, I potentially would have left as much of the funds as possible in the 401(k) account or rolled it over to an IRA. While I did research other sources for startup capital, I may have delayed our startup to pursue lengthier options rather than taking the financial hits in my retirement account. As such, my company's retirement benefits are just as critical to me as they are to my employees, and I have every incentive to ensure that we are getting great benefits at a fair price.

I have worked with my advisor since 2011—he is a trusted part of my team. Not only do I trust him to help me with implementing and maintaining my retirement plan, but also my employees trust him to provide educational materials that will help them make sound financial decisions. I am convinced that without the financial advisor most of my employees would not participate in the 401(k) plan and would not receive the benefit of the matching contribution.

I do not understand the reasoning behind this proposal. I have a trusted advisor that has provided great service, which has allowed me to provide retirement security for my employees and me. This proposal puts all of that in jeopardy. If there are concerns, the principles outlined by a bipartisan group of Congressmen, including the Chairman, should be followed.[1] All of the principles are important to promoting retirement security, but I want to highlight the principle stating that "Small business owners should have access to the financial advice and products they need to establish and maintain retirement plans and help workers save for retirement." As a small business owner, I absolutely agree. Limiting options reduces competition that, in turn, drives up costs for my small business, as well as the costs that will be passed onto my employees and me as participants in the plan.

The Chamber earlier submitted a comment letter to the Department of Labor enumerating many ways in which the proposed rule is unworkable.[2] In my testimony, I would like to highlight three issues that will have a particularly negative impact on small business plans:

1. The seller's carve-out discriminates against small businesses and will decrease access to much-needed guidance.

[1] https://roskam.house.gov/media-center/press-releases/bipartisan-house-members-outline-legislative-principles-ensure.

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

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"). However, this carve-out does not apply to advisors to small businesses. DOL seems to believe that small business owners, such as me, are not as sophisticated as large businesses and, therefore, need additional protections. The validity of this rationale is based on faulty assumptions, and does not justify discriminatory treatment. When I work with my financial advisor, I am aware that he is providing a service for a fee and selling a product. I would not be able to run a successful business if I were not able to understand when I am involved in a sales discussion - particularly, 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 readily understandable to any recipient.

The assumption that small plans, participants and IRA owners cannot understand the difference between sales and advice does not match 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 their right to choose the services and products that best fit their 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 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 and risk 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.[3] 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 DB Engineering has a 401(k) plan, there are Chamber members for whom a SEP or SIMPLE IRA is more practical. If these plans are no longer a viable option, there will be fewer small businesses that offer retirement benefits. Consequently, it is extremely important to consider the negative impact that increased costs will have—particularly in the small business plan market.

[3] 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.

In conclusion, for the reasons stated above, we are 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 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 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 look forward to any questions you may have.

Chairman ROE. Thank you, Ms. Doba. Ms. Mohrman-Gillis, you are recognized for five minutes.

TESTIMONY OF MARILYN MOHRMAN–GILLIS, MANAGING DIRECTOR, PUBLIC POLICY & COMMUNICATIONS, CERTIFIED FINANCIAL PLANNER BOARD OF STANDARDS, WASHINGTON, D.C.

Ms. MOHRMAN–GILLIS. Chairman Roe and Ranking Member Polis, members of the Subcommittee, thank you for the opportunity to testify here today.

I am here today on behalf of the Financial Planning Coalition, which is comprised of the Certified Financial Planner Board of Standards, the Financial Planning Association, and the National Association of Personal Financial Advisors.

We believe that the Coalition brings a unique perspective to the table. Our stakeholders and members have committed by virtue of their CFP certification or membership codes of conduct to provide financial planning services under a fiduciary standard. They provide fiduciary level services under different business models as investment advisors, as broker-dealers, and as insurance producers, and across compensation models, including commission and fee models.

We believe that updating the outdated 40-year-old definition of "fiduciary" under ERISA is essential and a long overdue reform to protect America's retirement investors. That is why we support the DOL's re-proposed rule.

We also believe that congressional intervention in this administrative rulemaking process at this time is not necessary and would only serve to delay or derail the rule.

For members of Congress who truly want a best interest standard for retirement savers, allowing the DOL to proceed to a final rule without intervention is the best way to achieve that goal.

You have heard much speculation and misinformation about the potential impact of the rule. We have a different view based not on speculation but on actual experience with the fiduciary standard. CFP Board adopted a fiduciary standard in 2007. At that time, many firms and industry organizations made arguments similar to those being made today about the DOL rule. They asserted that the CFP Board's fiduciary requirement was unworkable with their business models, that CFP professionals and their firms would be forced to relinquish their certification if required to provide fiduciary services.

Contrary to these predictions, the sky did not fall, just the opposite. The number of CFP professionals has grown by 30 percent to 73,000 since we put the fiduciary rule in place.

Opponents argue that the rule will eliminate the broker-dealer business model and force advisors into fee only models that will be more expensive for consumers.

This is not consistent with the rule as written or with our experience implementing a fiduciary standard. Advisors do not need to give up commissions. The best interest contract exemption is a principle-based business model neutral exemption that allows advisors to continue to charge commissions and still comply with the fiduciary standard under ERISA.

To those that say that the BIC exemption requirements are unworkable, we point to our own code of professional conduct, which contain requirements that are very similar to the BIC exemption requirements.

CFP professionals today are operating under these BIC exemption like requirements for commission based, not just fee based, business models.

Opponents also argue that advisors who are required to obligate themselves to act in the best interest of their clients will be unable to serve middle-class clients. Again, our experience and research belies this argument.

Today there are thousands of CFP professionals and FPA and NAPFA across the country who provide fiduciary level services to every day Americans under commission based business models.

If our experience is any indication, firms and advisors are more likely to adjust their policies and practices than to abandon middle-class clients.

In our view, the robust and transparent rulemaking process in which the DOL has been engaged for the last five years is working precisely as intended. The DOL has publicly indicated that it plans to make changes to address issues raised by us and other stakeholders.

Congressional intervention in this final stage of the rulemaking process before the DOL has the opportunity to promulgate a final rule incorporating all of this public input is unnecessary and would serve to delay or derail the rule.

The legislative principles as proposed by Representatives Roskam and Neal, as well as their articulated goals, are laudable. Legislation to achieve these principles and goals is not necessary. The DOL re-proposed rule already embraces these goals and is fully consistent with and far exceeds the proposed principles.

Retirement investors face a perfect storm in today's financial services marketplace with a regulatory structure that rewards advisors to recommend products that cause investors to lose billions of dollars. With ever increasing responsibility for their own retirement security, retirement investors more than ever require un-conflicting financial advice that is in their best interests.

We urge Congress to refrain from legislation and allow the DOL to promulgate its long overdue and badly needed rule. Thank you.

[The statement of Ms. Mohrman-Gillis follows:]

FINANCIAL
PLANNING
COALITION

STATEMENT OF

THE FINANCIAL PLANNING COALITION

BEFORE THE

UNITED STATES HOUSE OF REPRESENTATIVES

EDUCATION AND THE WORKFORCE COMMITTEE

SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, & PENSIONS

HEARING ON

"PRINCIPLES FOR ENSURING RETIREMENT ADVICE SERVES THE BEST INTERESTS OF WORKING FAMILIES AND RETIREES"

December 2, 2015

Statement Made by
Marilyn Mohrman-Gillis, Esq.
Managing Director, Public Policy and Communications, Certified Financial Planner Board of Standards, Inc.
MMohrman-Gillis@CFPBoard.org

I. Introduction

Mr. Chairman, Ranking Member Polis, and Members of the Subcommittee, thank you for the opportunity to testify in support of the Department of Labor's (DOL) proposal to update the definition of fiduciary investment advice under the Employee Retirement Income Security Act (ERISA). My name is Marilyn Mohrman-Gillis and I am Managing Director for Public Policy and Communications for the Certified Financial Planner Board of Standards, Inc. (CFP Board). I am testifying today on behalf of the Financial Planning Coalition (Coalition), which is comprised of CFP Board, the Financial Planning Association® (FPA®) and the National Association of Personal Financial Advisors (NAPFA).

We believe that the Coalition brings a unique perspective to the DOL's re-proposed fiduciary rule. CFP Board stakeholders and FPA and NAPFA members have committed, by virtue of their Certified Financial Planner™ certification or their membership codes of conduct, to provide financial planning services under a fiduciary standard. They provide fiduciary-level services across business models – as investment advisers, broker-dealers and insurance agents – and across compensation models – including commission and fee models.

We believe that a strengthened fiduciary rule under ERISA is essential for America's Retirement Investors and is workable for Advisers, and we strongly support adoption of the DOL's re-proposed rule. For those Members of Congress who truly want to strengthen retirement security and ensure that Advisers protect their clients' best interests, allowing the DOL to promulgate a final rule without Congressional intervention is the best way to achieve those goals. The re-proposed rule is fully consistent with the principles of a true fiduciary standard under ERISA. Congressional intervention in the DOL rulemaking process is unnecessary and will only serve to delay or derail this long overdue reform needed to protect and preserve Americans' retirement savings.

II. DOL's Re-Proposed Fiduciary Rule is Needed to Protect Retirement Investors

Retirement Investors face a perfect storm in today's financial services marketplace. With the dramatic shift in the retirement landscape from defined benefit plans to 401(k) plans and Individual Retirement Accounts (IRAs), Americans are increasingly responsible for their own retirements. At the same time they need to choose from an increasingly complex set of financial products and services. When they seek financial advice, they face a marketplace in which they cannot distinguish a salesperson from an Adviser; nor can they distinguish between those Advisers who are legally obligated to provide advice in their best interest versus those who are not. At a time when Retirement Investors more than ever need competent financial advice that is in their best interest, the current regulatory framework allows Advisers to make financial recommendations that place Advisers' interests ahead of Retirement Investors' interests. As a consequence of this misalignment of interests allowed under our current regulatory structure, Retirement Investors are harmed – in the form of higher costs and lower savings – which the DOL conservatively estimates to be $18 billion per year.[1]

[1] U.S. Dep't of Labor, *Fiduciary Investment Advice: Regulatory Impact Analysis*, Apr. 14, 2015, *available at* http://www.dol.gov/ebsa/pdf/conflictsofinterestria.pdf.

American workers who leave employment or who switch employers – and face the decision of whether to roll over their 401(k) retirement assets into an IRA – are particularly vulnerable to the negative impact of conflicted advice. They are making significant and often one-time decisions to move their retirement savings from more protected employer-based plans into less protected IRAs. Yet due to conflicted advice, permitted because of loopholes in a 40-year old rule, Retirement Investors who move their retirement savings from a 401(k) to an IRA can expect to lose 12 to 24 percent of the value of their retirement savings over 30 years.[2]

Congress wisely recognized, when it adopted ERISA in 1974, that advice related to tax-preferred retirement savings should be provided under a fiduciary standard of conduct. The DOL proposal, which would close those loopholes that allow for conflicted advice, is a long overdue reform needed to protect and preserve Americans' retirement savings.

III. __DOL's Re-Proposed Fiduciary Rule is Workable and Secures Critical Consumer Protections without Reducing Access to Advice__

When CFP Board adopted a fiduciary standard of conduct for CFP® professionals when providing financial planning services in 2007, many firms and industry organizations made arguments similar to those being made about the DOL's re-proposed rule today. They asserted that CFP Board's fiduciary requirement was unworkable with their business models and that CFP® professionals would be forced to rescind their certification if required to operate under a fiduciary standard.

Contrary to those predictions, the number of CFP® professionals has grown by more than 30 percent to nearly 73,000 since CFP Board established a fiduciary standard. And many firms, to their credit, are recognizing the value of competent and ethical advice and are supporting CFP® certification for their Advisers. Based on our own experience working with firms on compliance with CFP Board's rules, we believe the re-proposed rule can work for Advisers.

More specifically, many argue that the rule will eliminate the broker-dealer business model and force Advisers into fee-only models that will be more expensive for consumers. This is not consistent with the rule itself or with our experience in implementing a fiduciary standard. The Best Interest Contract (BIC) Exemption is a principles-based, business-model neutral exemption that allows Advisers to continue to receive commissions and still comply with the fiduciary standard under ERISA.

To those who say that the BIC requirements are unworkable, we point to CFP Board's *Standards of Professional Conduct*, which contain requirements that are similar to those under the BIC Exemption. Under CFP Board's *Standards*, CFP® professionals, when providing financial planning services, are required to:

- Act in the best interest of the client;
- Exercise reasonable and prudent judgment;
- Execute a written contract with the client;
- Identify and mitigate conflicts of interest; and

[2] *Id.*

- Provide written disclosures including the full costs of products and services and compensation paid to the CFP® professional and the employer.

In short, CFP® professionals today are operating under these BIC-like requirements with commission, commission and fee, and fee-only business models.

Many also claim that the re-proposed rule will force Advisers to stop serving middle-income Americans. The primary support for this oft-repeated assertion is an industry study that is based on the premise that commissions would be banned under the DOL rule. In fact, the re-proposed rule specifically permits Advisers to receive commissions for the sale of securities and insurance products. The BIC Exemption and other prohibited transaction exemptions (PTEs) in the rule broadly permit firms to continue compensation practices typically used by registered representatives of broker dealers and insurance agents with middle-income Retirement Investors, such as commission-based advice and revenue sharing practices, as long as they put in place policies and procedures aimed at ensuring their advice is in their clients' best interest.

Reliable empirical data from numerous studies conducted by and cited by the Coalition demonstrate that a fiduciary duty will not force Advisers to abandon middle-income households and will not leave them without investment advice. In addition, the Coalition's own experience belies the notion that Advisers, required to act in the best interest of the client, will be unable to serve middle-income clients. Today, there are thousands of CFP® professionals and FPA and NAPFA members across the country who provide fiduciary-level services to everyday Americans either under commission-based business models or for fees with no or very low minimum asset requirements. If our experience is any indication of the true impact of the re-proposed rule, firms and Advisers are much more likely to adjust their policies and practices, to keep this business, rather than to abandon middle-income clients.

IV. Congressional Intervention in the DOL Rulemaking Process is Unnecessary and Premature

With respect to the rulemaking, the DOL is the expert agency charged with implementing Congress' original intent under ERISA to provide fiduciary-level advice for tax-preferred retirement assets. The Coalition urges Members to reject any legislative proposal related to the DOL rulemaking – whether standalone legislation or appropriations "riders" on an omnibus funding bill. Such legislation is unnecessary and would delay or derail a final rule to legally obligate Advisers to serve their clients' best interests.

The DOL has engaged in a comprehensive, deliberative, fully open and transparent administrative rulemaking process. Over a five year period, the DOL has: (i) issued a re-proposed rule after incorporating an initial round of comments and extensive further study; (ii) provided two additional comment periods (totaling 163 days) for its re-proposed rule; (iii) conducted four days of public hearings consisting of 25 panels with 75 witnesses; (iv) conducted hundreds of meetings with interested parties; (v) consulted with and received technical guidance from the Securities & Exchange Commission (SEC); (vi) testified before Congress; and (vii) held many group and individual meetings with Members of Congress of both parties.

This extensive and robust rulemaking process is working precisely as intended. The DOL has publicly indicated that it plans to make changes to address issues raised by us and by other stakeholders. For example, the DOL publicly stated that it intends to simplify the mechanics and timing of the best interest contract, that it will review expanding the types of assets that would be allowed in retirement accounts, and that it will review extending the transition time for firms to comply with the new rule. Any legislative effort directing the outcome of this open, transparent, and fully participatory administrative process – before the DOL has an opportunity to consider and to incorporate public input into a final rule – is unnecessary and premature.

Congressional intervention in the middle of an administrative rulemaking, particularly through an appropriations bill, is not consistent with the principles of good governance or the principles of separation of powers provided under the U.S. Constitution. If Congress disagrees with a federal administrative agency's interpretation or implementation of a statute, the Administrative Procedure Act provides a process for Congressional review of a final agency rule before the rule becomes effective and is implemented.

V. Alternative Proposals Will Unnecessarily Delay the DOL Rulemaking and Serve to Undermine – Not Advance – A Fiduciary Standard under ERISA

The Coalition believes that any alternative proposal must be measured against the principles of a true fiduciary standard under ERISA. The principles of a true ERISA fiduciary standard include requirements to: (i) provide advice without regard to the financial interests of the firm and Adviser; (ii) receive compensation that is reasonable in relation to the value of the specific services provided; (iii) not only disclose but also mitigate conflicts of interest; and (iv) act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise. Such a fiduciary standard must be fully enforceable to protect Retirement Investors.

Legislation based on the "declaration of principles" as proposed by Representatives Roskam and Neal is not needed to achieve their stated goals to strengthen retirement security and ensure that Advisers protect their clients' best interests. The DOL re-proposed rule already embraces these goals and is fully consistent with, and in fact exceeds, the proposed principles. The push for legislation is not a response to any actual deficiency in the rule. Rather it is an attempt to rewrite the rule, without the benefit of a full and open regulatory process, which would only serve to delay or derail the rule completely.

Moreover, any legislation based on the Roskam/Neal principles would weaken – not strengthen – the proposed rule and would undermine – not protect – the client's best interests. These principles refer only to disclosure of conflicts of interest; but are completely silent on a fundamental component of the fiduciary standard – an obligation to mitigate compensation practices and incentives that give rise to conflicts of interest. These principles are also silent on whether Advisers must provide advice without regard to their financial interests and whether Retirement Investors will have meaningful legal recourse to enforce a "best interest" obligation against a firm or an Adviser.

Alternative "best interest" standard proposals, offered by financial services firms and industry organizations in this rulemaking, also fall short of meeting the principles of a true fiduciary standard under ERISA. While they purport to establish a "best interest" standard, they omit a key and essential component of the "best interest" standard – the requirement that the advice be provided without regard to the financial interests of the firm and Adviser. Among other deficiencies, they do not require firms to reduce incentives that cause conflicts with a client's best interest and they rely on disclosure alone to address conflicts.

The need for an updated fiduciary rule under ERISA is long overdue. A final rule, promulgated by DOL, the expert agency required to enforce ERISA, and fully informed though its rulemaking process, is the best solution to actually ensure that Advisers are required to serve Retirement Investors' best interests. The Coalition urges Congress to refrain from legislation – whether stand alone or in the funding bill – and let the DOL promulgate a final rule to require fiduciary-level advice for all Americans' retirement assets under ERISA.

Chairman ROE. Thank you. Mr. Gaudreau, you are recognized for five minutes.

TESTIMONY OF JULES O. GAUDREAU, JR., CHFC, CIC, PRESIDENT, THE GAUDREAU GROUP, INC., WILBRAHAM, MASSACHUSETTS

Mr. GAUDREAU. Thank you, Chairman Roe, Ranking Member Polis, and members of the Subcommittee, and good morning. I am Jules Gaudreau, president of NAIFA, the National Association of Insurance and Financial Advisors, and owner of The Gaudreau Group, a multi-line insurance and financial services firm, founded in 1921 by my grandfather, and headquartered in Wilbraham, Massachusetts.

NAIFA members are in every congressional district—I am sure you have all heard from them—and work primarily with families and small businesses that would be considered main street people.

My firm insures over 6,000 families and businesses in 12 states. Like most of our NAIFA members, over 80 percent of our clients are middle-income Americans with household incomes below $100,000. Most of my clients started out as new savers and most likely would not have started systematic retirement savings without my encouragement and advice.

When we engage businesses in my community, we spend many hours discussing the importance of secure retirement and the importance of attracting and retaining employees who wish to participate in a retirement plan. We then design the plan, ensuring compliance with qualified plan rules. We educate and enroll their employees, and we assist in a myriad of administrative duties, such as preparation of year-end 5500 reports.

I promise that none of these business owners would have gone through this important process if it began with an invoice for our services. You see, we only get paid when the job is done and action is taken by our clients. The result is a plan available for employees, likely with employer matching, and is a step in the right direction toward retirement readiness and security. We also source and service thousands of pre- and post-retirement individuals with information and advice on retirement security.

Our disagreement is not with the enhanced standard of care fiduciary rule, but rather with the details. Almost everybody agrees that the DOL rule as proposed is fraught with problems. Over 200 members of Congress have sent letters expressing their concerns. The DOL received hundreds of thousands of letters. FINRA has expressed concerns, and most significantly, even the DOL itself has acknowledged there are many problematic provisions.

The effort to craft a bipartisan legislative alternative to the DOL proposal is critically important. The principles upon which the alternative will be based are exactly right: a partisan legislative alternative will protect retirement savers' investment choices, their access to professional advice and education, and their hard earned savings.

Again, NAIFA applauds and thanks you for your leadership on this critical issue.

We do not believe that the DOL rule is consistent with the principles described by Representatives Roskam and Neal, and the other leaders of this effort, including you, Mr. Chairman.

For example, the DOL favors fee-only arrangements that will result in less access to education and advice and fewer choices for many savers who cannot afford such fee-only arrangements. Advisors in my firm offer and use both fee based models and commission models, depending upon the specific needs and desires of our clients.

We are not opposed to fee-only arrangements, but we strongly believe that preserving consumer choice is critical. We also believe that the DOL rule is inconsistent with the principle protecting consumer access to professional advisors. The DOL has stated consumers can take advantage of technology in place of personal advisors. We disagree.

My father cannot even order groceries online for delivery, and I have zero confidence that in the absence of professional advice that he could learn about asset allocation, make investment decisions, or figure out how much he can withdraw without spending his savings too quickly.

It has become clear from DOL public statements that they intend to rush this rule to meet their objective of having it final and effective before change in the current administration. DOL has stated that they do not intend to re-propose the rule or to open a new comment period before issuing a final regulation.

For these reasons, among others, we believe it is time for Congress to act and act now and expeditiously. We do not believe this is a partisan issue, and we believe the families and businesses we serve are entitled to access to retirement education, access to affordable advice, and seamless implementation of the easily understood rules to assure retirement savers are relying upon advice in their best interests.

We are confident bipartisan legislation can achieve the common goal expressed repeatedly in this committee's earlier hearing and articulated by Secretary Perez as DOL's North Star. That being an enforceable best interest standard.

We are not confident that the DOL can revise their complicated rule without further review and input, a process they are rejecting.

We are grateful to you for having this hearing and for working on a sound legislative alternative to DOL's proposed fiduciary conflict of interest proposal.

Our written testimony included numerous compelling stories about the importance of financial advisors to middle-income Americans.

Thank you for allowing us to comment today. We look forward to your questions.

[The statement of Mr. Gaudreau follows:]

NAIFA

National Association of Insurance and Financial Advisors

2901Telestar Court • Falls Church, VA 22042-1205 • (703) 770-8100 • www.naifa.org

Good morning Chairman Roe, Ranking Member Polis, and Members of the Subcommittee. My name is Jules Gaudreau and I am testifying today on behalf of the National Association of Insurance and Financial Advisors ("NAIFA") for whom I currently am serving as President. Thank you for giving us this opportunity to share our perspective on "Principles for Ensuring Retirement Advice Serves the Best Interests of Working Families and Retirees."

Founded in 1890 as The National Association of Life Underwriters (NALU), NAIFA is one of the nation's oldest and largest associations representing the interests of insurance professionals from every Congressional district in the United States. NAIFA members assist consumers by focusing their practices on one or more of the following: life insurance and annuities, health insurance and employee benefits, multiline, and financial advising and investments. NAIFA's mission is to advocate for a positive legislative and regulatory environment, enhance business and professional skills, and promote the ethical conduct of its members.

I am also the President of The Gaudreau Group Inc., a multi-line insurance and financial services agency founded in 1921 and headquartered in Wilbraham, Massachusetts. The agency has thirty employees and insures over 6,000 businesses and families in 12 states. Over 80% of my clients are middle income with household incomes below $100,000. Our agency offers individuals and small businesses a full range of group benefit, retirement planning and investment products and advice. Many of our clients are new savers or newly offering group plans to their employees. I believe that many of them would not have become savers at all without our assistance and advice.

On behalf of my colleagues at NAIFA and most importantly, on behalf of our largely middle-income clients, thank you for your interest in protecting access to affordable professional investment advice. NAIFA strongly supports the bipartisan legislative principles to strengthen protections for those seeking investment advice.

I intend to focus my testimony today on three core themes:

1. The Critical need for main street Americans to access financial advice and our concern that the Department of Labor's (DOL's) proposal as drafted will create barriers to middle and lower income persons receiving financial advice. We continue to have a savings crisis in America and impeding the providing of advice will only exacerbate that problem.
2. NAIFA supports a bipartisan legislative alternative to the DOL proposal built on principles that would protect savers without implementing complex rules that become a barrier to achieving the goal of post-retirement financial security.

3. A revised rule issued in final form makes it exponentially more difficult to address unintended flaws before they negatively impact middle-income savers. We urge Congress to adopt a sound legislative alternative to DOL's proposed fiduciary proposal.

Workable Financial Advice Rules Underpin Need to Promote Middle Class Retirement Saving

There is a critical need for main street Americans to access financial advice. We continue to have a savings crisis in this country, as the huge Baby Boomer population bulge reaches its retirement years. Impeding the provision of sound financial advice, delivered in the client's best interest, will only exacerbate that problem.

We are concerned that the DOL's complex and expensive conflict of interest/fiduciary duty proposal – while well-intended – will in fact create barriers to financial advice that will be insurmountable for many if not most middle-income Americans. As currently drafted, the proposal would impose a wide range of new, very expensive, and mostly unnecessary administrative requirements along with a "best interest" standard that invites litigation regarding what satisfies that standard. The proposal implicitly favors a fee-for-service model that does not work for most Americans of modest means.

While DOL says that it does not intend to cripple the broker-dealer commission-based advice model, the fact is that the rules the proposal imposes on that model are so unworkable that they will effectively destroy the commission-based advice model. DOL says it is listening to the input we and others in the retirement planning and financial services communities have offered, and has expressed its commitment to revising the proposal to address many of the identified concerns. But the DOL does not appear to intend to re-propose the rule for additional comment. That means the agency will issue a final rule that may not effectively address all of the many issues arising from their original proposal. Retirement planning professionals, financial advisors and indeed consumers themselves will, in the absence of an opportunity to review DOL's modifications, be denied the opportunity to propose solutions to issues that inevitably will arise when revisions of this magnitude are made.

Accordingly, the bipartisan legislative alternative, based on the principles that are the subject of this hearing, is a critically important mechanism for making sure that any new financial advice rules work effectively, especially for middle-income retirement savers. We applaud and thank the leaders of this effort—you, Mr. Chairman, and your colleagues: Representatives Peter Roskam (R-IL), Richard Neal (D-MA), Michelle Lujan Grisham (D-NM), Buddy Carter (R-GA), and John Larson (D-CT). Those of modest means who are doing their best to save for a secure retirement will benefit the most from your efforts.

The Principles Form the Basis for Effective and Necessary Financial Advice

The principles upon which a bipartisan legislative alternative to the DOL proposed fiduciary rule are based, along with our comments on them, are as follows:

- ***Promoting families and individuals saving for a financially-secure retirement is an essential public policy goal***—This is a basic truism, widely and long supported on a bipartisan basis by many Congresses, Administrations and the private sector. Evidence of this can be found in the entire body of pension and retirement saving laws and incentives. According to the Federal Reserve, one in five people near retirement age have *no money saved.* As reported by the

Washington Post, "[o]verall, 31 percent of people said they have zero money saved for retirement and do not have a pension. That included 19 percent of people between the ages of 55 and 64, or those closest to retirement age." Roughly 45 percent of people said they plan to rely on Social Security to cover expenses during retirement.

It is, therefore, important to make sure that U.S. retirement savings and tax policies encourage individuals to take personal responsibility for the need to save to protect their financial futures. It is also important to be sure that the rules in place to protect these savers and savings do not so burden the mechanisms for saving that the rules themselves become a barrier to achieving the goal of post-retirement financial security.

- ***Retirement advisors must serve in their clients' best interests and must be required to do so***—The idea that retirement advice must serve the client's best interest is beyond dispute. In fact, NAIFA members do work in their clients' best interest. Our members build long-standing relationships based on mutual trust and excellent service to clients.

  The problem at hand, therefore, is not whether there should be an enforceable best interest standard. Rather, the problem lies in the details of the proposed rules. A workable best interest standard that protects investors should *not* require opening the door to unrestrained litigation when investment performance goes south—as it inevitably does in the cyclical financial markets that underlie investments. The cost of defending against a meritless lawsuit is steep and that cost will add significantly to the cost of getting good retirement savings advice. This is one of many unintended consequences of the DOL proposed rule, and one which absolutely *must* be addressed in the bipartisan legislative alternative.

  Further, the proposed rule imposes vast and expensive data collection and disclosure requirements on both financial advisors and their financial institutions—without regard to whether the retirement saver will benefit from this overload of information, and equally without regard to whether the financial advisor has any access to the data required. This, too, must be fixed in the bipartisan legislative alternative.

  Unfortunately, the DOL proposal places too much emphasis on an investment product's cost—to the detriment of other equally important factors such as the provision of advice and service. Our national policy on retirement savings must avoid a "one size fits all" focus on cost to the virtual exclusion of these other important factors. Some savers will prefer a higher-cost product that brings with it extensive service or lower risk or the potential for higher returns. Others will opt for lower-cost, more standardized investment choices. It is undeniably important that retirement savers have the information they need to make the choice that is best for them and their families. U.S. retirement policy should accommodate the freedom of consumers, armed with all the relevant information they need, to make these choices themselves.

  Finally, it is worth keeping in mind that the most egregious examples of bad acting—e.g., the Bernie Madoff Ponzi scheme—were and are against current law.

- ***Retirement advisors must deliver clear, simple, and relevant disclosure of material conflicts, including compensation received and all investment fees to individuals saving for retirement***—To make an informed decision about what retirement savings strategy is best for a saver and his/her family, that saver must know the cost of the products about which he/she is being advised, and also the fact that the same or similar products may be available elsewhere—perhaps at lower cost with less service or more risk, or possibly at higher cost where there is more service provided. Clear, understandable disclosure of this *relevant* information is a must. However, it is easy to overwhelm a retirement saver, especially one who is in need of basic financial education. Too much disclosure leads to overload and possibly paralysis in the decision-making process. The DOL proposal, as drafted this past April, fails this important balancing test. It requires too much information—and it requires it of financial advisors who usually do not have access to the data the DOL proposal requires.

The "clear, simple and relevant" standard is a very important principle on which to base a bipartisan legislative alternative. The retirement saver needs to know the initial cost of any investment he/she is considering, and should be provided a simple history of how that investment has performed and what factors may lead to a different performance outcome in the future. In addition, the saver needs to know that the same or similar products may be available elsewhere in the marketplace so that the saver can, if he/she wishes, assess the costs and benefits of working with one particular advisor or financial institution as compared to others.

- ***Public policies must protect access to investment advice and education for low- and middle-income workers and retirees***—Financial education is a basic need for many middle income retirement savers. But that education must come in a form that middle income savers can use. A tutorial or a computer model on what constitutes a bond or a stock or a mutual fund; large cap, mid cap, small cap; debt as compared to equity; annual rebalancing; dollar-cost averaging; etc. is not very useful if the retirement saver cannot also be told which specific products are examples of the concepts being explained.

  The DOL's proposed education carve-out is far too narrow. To work, it would require far more learning that most retirement savers will be willing to do. The result will be either that retirement savers will have to spend money (that many simply do not have, and many others would take from funds that could otherwise be used to invest in retirement savings) to pay a fee to get this more specific information; or they will do without advice. Too often the result will be a decrease in savings—and sometimes it will mean failure to save at all.

  Without question, we live in a world that is increasingly driven by turning to the Internet for basic information. But computer models by themselves, without explanatory examples, just won't work for many retirement savers, especially those who did not grow up in the computer age. Asking your average 50-year-old to use a computer model as the basis for his/her retirement investment decisions is, in most cases, simply not realistic.

- ***Public policies should never deny individuals the financial information they need to make informed decisions***—Most retirement savers will have questions about how specific product choices work. How certain investment products fit into a balanced portfolio, how to assess a product's risk and how it fits into the individual's risk tolerance profile, and the comparative cost of one type of investment over another (both cost of acquisition and cost associated with maintenance and performance) are but a few of the commonly-asked questions financial advisors field on a regular basis. Under the DOL's proposed conflict of interest rule, none of these questions could be answered unless the investor pays an upfront fee to the advisor, or unless the advisor assumes a fiduciary duty to the questioner. While that best interest/fiduciary duty is appropriate if the advisor is making a recommendation on which the investor may rely, it is not appropriate when the advisor is only answering questions, before the saver has even made a decision about whether to work with the advisor on his/her retirement savings portfolio.

A best interest standard carries with it significant (and appropriate) responsibility and potential liability. It can and should be the standard used when making recommendations on which retirement savers rely. However, it is not appropriate in an education context. A requirement that this standard apply to an educational conversation will result in less education or more upfront cost to the saver.

- ***Investor choice and consumer access to all investment services–such as proprietary products, commission-based sales, and guaranteed lifetime income–should be preserved in a way that does not pick winners and losers***—Many consumers want a specific company's product(s). Many advisors sell only those products offered by their financial institution. The choice to work with a particular company, with a company's representative, and with that company's products is one which should remain available to retirement savers. So long as the retirement saver is informed—in a clearly understandable manner—that the same or similar investments can be obtained elsewhere in the marketplace, advice on proprietary products discussed within the broker-dealer business model should be permissible within the best interest standard.

  Similarly, when the cost of acquiring an investment is absorbed by a commission, the retirement saver avoids the need to come up with upfront money with which to acquire the investment (or to take payment out of the amount available to be invested). This is an especially sensitive problem when the retirement saver is already challenged by the need to come up with the amount to invest. Another serious problem can occur when the saver is moving funds from, for example, a retirement account with a former employer, or inherited retirement funds. Using some of this money to pay for advice-related fees can trigger significant adverse tax consequences, thus increasing the cost of the rollover decision. A rule that leaves the retirement saver with no choice but to pay upfront for advice (often with adverse tax consequences) or do without advice is not good retirement policy. There are many reasons—cost is but one of them—why a retirement saver may wish to roll over his/her retirement savings. The reasons run the gamut from the possibility that a retirement saver may lack trust in the former employer and/or its plan, convenience, or the desire for a different set of investment choices and/or professionals to manage the funds, etc. Retirement and tax policy should guarantee that the retirement saver retains his/her ability to make an informed choice. The attached Exhibit 1 provides an example of how a NAIFA member provides 401(k) rollover guidance to a retirement saver.

  Also of considerable importance and significance are rules that make it easier, not harder, for a retirement saver to choose the lifetime retirement income option that comes with an annuity. Current law effectively protects savers who are seeking advice on the full range of annuities from which they can choose. DOL's proposed changes would make it materially more difficult—some predict impossible—for an advisor to present information on all kinds of annuities (e.g., fixed, variable, adjustable) unless the saver is willing to pay an upfront fee for the advice. The attached Exhibit 2 provides an example of a NAIFA member helps a saver establish a guaranteed lifetime income.

NAIFA believes that investment decisions are and must remain the saver's choice. It is not for the government—no matter how well-intentioned it may be—to make those choices for individual Americans. We agree with and support the need for full and fair disclosure of adequate but relevant information, so that the saver can make an informed choice. We also agree with and support the premise that advice on these choices should be given in the clients' best interests. But proprietary products, products that vary in cost, commission-based products, and all types of annuities are choices that should be available to all savers. To limit or deny these choices is bad policy and would harm the very retirement savers the rules are designed to protect.

- ***Small business owners should have access to the financial advice and products they need to establish and maintain retirement plans and help workers save for retirement***—About half of all retirement saving is done through the workplace, via employer-sponsored retirement savings plans. Small businesses especially need expert help both to decide to establish a plan, and to design and administer it. As drafted, the DOL proposal arguably prevents small businesses from getting this expert advice, unless they are willing to pay an upfront fee. Given the initial start-up cost of establishing a plan, not to mention the ongoing administrative and contribution costs, many small businesses will simply forego offering their workers a retirement savings plan if they have to pay a fee for advice on how to implement one. This is a result that DOL probably did not intend—that is certainly what we believe after multiple conversations with agency personnel during the comment phase on their proposal. It seems likely that DOL is open to addressing this problem, but once again we are faced with the likelihood that we will not know what DOL will do about this issue until we see a *final* rule. The bipartisan legislative alternative should include specific authority for financial advisors to provide advice to small businesses within a commission-based broker-dealer model, within the confines of the best interest standard. The attached Exhibit 3 provides an example of how a NAIFA member assists a small business owner reduce costs to the employer and employee participants.

Consequences of a Flawed Rule Would Fall on Middle-Income Retirement Savers

NAIFA fully agrees with the bipartisan legislative alternative's sponsors when they say, "We are concerned that the Department of Labor's current fiduciary proposal may have unintended negative consequences that could harm individuals and families saving for retirement. We acknowledge the Department of Labor's pledge to change aspects of the regulation before final issuance, but believe more must be done to adequately address concerns about the rule's impact on the ability of low- and middle-class families to save for retirement."

"The Department of Labor has said it will change certain aspects of the regulation before final issuance. However, if the final rule has flaws, damage can be done upon the rule's release due to the immediate changes the retirement savings industry would have to make and the likelihood that those changes could limit access to services and education for those saving for retirement."

A revised rule issued in final form makes it exponentially more difficult to address unintended flaws. If in fact the final rule is imperfect, retirement savers will be left with much more limited access to retirement savings advice during the time between release of a final rule and when those flaws can be addressed. Flaws are so likely as to be almost inevitable; no one, no matter how well-intentioned or expert, is likely to get every detail right when the scope of the new rules themselves, and the changes that have already been identified as needed, are so great.

Accordingly, this effort to craft a bipartisan legislative alternative to the DOL proposal is critically important. The principles upon which the alternative will be based are exactly right. A bipartisan legislative alternative will protect retirement savers' investment choices, their access to professional advice and education, and their hard-earned savings. It is hoped the effort will also help DOL as the agency works to achieve that flawless rule that both the agency and we hope can be created. Again, NAIFA applauds and thanks you for your leadership on this crucial issue. We are grateful to you for having this hearing, and for working on a sound legislative alternative to DOL's proposed fiduciary/conflict of interest proposal.

NAIFA has made all of these points to DOL, to members of Congress in constituent meetings and at previous hearings and briefings, and to the Administration, in the context of comments on the DOL's proposed rule. NAIFA comments filed July 21, 2015, on the DOL's proposed fiduciary rule and the Proposed Transaction Exemptions (PTEs) outline our specific concerns with individual elements of the Department's proposals in more detail and which suggest ways in which some the proposed elements we believe are damaging or burdensome can be ameliorated or corrected. Many of the Subcommittee members have already heard from constituents who are NAIFA members, and we have included a few specific comments in Exhibit 4.

Again, we thank you for considering our concerns, which are based on what is in the best interests of our middle income retirement saver clients.

I'm happy to answer any questions you may have.

Exhibit 1

RETIREMENT AHEAD

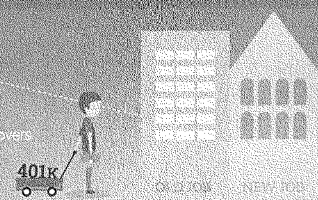
WE ALL NEED INVESTMENT ADVICE!

NAIFA

NAIFA members are concerned that the Department of Labor's proposed "investment advice fiduciary rule" will harm advisor-client relationships, interfere with advisors' ability to serve retirement savers and increase costs.

CONCERN

The DOL Rule Would Limit Advice on Plan Withdrawals and Rollovers



The DOL's proposed fiduciary regulation will not allow advisors to provide guidance to retirement savers on plan withdrawals and/or rollovers to other plans or IRA's, except on a fee-for-service basis.

NAIFA'S RECOMMENDED SOLUTION	The DOL must clarify the language of the Best Interest Contract exemption so it includes advice on distributions and rollovers.

WHAT NAIFA MEMBERS ARE SAYING:

"My client and friend, Jeff, needed an income strategy to keep his family in their home, his son in college, and slow the depletion of his other assets after being laid off a couple years ago. The decision was made that rolling his 401(k) assets into an IRA and receiving Substantially Equal Periodic Payments (SEPP's) was the best choice for Jeff. I helped him decide how to invest the IRA account to best meet his financial situation, tax status, investment objectives, liquidity needs, and risk tolerance. Under the current DOL proposed rule, I wouldn't be allowed to help Jeff. Without advice, Jeff would have likely cashed out his 401(k) and suffered the tax and the early withdrawal penalty."

– MARK K.

NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS
2901 Telestar Court • Falls Church, VA 22042-1205 • 877-866-2432 • www.NAIFA.org

Exhibit 2

RETIREMENT AHEAD

WE ALL NEED INVESTMENT ADVICE!

NAIFA

NAIFA members are concerned that the Department of Labor's proposed "investment advice fiduciary rule" will harm advisor-client relationships, interfere with advisors' ability to serve retirement savers and increase costs.

CONCERN

The DOL Rule Would Make it Difficult to get Guaranteed Lifetime Income Options

The DOL's proposed rule is particularly complicated and confusing with respect to the sale of different kinds of annuities and proprietary products. This complexity is contrary to the DOL's views on guaranteed lifetime payments -- which annuities provide.

NAIFA'S RECOMMENDED SOLUTION	The DOL should state affirmatively that the sale of annuities and proprietary products is not a violation of a best interest standard.

WHAT NAIFA MEMBERS ARE SAYING:

" A client was retiring and relocating to another state. She was very concerned about her financial well being and whether her funds would last through the balance of her life. I was able to establish a guaranteed lifetime income sufficient to cover her financial needs as well as some of her financial wants. This was done by purchasing a variable annuity. The funds came from the retirement plan with her previous employer. Since she did not have a defined benefit pension plan, this was a perfect solution for her. Under the proposed DOL rule I would not have been able to help her. She is very happy with what the outcome and feels very comfortable with the future of her finances. "

– DAVID S.

NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS
2901 Telestar Court • Falls Church, VA 22042-1205 • 877-866-2432 • www.NAIFA.org

Exhibit 3

RETIREMENT AHEAD

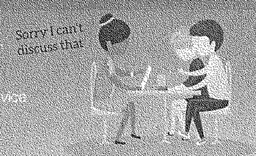
WE ALL NEED INVESTMENT ADVICE!

NAIFA

NAIFA members are concerned that the Department of Labor's proposed "investment advice fiduciary rule" will harm advisor-client relationships, interfere with advisors' ability to serve retirement savers and increase costs.

CONCERN

The DOL Rule Would Limit Advice to Retirement Plan Sponsors



NAIFA members assist small business owners in setting up employer-provided retirement plans and in explaining how these benefits coordinate with personal savings.

NAIFA'S RECOMMENDED SOLUTION	The DOL needs to permit third-party compensation models when working with businesses so advisors may continue to serve them.

WHAT NAIFA MEMBERS ARE SAYING:

"For employers, servicing retirement plans will not improve with the new rule and fewer advisors will operate in the space, to the detriment of employees. I am currently engaged in reviewing an existing plan for a small business owner who employs 100 people in my community. It appears my firm will be able to reduce costs by approximately 30% to the employer and to the employee participants. The employer was open to reviewing his plan, because it would not have an "upfront cost" to him up front. If I had charged thousands of dollars to review the plan, he would not have done so."

– JONATHAN D.

NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS
2901 Telestar Court • Falls Church, VA 22042-1205 • 877-866-2432 • www.NAIFA.org

Exhibit 4

David P. Roe, Tennessee

Mark M. – Memphis, TN – TN-9
Rest assured that, after a high level of due diligence is completed (due diligence required by my company, or they will not approve a proposed transaction), I make sure that I am making recommendations that are appropriate and suitable for my clients. To do anything else would be career suicide. In its current state, the BIC is completely unmanageable, not so much for its intent, but for the fact that "best" can be a moving target, and what may be best today isn't so tomorrow. An advisor could find himself in violation of the regulation on a snapshot basis, which would render it virtually impossible for an advisor to comply.

Joe Wilson, South Carolina

Steve B. – Travelers Rest, SC – SC-4
I have been in the financial services business for 47 years, the last 45 with State Farm. I spent 22 years in leadership and returned to personal production 20 years ago. Soon after, State Farm got into financial services all the way and I got into financial services all the way with them. I had already completed my CLU several years before, but felt I needed to study for and earn the CFP, which I did and earned the ChFC in the process. I was a CFP Designee for 5 years when the CFP Board changed their standards. We had always been held to a fiduciary standard when doing financial planning, but the change caused State Farm to interpreted the fiduciary standard to include property and casualty transactions when a financial plan was done for a current client. Subsequently, they required me to relinquish my CFP marks. What took years and tens of thousands of dollars to acquire, was wiped away with the stroke of a pen.

The DOL is about to do the same thing. Please do not let this happen. There is a distinct difference between holding financial services professionals to a suitability standard and a fiduciary standard. Being held to a fiduciary standard would drive a vast number of financial services professions out of the business. Those who stayed in the business would be severally limited as to their ability to assist clients with their needs.

Virginia Foxx, North Carolina

Grayson F. – Carolina Beach, NC – NC-7
Recently, I helped a client of mine, Theresa, decide what to do with her 401(k) account when she terminated employment. I was the one that did the planning with the employer, which allowed us to set up and implement the 401(k) from the beginning. After the 401(k) was in place, I personally met with each and every employee to help them evaluate and assess their goals, to help them align their 401k to those goals. Since I had built the personal relationship with Theresa, I was the first person she called when she left her employer. She came to me because she trusts our advice and planning.

The decision was made that rolling the assets into an Individual Retirement Account (IRA) was the best choice for Theresa. I helped Theresa decide how to invest the IRA account to best meet her and her husband's financial situation, tax status, investment objectives, liquidity needs, and risk tolerance. I received commissions from the purchase of mutual funds and an annuity.

Under the current rule, I would be prohibited from providing any of those services. If I wouldn't get paid for the services I provide, I wouldn't keep providing those services. in that case, the likely result would have been that Theresa would instead just cash out her 401(k) and would suffer the tax and the early withdrawal penalty. A wrong decision but one likely if she hadn't had access to my services.

Tim Walberg, Michigan

James C. – Sterling Heights, MI – MI-10

As a Registered Financial Consultant with over 35 years of experience, I have assisted my clients with their complex decision on what to do with their 401 (k) plan when they terminate employment. If they decided to rollover their retirement assets into an individual retirement it was because after measured thought it was in their best interest to do so. A considerable amount of time goes into determining this choice. We review risk tolerance, financial situations, tax status, investment objectives and liquidity needs. I receive a fair commission for this work. Under the proposed rule, I would be prohibited from providing any of those services. My clients consider my services to then to be invaluable and would not be happy if I could no longer provide those services to them.

Lee M. – Decatur, MI – MI-6

I am writing you in response to the proposal of a new regulation that if put in place will impact my industry in a very negative manner.

If this regulation is put in place this will have a direct impact not only on us in financial services industry but the general public. I have people that I meet with everyday that not only need, but want guidance with their financial plan.

They need the education that we give them on how to invest their money based on their risk tolerance, investment objective, retirement date, etc. Not only that what what should they do with their money when they retire? How do they know they have saved enough money for retirement? How do they make it last as long as they do? How do they pass this money tax efficiently to their kids and grand kids?

These are all important questions that need to be answered. This guidance from us allows people to have a peace of mind not only when they are saving for retirement, but when the actually do retire. Without a trusted advisor these questions will not be answered nor will these people get the important help they need and want.

For example, I had a woman that just retired today and her concern is drawing a specific amount of income per month for the rest of her life without running out of money, while keeping some of her money liquid in case of an unforeseen event. I will be able to put a plan in place for her that allows her to live on that income the rest of her life without running out of money and also keeping a portion of her money liquid that will grow with her as time goes on. This plan will be put together with proprietary products. If this regulation is put in I will not be able to be of service to her.

Yes we as advisors get compensated, but it is a bi-product of helping people, if this regulation is passed and there are no compensation for setting up and running 401k's, helping set up proprietary products such as IRA's and ROTH IRA's these people will be at a huge disadvantage. You WILL see people cashing out 401k money creating a huge tax liability, you WILL see people not actively managing their money which WILL cause losses in turn affecting their ability to retirement.

Brett Guthrie, Kentucky

Jamie N. – Corbin, KY – KY-5

I recently had a gentleman come to me not sure what to do with a 401(k) account from an old employer. He is a pharmacist with a family and doesn't have time to research and figure out what investment strategy would be best for him. Together we figured out his comfort level with investment risk and I was able to put together a investment strategy with a large mutual fund company that met his needs with less risk than his 401(k) had been allocated. I did receive a commission from my broker dealer on this transaction and the client has been well served and I'm confident he would not have been able to duplicate this planning on his own or through his former investment accounts.

Luke Messer, Indiana

John H. – Evansville, IN – IN-8
Today I helped a client decide what to do with his 401(k) account when he terminated employment. The decision was made that rolling the assets into an Individual Retirement Account (IRA) was the best choice for him. I helped him decide how to invest the IRA account to best meet his risk tolerance, financial situation, tax status, investment objectives, liquidity needs, and risk tolerance. I was able to combine these monies with existing account for his family resulting in no sales charge for him. Under the current rule, I would be prohibited from providing any of those services. The likely result would be that my client would instead have kept his money in the 40lk and received no advice and paid higher annual management fees than having his money invested in A shares which are usually lower management fees. If I rolled all of my clients into managed accounts, they would pay 1% a year or more in annual fees which would not be good for them in the long term.

I have many clients in the same situation. Some have not had any personal advice in many years and are either making no decision or a bad decision on their funds. I provide a very personalized service tailored to each individualâ ™s needs. I have spent many years in the business with many hours of continuing education to provide this much needed service.

Rudolph M. – Ft. Wayne, IN – IN-3
I have been helping people make financial decisions for over 30yrs. All of my clients recognize the value added my advise has given them. No two clients are the same. They have completely different needs. Knowing their full financial, personal, family, health, and business needs are necessary to give quality advise. Some clients need a complete plan that is fee based. Some need only money management that is fee based. Some need insured products, that have some quarantined benefits. Some need alternative products that can only be offers as FINRA brokerage accounts.

We take our roll seriously. I am already regulated by FINRA, SEC, my broker dealer, my professional organizations, my faith, and my value systems. More regulation is unnecessary and would have the undesired effect of harming the people you intend to protect.

Dan S. - West Lafayette, IN – IN-4
I have spent over 30 years educating consumers on insurance and investment products and fees. Most of my clients had no investments at all until I met with them. The bulk of my income comes from the 12b-1 fee on direct "A" share accounts.

The 0.25% or less (under $250/year on a $100,000 account) distribution fee seems to be demonized now by the DOL.

This new regulation will make me out a hypocrite and force me to start setting up brokerage accounts, charging brokerage fees, and be impossible to justify to my clients.

The increased paperwork and regulations appear to impossible for a sole proprietorship like mine to understand and survive. If I am forced to sell my business what will happen to my approximate 800 small clients? Would they pay the higher fees and go to the "big boys"? Would they simply quit investing? Would they revert back to their poor decisions of the past and cash in their accounts? None of these are good options for anyone involved.

Waylon P. – South Bend, IN – IN-2
I also think that the proposal needs to go further in addressing one of the biggest fiduciary issues facing retirees and potential conflicts of interest. Please make sure that life insurance agents or anyone who promotes themselves as a financial professional who do not hold securities licenses do not make recommendations to employees to sell the securities in their retirement plans. If you are not securities licensed, you should not give investment advice unless you become securities licensed. Some agents purposely choose to not be securities licensed to reduce the amount of

oversight from securities regulators, such as FINRA and the SEC, while continuing to work with employees in the retirement plan rollover market. Also, all states should follow the NAIC 10/10 annuity rule so high surrender charge period and high surrender charge fees are no longer allowed. Finally, all lump sum premium life insurance policies and qualified annuities should have additional scrutiny by tracking the source of funds; when the money is coming from an IRA or retirement plan, the regulators should make sure that only investment professionals who are securities licensed make recommendations to customers to sell their securities.

Buddy Carter/Rick Allen, Georgia

Sam M. - Peachtree City, GA - 3
Frequently I am able to offer valuable and practical recommendations to both friends and clients that enable them to make more informed decisions, and to ensure a more secure financial future. This may involve simply informing them of the basics of investing, educating them on their options, and answering their questions. Many times I have been able to help them not make serious mistakes that can be extremely detrimental to them. This rule as written currently will drive many honest, ethical persons out of the business and make such professional advice unavailable to many people. I urge you to consider this when moving forward. This appears to me to be a misguided use of regulation, which though maybe good in intent, is going to do far more harm than good to the citizenry.

Glenn Grothman/Mark Pocan, Wisconsin

Krista J. - Lac Du Flambeau, WI – WI-7
I regularly help clients who are about to retire plan for their retirement income. This is a complex situation for them. These nearly retired people usually don't have the expertise to choose the best solution for themselves. I am able to help by educating them on what is available and narrowing down the overwhelming amount of choices to those that are suitable. Without access to this kind of help many people would run out of money before they die leaving them in a gloomy retirement rather than a pleasant one. We all dream of retirement as a time to relax and have fun and to experience those things we couldn't do while working. If it isn't planned for properly, this dream will likely never become a reality.

Michael S. – Oshkosh, WI – WI-6
I work with many 401(k) participants on a daily basis. The bulk of them are in the manufacturing industry. 80% of them have very little investment knowledge and do not understand what they should be doing to properly save and achieve a successful retirement.

If the proposed law were implemented I would not be able to meet with these participants and provide the retirement education that I do. I regularly have participants tell me that, "My wife's company does not offer anyone for her to meet with and we just kind of guess at what we should be doing". Be implementing the proposed legislation advisors will leave this arena in flocks and it will ultimately hurt the people who need help the most. They will instead be directed to a website or an 800 number and this will continue to drive down the number of participants that are on track for a successful retirement.

Unfortunately there are advisors that do not serve in the best interest of their clients, but they are the significant minority. The proposed law will penalize the majority who do a good job for their clients and drive them out of this marketplace ultimately hurting the clients who need their help the most.

Juli M. – Spencer, WI – WI-7
I would like to share an example of one particular client. I began working with Clay because he recently took a job with an employer that I already had established a SIMPLE IRA. Clay opened an SIMPLE account and began contributing 3% of his earnings which was about $100/month. We discussed the old 401k he had at his former employer so that we could

coordinate all of this retirement savings. We decided to schedule a separate appointment to review that investment. After a short time we meet and review the 401k at his former employer. It was about $12,000. We meet for 2 hours discussing Clay's entire situation, which included a pending custody battle, purchasing a new home and lastly his retirement savings. No transaction was completed but we spent a significant amount of time on education, time horizon, risk tolerance and various types of investments. At this time we decided to leave the funds in the 401k account until he decided what to do with the pending custody battle and the home purchase. This decision was made because it was in Clay's best interest for now. No fee was paid for this 2 hour session and no contract was signed. Clay is my client and his situation is unique and as his advisor I need the ability to speak to him freely without hinderance of a BIC or education/advice restriction. It is my intention to continue to talk to Clay regarding his ongoing situation. He will be a long term client.

Constance B. - Waukesha, WI- WI-1
American investors, including small business owners who care greatly about their employee's ability to save for retirement, need reliable education, affordable retirement advice and clear and easily understood disclosure.

Under current regulations, investors, small business plan sponsors and retirement plan participants are clearly advised of compensation being paid to financial representatives. Not one of our clients have ever expressed a concern about this. They clearly understand, via every day experience, the nature of the work we perform for them.

In many cases, small employers do not have the luxury of having a dedicated HR department and so the owner wears that hat and must sift through all the rules and regulations applicable when it comes to defined contribution plan set up and administration. Trying to keep on top of that, along with navigating a business through the recent recession, all the while providing JOBS, can be a monstrous task.

Many of these same employers stopped matching 401k deferrals during the recession and are just now getting back to matching, a VERY IMPORTANT event in our world. If you begin making things so complicated and cumbersome that reps have no choice but to bow out of the retirement plan market, how do you expect this to end? Not well is my thought.

We are the unsung heroes of the small employer 401k market. The work it takes to solicit, set up and service a small (under $100,000) or new plan is in no way compensated by the commissions generated in the first 2 to 4 years under current commission standards. It requires a long term commitment on both the part of the plan sponsor and the rep and that requires mutual trust and respect and willingness to work together. This is something, sir, you cannot legislate or issue regulations on. It must come from hard work, intelligence, ethics and character.

I would be happy to provide further enlightenment on exactly how millions of hard working registered representatives help people with financial decisions every day, many times for NO COMPENSATION because contrary to what the public seems to believe, not everyone who comes to us is in a position to use our services, they just need access to our huge knowledge base.

Joe Courtney, Connecticut

Robert D. – Cheshire, CT – CT-5
In my 40 years as an advisor the most beneficial work I provide for all clients, regardless of the size of their accounts, is the time I spend with them helping them understand the challenges they face and what steps they can take to manage their finances. Unlike attorneys or accountants, there is no clock ticking in the background so this time is without compensaiton. Furthermore, they regard me withj a high degree of respect for that approach. Your proposed legislation will prevent me from providing the type of advice that most investors clamor for and cannot get from a robo-advisor. I urge you to prevent this legislation from being passed.

Margaret A. – Manchester, CT – CT-1
It is all about the problem of well-intentioned legislation and unintended effect on the middle class, widows, divorcees, and pay-check-to-paycheck workers just getting by. If I were to charge fees for my time as a financial professional, I would never have met and educated and assisted the over 80% of my clients who are not wealthy. I helped Pat, a divorcee, make decisions about 401(k) money she was receiving due to her unwanted and unexpected divorce. After reviewing her financial situation, income needs, investment objective and risk tolerance, we set up a rollover to a product that met her needs and her best interest exactly and yes, I received a commission.

Another client of mine, Kathy, was a widow with four young children who desperately needed guidance. Yes, I attended the funeral. We financial professionals don't just open accounts and then just leave clients to fend for themselves, we are there for them at all stages in life, helping them to understand all of their options and educating them. I helped her rollover her husband's retirement plan into an IRA of her own (yes, a product from my company for which I received a commission) and informed her about the significant Social Security survivor benefit that became a significant source of income to keep her children in their many activities and a permit the purchase of a reliable car to drive them in. Requiring a signed contract before giving her any assistance would likely have scared her away from working with me. Then she likely would have cashed out the retirement fund, paying punishing taxes on the distribution, in her panic to to provide for her family.

Rubén Hinojosa, Texas

Steve C. – College Station, TX - 17
I've been in the Financial Planning and Investment business for over 24 years. I meet with individuals daily to conduct financial planning. My clients' questions relate to their individual situations, including retirement planning, inheritance issues, tax-reduction strategies, investment and accumulation products, and other concerns such as how to best address Long Term Care issues.

The proposal contains provisions that will have the INTENDED consequence of leaving many retirement savers without access to professional education, advice and services. Savers, without access to professionals, will perform "financial surgery on themselves" and incur huge tax bills by not properly planning.

Larry T. – Abilene, TX – TX-19
For thirty-two years I've been helping clients plan for a successful retirement. I've spent many hours and much money obtaining professional designations such as the Chartered Financial Consultant designation so that I can be better prepared to help my clients properly allocate their investment assets in a manner that is properly suited to their needs and goals. I am paid fair commission for my time, advice and for on-going service. A question I always ask myself when advising people is whether what I am recommending to them will hurt them or help them. If it is not in their best interest I do not recommend it to them. People need help to know what to do, but in order to give sound advice and quality service I have to be compensated just like any other business that provides a valuable service.

Geoffrey H. – San Antonio, TX – TX-23
I have been a licensed insurance agent and advisor for 43 years. During that time I have committed much of my time and resources to continued personal development and improvement, precisely because I believe that customers deserve my absolute best efforts and opinions. They know I have their best interests foremost in my mind, not just because of those efforts, but also because my continued membership in educational organizations which require extremely high ethical standards while interacting with any members of the public.

My company deals with many people in a marketplace that is underserved by financial advisors precisely because they don't have hundreds of thousands of dollars for investment and risk management. The proposal will drastically reduce opportunities for those people to receive information about a myriad of financial services products, precisely when they most need appropriate advice and investment education.

Frederica S. Wilson, Florida

Anthony K. – Miami Lakes, FL – FL-25

Please don't rush this DOL Fiduciary Rule (RIN 1210-AB32). As you have seen from myriad letters sent by my peers in the industry, the new rule has some serious flaws in its current state. Continued dialogue among all parties involved is needed before proceeding with such a huge measure.

There will always be a small number of unscrupulous, lazy, or greedy individuals in any industry for whom rules and regulations need to be created; but the majority of us, who take care of people's financial lives for a living, who help them to secure a retirement and achieve their life's goals, and who care deeply about our clients and their families, are doing the right thing for our clients, day in and day out. And we, who without question always put our clients' best interest first without ever having to be asked, believe this proposed rule will harm us and more importantly our clients.

Please don't allow the rule to be enacted in its current form, because it will hinder our ability to serve our clients in the best way possible, which will in turn hinder the very clients that all of us -- you and I alike -- are working to help and protect.

Please listen to the voices in the industry, explore thoroughly the reasons given, and address the serious, well-founded concerns about the Rule (RIN 1210-AB32) that are being brought before you. We all have the best interests of our clients in mind; Please take the time to examine the drastic effects and unintended consequences this new rule is very likely to create.

Dan F. – Largo, FL – FL-13
I recently rolled over a 401k for a customer to an IRA we established. This 401k was from an employer that he was with over 10 years ago. He decided that he wanted to get the money out of the plan and have it under his control, in his IRA. I proper risk Tolerance was completed along with all the proper paperwork. Not having this option for customers is not a good practice. The customer should have the right to choose what investment they want, when it is their money.

Reina S. – Fort Myers, FL – FL-19
Below is the recommended verbage from my industry association, but here is my personal comment: I am a CPA/PFS and have been advising clients since the 1980s. My clients' needs come first, not my compensation. The ability to design, and then recommend what is felt to be the most suitable result for my client, that also allows a compensation for me to have a livelihood has taken years of study, education, participation in the evolution of different available instruments, etc...

I am a trusted advisor and am flabbergasted that the details of the DOL initiative get into a level of my business that they do not have the expertise to design. Make the penalty and impact for injuring a client SO onerous that the "bad eggs" might think twice about harming a client. Otherwise, I see GOOD advisors ready to leave the business because it will be strangling and impossible to follow the rules AND give best advice to clients.... when the bad eggs will simply continue to break whatever rules exist and are added in the future.

I DO believe in a level of regulation to protect the public. THIS IS NOT THE WAY TO DO IT. PLEASE, vote, not just to delay the DOL FIDUCIARY RULE until the next administration... but vote NO on this one.

James T. – Sarasota, FL – FL-16
As I read the current proposal of the DOL regarding changing the "Fiduciary" Rule, I find that the practical impact would

be adverse for the overwhelming majority of our clients. We service several thousand individuals and businesses, as well as governmental entities regarding investments, qualified and retirement plans, including the Sarasota County Sheriff's Department, Sarasota Manatee Airport Authority, and a number of private employers.

We provide educational service to ALL participants regarding their options and rationale for participating, particularly where participation is optional, i.e. their own deferrals and investments. We do not charge additional "fees" for such service. At transition times, i.e. termination, withdrawal, death or disability our continued counsel is critical to the client to understand their options and choices.

Frank M. – Jacksonville, FL – FL-4
I have assisted numerous clients with balances under $20,000 that are bewildered with the options and rules surrounding qualified and non qualified investments. An 1-800 service doesn't give them the confidence they need to make a decision nor does it provide the accountability to the client that is needed. I need to discover and document the client's situation before making a recommendation, however an 800 number cannot do this and most likely will not do it.

As elected officials, you know the importance and duties that being a representative entails for your constituents. WE feel the same obligation and in the majority (just like our elected officials) perform our duties with high regard to client needs. There are laws and regulations in place to catch the bad actors. By implementing these new DOL rules you will force the majority of Americans to seek help from an impersonal service because they cannot pay an upfront fee for the advice needed.

Jonathan D. – Tampa, FL – FL-14
The proposed DOL fiduciary rule is well intended, but misguided. I have operated my own financial practice for 20 years, serving everyday, Joe/Jane Lunchbucket Americans. The folks the rule seeks to protect are my clients, and those folks would be harmed by the rule.

First let me address employees/participants. The rule would force many people into the world of "Asset Based Fee" and "Fee for Service" planning. Those platforms sound great, but generally cost clients significantly more in the long term. On the front end, fees are a deterrent to seeking out professional advice. The result will be disastrous. Clients will see fees that will discourage them from seeking professional guidance with their retirement accounts. This will likely be a boon to Treasury, as more people will make the mistake of taking full distributions, instead of rolling funds over, creating unnecessary taxes and penalties.

As for employers, service of retirement plans will not improve with the new rule. It will get worse. Fewer advisors will operate in the space, to the detriment of employees. I am currently engaged in reviewing an existing plan for a small business owner who employs 100 people in Savage, MN. It appears my firm will be able to reduce costs by approximately 30% to the employer and to the employee participants. The employer was open to reviewing his plan, because it would not have a "Cost" to him up front. If I had charged thousands of dollars to review the plan, he would not have done so. Because I will be paid a commission, the business owner was more than happy to review the plan to see if a better option is available.

Sydney G. – Windermere , FL – FL- 10
Example: I recently helped an individual decide what to do with their 401(k) account when they separated from service from their employer. The decision was made that rolling the assets into an Individual Retirement Account (IRA) was their best choice.

I helped them decide how to invest the IRA to best fit their personal financial situation, their risk tolerance, investment objectives, tax status and liquidity needs.

I received commissions from the purchase of mutual funds. Under the current rule, I would be prohibited from providing any of those services. If I didn't help this person, the likely result would have been a cash out premature distribution which results in tax implications and early withdrawal penalties. Each person has their own unique situation that requires guidance.

Celine P. – Palm Beach, FL – FL-12
I'm sure you've received many canned responses to this but I would like to share with you my personal take on it:

My opposition to to this complex regulation does not mean I'm against the concept of putting my clients first. I already am a "fiduciary" as an Investment Advisor, but also offer commissioned insurance products which my clients need for a secure, well rounded retirement.

For me personally, I think to best protect the public without throwing the baby out with the bath water as we did with Obama Care (and HIPPA for that matter), and literally risk putting thousands of small business agents out of business, I think this discussion should be more about disclosure and less about regulation.

In a real estate transaction a buyer knows who the agent represents and it is fully disclosed (with one form and one signature). The buyers can then make an informed decision on whether there is any "bias" in their agents recommendations because they know how they are getting paid and who they are representing. It doesn't require legal contracts that the buyer can then come back and sue the agent if they ended up in a neighborhood that was not what they expected (notice I said "expected" and not what they were told). People often change their minds or think a deal was not good after the fact, when at the time it may have been exactly what they asked for or the best deal for what they could afford or qualify for.

As I mentioned earlier, I am a fiduciary that works in the clients best interest and there are plenty of us in the market place and clients and companies are free to shop the market and decide for themselves (like free enterprise is supposed to work).

I think that if we simply increase disclosure by requiring all agents to disclose how they get paid and any potential or real conflicts of interest and then allow the public to decide for themselves, then that is a truly free enterprise system and the public will dictate how they prefer to do business. So rather than the government tell us, why don't we allow the consumer to make that decision?

This rule needs to be rewritten and simplified to require more disclosure and not more regulation!

Mark Takano, California

Michelle C. – Woodland Hills, CA – CA-30
IMPORTANT***Aside from all these formal reasons to review this issue, you need to really look at the people side of this issue. Most people have never taken a personal finance course and I've found an educated client is a better client. I've spent many years educating and investing in myself for this business, I've earned the CFP(r) and ChFC designations and have learned that people don't really take action or make decisions without being informed. We are there to help them with this and 1) should be compensated accordingly and 2) should be supported in helping all Americans to have access to this information.

It seems easy from a bird's eye view to make these sweeping statements about our industry and how to fix it, and unfortunately there are people in the industry who should not be giving advice - but that is the case with every industry. The majority of us work hard to do our best for our clients so we and them can sleep well at night. I'd appreciate you looking further into this matter and realize that this is a contact sport with real people helping clients get to a successful retirement.***

Kurt S. – Fresno, CA – CA-22
As a licensed, financial professional, I find myself regularly assisting people with retirement and investment decisions. I help people who may be transitioning jobs with the important decisions regarding their retirement portfolios. Many times those decisions include movement from a 401k to a personal IRA. I help them determine the best place for their IRA money based on their needs, their risk tolerance and investment objectives. I receive commissions from this service, and under the current wording of the rule, I would be prohibited from providing these services. I am afraid that clients without my service would be left making harmful financial decisions. A possible outcome would include the cashing out a 401k that would create tax and early withdrawal penalties not to mention the loss of the retirement account.

Hakeem S. Jeffries, New York

Tony M. – Rochester, NY – NY-25
For Example, I recently helped a physician, John roll an old 401k into an IRA for retirement from his old plan. He had moved to cash after 2008 and was in cash for an extended period of time, missing the market growth following the market crash. It was decided after reviewing, investment options, pros and cons to roll his old 401k into and Individual Retirement Account. This account was established based on John's investment risk tolerance, age, marital status, tax status, investment objectives, cash flow. The decision was made to roll over into a Variable Annuity inside of an IRA with guarranteed death benefit, and guarranteed income for his life as well as that of his younger wife, Deb. I received commission from the purchase of an annuity. Under the current rule, I would be prohibited form proving any such service. The likely result would be that John would have stayed in cash, missing long term investment opportunities for growth, or would have potentially cashed in the assets, a wrong decision yet potentially likely if John had not had access to my services.

John T. – East Syracuse, NY - NY-24
My opposition to provisions in a complex regulation does not mean I'm against the concept of putting my clients first. As a CLU, I have pledged to act in my clients best interest, using the biblical Golden Rule as a guide... do unto others as you would have them do for you. The guide tells us to act as we would do for ourselves with the same set of facts. Years ago I learned that doing the right thing for my clients is the only way to have a long term relationship. My clients, many of whom I have worked with for a dozen years or more, know that I have their best interests in mind. Otherwise, they would no longer be my clients.

The Best Interest Contract Exemption is inoperable. The new exemption that would allow otherwise prohibited compensation such as commissions and 12b-1 fees, is complicated, confusing to consumers and costly. I urge DOL to simplify the contract requirements and eliminate the burdensome data retention and cumulative disclosure requirements. In my 35 years of dealing with clients, I have learned that disclosure is meaningless if it isn't read. My interactions with clients over these years, tells me that if the disclosure is longer than one page, it is highly unlikely they will read it. If that is the case, it is incumbent on the regulators to find a more concise and simple way to inform our prospects. I have found that clients do business with me because they trust me. I need to continue to be trustworthy. No regulation or law is needed for me to act in the best interest of my clients because it is in my best interest as well.

Robert C. "Bobby" Scott, Virginia

Peter G. – Vienna, VA – VA-11
Below this paragraph you may recognize the form nature of the letter. So, first, please know that I am an advisor with 28 years' experience in the Washington, DC area. The majority of my clients regularly request my guidance for their 401K's and IRA's. It would be very difficult to do a good job for them without considering all assets. Without help, many

people neglect to give these accounts attention. I am just a few blocks away if you would like to discuss this with someone who regularly deals with people who would be impacted.

Mark K. – Clifton,VA – VA-10
Recently, I helped a client, friend, and fellow church member Jeff, age 55 1/2, create an income strategy to keep his family in the house, his son in college, and slow the depletion of his other assets after nearly 2 1/2 years of involuntary unemployment (laid off). The decision was made that rolling his 401K assets into an Individual Retirement Account (IRA) and receiving Substantially Equal Periodic Payments (SEPPs) was the best choice for Jeff. I helped Jeff decide how to invest the IRA account to best meet Jeff's risk tolerance, financial situation, tax status, investment objectives, liquidity needs, and risk tolerance. I received commissions from the purchase of a fixed indexed annuity - parenthetically the lowest commissions of the three suitable solutions presented and my only compensation for untold hours of analysis. Under the current rule, I would be prohibited from providing any of those services. The likely result would be that Jeff would instead just cash out his 401(k) and would suffer the tax and the early withdrawal penalty, a wrong decision but one likely if he hadn't had access to my services.

Sharon T. – North Chesterfield, VA – VA-4
Recently I worked with a 68 year old woman whose husband has Alzheimers. She has never worked with their investments and was going to simply take all her 403(b) money out and put it in a CD. She was referred to me and I helped her look at her own longevity versus that of her husband's illness. She has invested her retirement funds in a way to guarantee to replace her husband's social security , which is less than hers, and she is very relieved to have this kind of help to provide a sustainable and secure retirement.

Chairman ROE. Thank you, Mr. Gaudreau. I will now yield to Mr. Wilson from South Carolina for five minutes.

Mr. WILSON of South Carolina. Thank you, Dr. Roe, and thank you for your bipartisan leadership on this issue addressing a bipartisan alternative.

Mr. Gaudreau, the National Association of Insurance and Financial Advisors, NAIFA, has assisted families and businesses professionally and competently in the midlands of South Carolina since 1931. Your members are important civic leaders in our state, and very much appreciated. People know they can count on them. Thank you, you should be really proud of the people you work with.

Can you tell us what the impact of the proposed fiduciary rule will have on your Association's ability to serve your clients?

Mr. GAUDREAU. We believe this is an unworkable standard that will drive advisors away from the small- and middle-income investor, and thus, deprive Americans in those markets with access to qualified financial advice, the very people who need it the most.

A similar scheme was tried in the United Kingdom, and despite the comments of the DOL and others who were in favor of this rule, the reality there is that Parliament in the United Kingdom is considering what they call a public policy solution to fix the gap advice over there, because hundreds of thousands of people in their country are suffering from the lack of financial advice that we fear this rule would cause in America.

Mr. WILSON of South Carolina. I was really impressed, Ms. Doba, with your experience and your firm. According to the U.S. Chamber of Commerce, small business owners through savings and incentive matched plans, employee's IRA plans, and simplified employee pension IRA plans provided $472 billion in retirement savings to over 9 million American households.

However, the largest gap in coverage for retirement savings is with small businesses. These small business owners and employees should have a retirement savings plan that works.

How would this Department of Labor proposed increase problems that small business employees face when seeking retirement savings advice?

Ms. DOBA. I can really only speak from my experience and my perspective, but I know when I started my company, cashing out my 401(k) and what have you, and I had worked at another firm that had a retirement—they did not have a retirement plan because it was just too difficult or they did not want to deal with it, so I honestly did not think I would be implementing a 401(k).

Had this rule been in effect at that time, I can guarantee you that I would not have started a 401(k). As a small business owner, most people that are looking at starting to provide benefits, they are dealing with starting a company.

They are putting health insurance plans together, just trying to make payroll, having added costs put on top of that, you are already in a cash flow situation, so you have a bunch of hurdles already to go through, and as a small business, there is already a stigma attached to it, not providing quality benefits to our employees. We are constantly battling that.

I just had an employee that I hired a week ago, and he almost didn't take the interview because his perception was as a small business, we could not compete with his large company he was moving from, benefit wise.

Mr. WILSON of South Carolina. Congratulations on your deserved success. I can see your empathy for the people you work with, a great team.

Ms. DOBA. Thank you.

Mr. WILSON of South Carolina. Secretary Campbell, in your opinion, how will this proposal change a fiduciary's ability to give advice to those who need it the most? Will this proposal have a greater impact on lower- and middle-income individuals rather than higher income?

Mr. CAMPBELL. Yes, I believe that it will, and I think that is one of the real problems with this proposal, that it is going to impose additional litigation risks, additional compliance costs, and disrupt a lot of the processes that currently are occurring that provide services to participants and to IRA owners in a way that is going to result in those additional costs, which is going to of necessity have to have advisors charge more to be able to stay where they are.

I think another important thing to understand is when we talk about a fiduciary standard, "fiduciary" is sort of a catch all word that applies to a lot of different standards. What the standard DOL is trying to apply here is the ERISA fiduciary standard, which is quite different than the securities fiduciary standard that the CFP, for example, is embracing.

It is a much more restrictive standard, particularly when you put it with the prohibitive transaction rules, such as the ability of an advisor to even assist a participant with a rollover. That is a structural difference in cost, which is perceived as a conflict by the rule, and therefore, requires the use of special rules to be able to even do that transaction.

When you go through all that process, there is a lot more litigation risk and a lot of more costs associated with it.

Mr. WILSON of South Carolina. Thank you for your insight and your background at DOL should be very helpful to the persons currently at DOL. Thank you very much.

Chairman ROE. I thank the gentleman for yielding. Mr. Polis, you are recognized.

Mr. POLIS. Thank you. Ms. Mohrman-Gillis, most financial advisors currently seek to do what is in the best interest of their clients, including those certified by your organization. As is the case in all fields, there are a few bad actors. That is the reason we have a formal standard in place.

Now, there has been a good deal of discussion that the financial advisors would stop serving clients under the Department of Labor rule. As I understand it, the CFP Board and those certified by the Board already use a conflict of interest standard.

My question is can you explain why you believe a strong conflict of interest standard is important to savers, and what has been the experience of your Board and its advisors with the fiduciary standard, and how are individuals certified by your organization going to be impacted if there is a similar rule to the one proposed by DOL?

Ms. MOHRMAN–GILLIS. Thank you. I appreciate that question because we have heard a lot of comment about what the impact of this rule is going to be on small savers, on the middle class, on small businesses.

We speak not from speculation but we speak with experience of putting a fiduciary rule in place, of putting requirements in place that are very similar to the BIC like requirements, to essentially act in the best interest of the client, have a written contract, provide disclosures of conflicts of interest, and mitigate those conflicts of interest.

Our experience has been that it will not prevent advisors from providing services under commission based business models. Our advisors, we have CFP professionals, FPA, and NAPFA members across the country who are providing services either under commission based business models or for low fees or low assets under management, not only to middle class clients but others.

One example is Mr. Ray Ferrara. He testified at the DOL hearing. He is a CFP professional in Florida, chairman and CEO of ProVise Management. He provides advice to small business owners, 401(k) plans who collectively have 1,800 participants with a balance of $50,000 in their average account. He provides advice on a commission basis and on a fee basis. He provides advice that is in their best interests.

He testified at the hearing that he will continue to provide that advice under a DOL rule, and he further testified that for those who claim they are not able to serve the middle-class clients under a fiduciary standard, ProVise and scores of CFP professionals across the country stand ready to fill that gap.

Mr. POLIS. If you can submit that testimony, I can enter it in our congressional record as well. I would love to see that.

One of the issues that many of us have been concerned about is the lack of financial literacy. I wanted to give you a chance as well as Mr. Campbell a chance to address how you see the rule impacting financial literacy and education, and what could be improved to ensure that we do not impede financial literacy and education. You each have about 45 seconds.

Ms. MOHRMAN–GILLIS. Well, first of all, the DOL rule will not impede the ability of advisors to provide educational advice—education to their clients. Under the—

Mr. POLIS. That is to their clients, that is after they have signed on, correct?

Ms. MOHRMAN–GILLIS. No, not after they have signed on.

Mr. POLIS. Okay. You said "clients."

Ms. MOHRMAN–GILLIS. We do not believe that the rule as written or the rule as we expect the DOL to modify it will require advisors to essentially shove a contract in the face of their clients and require them to sign the contract before they are able to provide them with information—

Mr. POLIS. Thank you. For my last 45 seconds of time, I want to give Mr. Campbell a chance to address many of our concerns about impacting financial literacy and education in this rule.

Mr. CAMPBELL. Yes. The rule, while it does still preserve a rule for education that is not advice, it does restrict and narrow that from what the current standard is and in a way that I think is very unhelpful.

For example, if you are providing a participant in a 401(k) plan a model asset allocation portfolio that says here is what someone like you would consider by asset class, you know, 40 percent in large cap, *et cetera*, the DOL proposal would actually not allow you to then connect the dots and say and in your plan, those funds are, and that would suddenly become fiduciary advice.

I think that really undermines the purpose of that education. I am hopeful the Department will change that, but as proposed, I think it is very much an imposition and restriction on the ability to provide useful education.

Mr. POLIS. Thank you, and I yield back.

Chairman ROE. I thank the gentleman for yielding. Dr. Foxx, you are recognized.

Ms. FOXX. Thank you, Chairman Roe, for holding this hearing. I want to thank the witnesses for being here today. There may not be another issue before our committee's jurisdiction that I have heard more about from my constituents than this one.

It is easy to understand why they are so concerned. Just as in the Department's first effort several years ago, this rule is predicated on a belief that Government knows best and private financial advisors will not act in the best interest of their clients. I disagree.

Why would my constituents have any confidence that a new Government driven regime for financial advice will turn out any better than the implementation of ObamaCare or the administration of the VA?

Look at what federal control brought to our education system through *No Child Left Behind*. We are moving this week to fix that mistake. It is my hope we will stop this rule before it becomes yet another mistake in overreach by the Federal Government.

Finally, I would like to reiterate my support for the individual financial advisors who would be impacted by this rule. I know the overwhelming majority of them have always acted in their clients' best interests, and do not need the Department of Labor to tell them what to do. If they are bad actors, let's ensure they face the stiffest appropriate penalties. We must allow the rest to continue their work, helping Americans save for their life goals.

My question, Mr. Gaudreau—I am the sponsor of the legislation to make clear that employees can transfer qualified money into a simple IRA account, believing that employees who participate in retirement plans should have choices and flexibility in moving their funds.

If the DOL rule limits access to professional advisors, what are some of the poor choices they might make, including taking taxable distributions subject to early withdrawal penalties?

Mr. GAUDREAU. I think those are two of the biggest problems. What we find without the access to appropriate qualified advice, people might rely on friends, their neighbor, the chef at their local restaurant, the plumber, cousin Billy or somebody else, to get advice on what they should do with that rollover.

Of course, there is a lot of chatter and noise in the news media, a lot of disagreement. If you watch anything on television any Saturday morning, you will see experts disagreeing almost entirely on different investment things.

It is very, very important. I think consumers are confused. They need somebody they trust, somebody in their community that they can count on to have their best interests and give them advice.

You mentioned two very particular things, which is people taking money out of a qualified plan and depending upon the timing and the constructive receipt, having to pay both a penalty as well as taxes on those funds. Simple financial advice could have recommended them to do otherwise.

Ms. FOXX. Thank you very much. Mr. Campbell, what are your thoughts on the methodology the Department of Labor has used to calculate its numbers on the purported benefits of this rule, beyond those macro numbers, do you believe there are any benefits of the current system that their methodology ignores?

In other words, could this rule reduce the amount individuals were able to save by retirement through lost growth, poor risk allocations, or other factors?

Mr. CAMPBELL. I think that is an excellent question because it goes to one of the key problems, I think, with the proposal. I mentioned in my opening statement the $100 billion per year that the Department previously estimated just in 2011, so the same administration, is estimated lost due to lack of access to advice. That number somehow has never made its way into this proposal. They have never put together what they said in 2011 versus what they are saying this year.

Also, in the academic studies they relied on to come up with the $17 billion, there is a range, but $17 to $40 billion worth of conflicts, that looked at a very narrow type of transaction with a particular type of advisor, and did not take into account virtually anything else that goes on in that advice relationship.

For example, if I am sitting down with my advisor, one of the things I am hoping that they are convincing me to do is save more, and if I can save one percent more than I am now, that is going to be a massive amount of increase in my retirement readiness and savings. None of that benefit is calculated in the DOL economic analysis.

Lastly, I would say the cost that they estimate otherwise for compliance is laughable. We are obviously helping many clients at my firm start to comply, think about how to comply, look at the rule, what would it mean.

They have already incurred much more in legal fees than DOL thinks they would over the entirety of this process. That is just the reality of those compliance costs as opposed to DOL's numbers on what they think it would be.

Ms. FOXX. Thank you very much. I yield back, Mr. Chairman.

Chairman ROE. I thank the gentlelady for yielding, and now I will yield to the Ranking Member, Mr. Scott, for five minutes.

Mr. SCOTT. Thank you, Mr. Chairman. I thank you for convening this hearing. Ms. Mohrman-Gillis, we know that the rule has been subject to a very long and deliberate process. The Secretary has said he is going to make changes based on the input he has received. What is wrong with waiting until the rule is actually promulgated?

Ms. MOHRMAN–GILLIS. Thank you for that question. Nothing is wrong with waiting. In fact, that is what we think should be done. The DOL has spent over five years working on this rule with an extensive, robust, open comment period.

The DOL has been very receptive to comments from us and other stakeholders and has stated publicly that it plans to refine the rule based upon the comments that it has received and make changes that will address specifically many of the issues raised by members on this subcommittee and others in Congress.

We believe that it is well past time for the DOL, the agency in charge of actually effectuating Congress' original intent in 1974, to provide fiduciary level advice to tax preferred retirement assets, to allow the DOL as the expert agency to promulgate a final rule, and then take a look at it and see if you think there are issues or problems with the rule.

Mr. SCOTT. You have suggested in your comments that we are talking about retirement funds. This committee does not have jurisdiction over normal transactions, commercial transactions, it is the Securities and Exchange Commission, and another committee has that.

We are talking about retirement funds. Should there be different protections for retirement funds than there would be for other transactions?

Ms. MOHRMAN–GILLIS. Congress in its wisdom in 1974 set standards and protections for tax preferred retirement funds in ERISA. That is what this is all about. The DOL is attempting to update a rule to actually effectuate congressional intent.

Its authority is very different from the authority of the SEC, and under a completely different set of statutes that regulate the securities industry.

The DOL is acting within its authority and is acting to implement Congress' intent to correct what is now a marketplace—a problem with the marketplace.

Folks are talking about bad actors, and the bottom line is it is not the advisors necessarily that are the problem. It is a structural problem in the marketplace where we allow, specifically allow compensation incentives that allow advisors to make recommendations and incentivize advisors to make recommendations that are not in the best interest of the client but rather in the best interest of the advisor. That is what needs to be corrected with the DOL rule.

Mr. SCOTT. Thank you. Mr. Gaudreau, there are some unscrupulous advisors out there who frankly just rip off their clients and their business model frankly may not even work if they were not able to rip off their clients.

What kind of products do you think need to be available for recommendation that are not in the best interests of the workers and their pension funds?

Mr. GAUDREAU. We certainly do not believe that the rule should pick winners and losers, Congressman. I guess the short answer is that there is no right product in every situation for every client, and there is no wrong product.

Annuities are a very important product if implemented in the right situation for many, many Americans. Certificates of Deposit are.

Mr. SCOTT. The question was what would you recommend that is not in the best interests of the workers and their pension funds.

Mr. GAUDREAU. I am not sure I understand your question.

Mr. SCOTT. That is what we are talking about. We are talking about the responsibility to recognize the best interests of workers and their pension funds. Some people would like to recommend things that are not in the best interest of the workers.

The question is what would you want to recommend that is not in their best interests? Hopefully, nothing, because you have their best interests at heart.

Mr. GAUDREAU. I cannot think of it. We already believe that we do engage in the best interests of our clients. We take an ethics pledge on their behalf. We look at every situation—

Mr. SCOTT. You want to maintain the best interests of your clients?

Mr. GAUDREAU. That is correct.

Mr. SCOTT. Good. I yield back.

Chairman ROE. I thank the gentleman for yielding. Mr. Walberg, you are recognized.

Mr. WALBERG. Thank you, Mr. Chairman, and to the panel. It has come to my attention that in 2014 the Assistant Secretary of Labor for Employee Benefits Security Administration was quoted saying this, "Today, you cannot get Congress to pass a Mother's Day resolution."

I do not know if we are that bad. What we have done is we have shifted—this is his statement—we have shifted from the way that social change and legal change and financial change is accomplished through congressional action to two different avenues for making changes, the main one being regulation.

Mr. Campbell, as a former Assistant Secretary of Labor for the Employee Benefit Security Administration, am I wrong to think that Congress is responsible for making policy and the Department of Labor should return to its proper role as the interpreter of the law, not a maker of new law and policy?

Mr. CAMPBELL. Well, I certainly agree that the Labor Department only has the authority that Congress delegates to it, and I think on this issue, absolutely, Congress is the proper venue to resolve it, because we have talked about the different types of regulations, the SEC, the State Insurance Commissioners, all these different avenues of regulation apply simultaneously.

When the Department of Labor changes its standard, it can conflict with those other standards, as this proposal does with the securities laws. Congress is a much better institution to holistically look at these issues.

If I might actually point out one other thing about the Labor Department's proposal. I actually believe they are exceeding their authority in several respects.

Mr. WALBERG. Is that their broader posture today?

Mr. CAMPBELL. They believe they have the authority to put out the proposal they do. I would argue with that. I think they are doing things in this proposal they do not have the authority to do.

For example, Congress affirmatively decided in 1974 when it created ERISA to apply the ERISA fiduciary standard to plans, to employee benefit plans. The idea being I am a participant in the plan, you are making decisions for me, fiduciary of this plan, therefore, you must be held accountable for those because I do not have input into it.

Congress did not apply that standard to IRAs. IRAs do not have a fiduciary standard applicable under the law. That was an affirmative determination Congress made, I believe, because I do control my IRA. This ERISA fiduciary standard based on protecting me under trust law does not apply to a situation where I am actually making my own choices.

DOL is using that lack of fiduciary authority to justify applying fiduciary authority that Congress expressly declined to apply. I think that is one example of where this authority is being exceeded.

Mr. WALBERG. Thank you. Mr. Gaudreau, Secretary Perez has said in testimony before this committee that so-called—his term—"robo advisors" could be used by some individuals as a primary source of advice instead of face to face interactions with advisors."

Do you share this view that online tools can replace face to face interactions?

Mr. GAUDREAU. I think for a small segment of the marketplace, who are more sophisticated perhaps and may be accustomed to making purchases of financial products over the Internet, it might work. We believe that the choice to have that sort of an arrangement or to deal with the professional financial advisor, another human being, should be available to the American consumer.

People tend to get information on the Internet. It is usually where they start. They usually finish by making their decision based upon the financial advice of another human being in a face-to-face relationship based upon rapport and trust.

Mr. WALBERG. Using that or expanding upon that, going back to the stressful market events like the August 2015 stock market sell off, what would be a better approach that you would recommend to your clients in handling this?

Mr. GAUDREAU. We help walk our customers home. We hold their hands through those turbulent weeks and months when the market is going up and down and they are unsure what to do.

A few years ago, everybody thought they should sell Apple stock. Now, everybody thinks they might buy Apple stock.

The fact is the consumer left unassisted often buys high and sells low. By holding their hand through this process, by being there with them, understanding who they are, where they live, what they do, and what is important to them and their family, we are able to appropriately advise them.

Mr. WALBERG. Especially those, I would assume, that do not necessarily have the income and investment capability of those more astute people that can buy and can use different approaches—this would block them out.

Mr. GAUDREAU. Precisely. The problem with America is not that there is too much advice. The problem is that there are not enough of our fellow Americans saving enough to provide a satisfactory, stable, and secure retirement for themselves. We need more people advising more Americans. Anything that we do that deters that process is a mistake.

Mr. WALBERG. Thank you. My time has expired. Thank you.

Chairman ROE. I thank the gentleman for yielding. Mr. Pocan, you are recognized.

Mr. POCAN. Sure. Thank you, Mr. Chairman, and thank you to our panel. I guess I come at this in a little bit of an unique perspective in that I do not think, like some, this is going to bring financial ruin for the entire population of the planet. At the same time, I do not think the proposed rule as presented will accomplish what it aims to without having some negative consequences.

I think, Mr. Gaudreau, you said about the enhanced standard of conduct is generally people support it, it is the details we are concerned about.

Ms. Mohrman-Gillis, you presented at another panel, and you were very impressive and I appreciate the comments you had to say, specifically about some of the tweaks. I guess that is the first question I would like to ask you.

Some of the technical issues, like timing of signing of contracts and the details of disclosure requirements. Just in about 60 seconds, what are some of the recommendations you have for the Department of Labor that they should tweak from what we saw before they present their final rule?

Ms. MOHRMAN–GILLIS. Thank you. We made quite a number of recommendations to the Department of Labor to make tweaks, to make the rule more operational across business models, including the contract issue, for example.

We suggested to the Department of Labor that in every single financial services relationship there is some sort of contract that the client has to sign, an account opening agreement. At that point in time, the client can easily sign the best interest contract exemption agreement basically where the advisor obligates themselves to provide advice in the best interest.

We suggested that any advice that may have been provided prior to that time that might have been a recommendation versus education should be covered retroactively by the best interest contract exemption.

We suggested streamlining some of the disclosure requirements, some of the reporting requirements. We suggested adjusting the time frame in terms of the enforcement obligations under the rule to make it easier for financial services firms and advisors to comply, and a range of other things.

We feel confident based upon what the DOL has said publicly that it has taken all of this input very seriously, and is working on a final rule that will truly address those issues.

Mr. POCAN. Thank you. Let's hope those messages are heard, because I think that is one of the concerns a lot of people have is the final rule is going to be the final rule. We want to know that various inputs are heard.

I want to follow up on Mr. Walberg's question. I have to admit that it stuck in my craw that someone was saying, "go to this website," and I will not say the website they mentioned, but they actually suggested a website, and I went to it. I answered eight questions about my willingness to lose money. That is all they asked. I was a 5.5 out of 10, so I guess I am more of a blackjack player than craps or slot machine player.

That is not something that most people are going to be able to use, as you said, a very small percent of people. My mother, we got her an iPad. She thinks it is a device to play Yahtzee.

Again, a question on that specifically, because I thought that was one of the worst answers the Department gave. That is not an alternative, so what potentially can we offer to this personal advice and service question that is out there to make sure that everyone still has access to be able to get that personalized advice?

If I want to retire at 62, if I want to have a second home, those are questions that when I did it on the computer, they do not answer, and then I called them up, and they still do not answer because that is not part of their model. You need to have that in place. If you could just address that.

Ms. MOHRMAN–GILLIS. Sure. Certainly, as certified financial planners, we believe that consumers and small businesses across the country need financial advice. We fundamentally disagree that the DOL rule as written and as we expect it is going to be tweaked and modified, will constrain that advice, will prevent that advice.

I think it is really important to continue to understand that the DOL rule allows for advisors to provide advice and receive commission compensation. The only thing they have to do is put in place policies and procedures to mitigate the conflicts that are inherent in commission—

Mr. POCAN. If I can just reclaim because I have about 20 seconds left. I hope they are hearing you, and I hope they are hearing us, because my concern is that if these are not addressed and we have a final rule, the fact that they offered that website as an answer implicitly suggests that is where people will be driven to potentially out of the rule, and to me, that is unacceptable.

I hope they are listening to you and others as we look at how to tweak the rule and make it better, especially for low income and moderate income investors.

Thank you, Mr. Chairman. I yield back.

Chairman ROE. I thank the gentleman for yielding. Mr. Guthrie, you are recognized for five minutes.

Mr. GUTHRIE. Thank you very much. I hope the comments are listened to, reacted to. I just have to be honest. I have been working on this for a while. There are certain things specifically that I was able to work with the Secretary and Department of Labor on, and they did listen and they did react. I have to say that first before I get into my questions because that was a positive experience and I really appreciated that.

However, there are still concerns moving forward. Dr. Foxx talked about hearing a lot from her District, and I have had a lot of people come to me that are in the industry. Also, I hear more from people about Dodd-Frank and the financial service than any other issue going forward, and it gets to you. You do things here and you pass them out, and they sound simple, and you can walk through it on a piece of paper and it makes sense, but you have all these people, particularly in the Second District of Kentucky, and small banks, just trying to react, trying to figure out how to make this work. It sounds so simple when you are talking about it here, but it is so difficult when you have lawyers say well, it could be interpreted this way so you better protect yourself this way, that way, or the other.

My concern here is not just that we can read it and say here are the comments, we can react to it, and this is all going to work. It is how it is really implemented. I have heard people say that the industry is just going to adapt to it and figure this out. I will tell you that is happening in Dodd-Frank, we are losing small banks.

Mr. Gaudreau, what do you think of that, that comment, the industry is going to adapt to it, we are going to make this all—

Mr. GAUDREAU. Frankly, anyone who says that could not possibly be part of this industry and make such an assertion. Discussion around retirement, retirement plans and retirement products, and strategies is a core focus for most financial advisors in your districts.

This will decimate the field for us, drive many out of our profession, make it difficult to attract new advisors, young advisors, particularly in diverse communities, to come into our profession, and thus dramatically reduce access for moderate income Americans to qualified financial advice, the very people who need it the most.

The affluent and their advisors who pay fees for service, family CFOs and all this stuff, they will adapt fine. They always do. The middle-income American will not have access to financial advice, and in the long reaches of time, when we look back to those people who are left in the shadows, how do we care for them? A government of finite resources, how will we care for them?

We need to encourage them to take charge of their own retirement security, and it is personal financial advisors that do that.

Mr. GUTHRIE. Another thing, the proposal as drafted has eight months, it will be implemented in eight months. What about that time frame?

Mr. GAUDREAU. It is absolutely unworkable. Instead of adapting, what is going to happen is major financial institutions are going to restrict their advisors from being able to engage in new client relationships unless those accounts are large enough to essentially cover this cascading fiduciary liability that is going to broker-dealers, insurance companies, banks, and other providers of financial products.

They are going to just stop, I think, and say “let’s just figure out the strategic issues here involved so we do not incur all kinds of fiduciary liability as institutions ourselves.” That means even if we wanted to do pro-bono work, we might not be able to do that.

Mr. GUTHRIE. Ms. Doba, setting up a small business retirement plan, could you discuss some of the practice challenges you are facing when you go through setting up a plan for a small business?

Ms. DOBA. Well, when I went through it—

Mr. GUTHRIE. How did your advisor help you, I guess is the question I am getting at.

Ms. DOBA. As I kind of alluded to earlier, when I was starting a company and going through all that, and especially as an engineer, we have a lot of regulations. I am a woman-owned firm. I am a disadvantaged business enterprise. I have all kinds of certifications and enough requirements that I have to fill out on a daily basis. I do not do engineering anymore, by the way, I push papers.

I found that you are so busy dealing with all of that and you are stressed out mentally, financially, time wise, that if it were not for an advisor, I was just going to push off and probably not do a 401(k), had I not had a trusted advisor that I could speak to and trust that he could field and deal with a lot of my non-responsiveness on matters because I had urgent issues to handle, it would not have happened, frankly.

Now that I am in the position I am in, I am very fortunate that I had that advice, and so are my employees because while we are a diverse company, most of our employees are millennials. With every generation, we need to be saving money. This rule is going to discourage some of them, I guarantee that they would have not, had there been more hurdles to go through, participated in our plan. We may not have had a plan.

Mr. GUTHRIE. Thanks. Before I get to my last question, I will probably get gaveled down. I would just emphasize, I know the comment period is going forward, and I know the experience I have had with the Department of Labor moving forward does make this very workable.

I am not going to get my question in, but thank you so much, and I appreciate it. I yield back.

Chairman ROE. I thank the gentleman for yielding. Mr. Sablan, you are recognized for five minutes.

Mr. SABLAN. Thank you very much, Mr. Chairman. Thank you for holding this hearing. Ms. Gillis, good morning. Consumers right now go out and face the marketplace. Here in the 48 states, there are many advisors, many individuals who are licensed and authorized to provide advice and to manage money, but where I come from, besides the banks, I think there is only one. We have a limited number of individuals who do provide advice or who handle money.

Still, you testified and your written testimony stated that consumers in the marketplace sometimes have difficulty in distinguishing the advisors, those who provide fiduciary advice and those who do not.

Let me just make an example, you come to this committee expecting to testify and to tell the truth. The committee still requires you to raise your right hand and make that oath. Is this not what the DOL is proposing to do, while we trust you, I trust you as an advisor, I still want to verify, you know, some famous president made the trust, verify, why are people objecting to this when we are requiring an advisor would sign with his signature on a piece of paper and say I will provide you with—serve your best interests as a consumer.

Ms. MOHRMAN–GILLIS. I think that is an excellent question. Witness after witness testified before the Department of Labor that they believed in the best interest standard, and yet when they were asked by Labor officials whether or not they would obligate themselves in a written contract to provide best interest service, witness after witness said no.

It sort of defies credibility, and I keep wondering why opponents to this rule are spending millions and millions of dollars with armies of lawyers and public relations specialists—

Mr. SABLAN. At least some of them, yes.

Ms. MOHRMAN–GILLIS. With commercials, arguing against this, if they really do agree with and want to comply with—

Mr. SABLAN. I do not mean to interrupt, but they are saying they will do so but they will not sign the piece of paper?

Ms. MOHRMAN–GILLIS. Correct.

Mr. SABLAN. That requires them to do so.

Ms. MOHRMAN–GILLIS. Correct.

Mr. SABLAN. I am from the islands, so I do not know too much about money. Why will they not put their name on a piece of paper that they say they do anyway?

Ms. MOHRMAN–GILLIS. Well, I think that is the fundamental problem here. The Department of Labor basically has a common sense rule to update its definition of "fiduciary" to essentially have an enforceable obligation to provide advice in the best interest of the client, and that is what is at issue here.

It is being strenuously oppoposed by industry organizations. Our experience over eight years of basically overseeing a fiduciary obligation of CFP professionals says that it will not diminish services, it can be done, it can be done under the types of requirements that are very simple requirements in the Department of Labor rule.

Mr. SABLAN. To be clear on this confusion, my confusion actually. I am probably Billy Joel. I do not know how to handle money. My wife does.

Ms. MOHRMAN–GILLIS. And most consumers do not know.

Mr. SABLAN. They have a choice between what they call wealth managers, I think, in banks.

Ms. MOHRMAN–GILLIS. Right.

Mr. SABLAN. Or this one individual who I personally know, I will still require him to sign a piece of paper that tells me he serves in my best interest, and he is someone I know.

Ms. MOHRMAN–GILLIS. Consumers today in today's marketplace have no ability to determine whether or not their advisor is required by law to be a fiduciary or not. We have a fragmented regulatory structure that allows people to call themselves "advisors," and one group of advisors is only required to provide advice that is suitable and can provide advice essentially that is in their own best interest as opposed to the client's best interest.

Mr. SABLAN. They are simple.

Ms. MOHRMAN–GILLIS. And another that is required. What the DOL is saying essentially is that for tax preferred retirement savings, we need to really enforce what Congress put in place in 1974, which said for these savings, we need to have fiduciary level advice.

Mr. CAMPBELL. May I reply?

Chairman ROE. The gentleman's time has expired. Mr. Carter, you are recognized for five minutes.

Mr. CARTER. Thank you, Mr. Chairman. Mr. Campbell, do you want to respond? Go ahead.

Mr. CAMPBELL. If I may, I think there was some mischaracterization of what actually occurred at those hearings, at which I also testified.

Witness after witness was not saying no, we will not sign a paper that says we will act in the best interest of our clients. They were all prepared to do that.

What they were saying is we will not sign this best interest contract exemption as proposed, which offers unlimited class action liability in states under state contract law, which is an issue no one has ever introduced in this space before and has an unknown amount of liability and risk associated with it, that will make disclosures that no one can currently make.

They do not gather the data in a way yet to make disclosures as required by that exemption, and cannot do it in eight months.

There is a big difference between saying yes, we will abide by your best interest, and we will sign a document to do that. The debate is: what does the document say, what are the obligations that go along with it?

I think it is very over simplified to suggest that all the Department is doing is saying you should act in your best interest. Quite the opposite. The Department is laying down very specific onerous difficult to comply with requirements that do not mesh necessarily with your best interest.

Mr. CARTER. Right. Thank you, Mr. Campbell. Ms. Doba, you are a small business owner. I am a small business owner, too. In fact, five days ago, I am proud to announce, that we started our 28th year in business, started that business when I was five-years-old. It is amazing.

Nevertheless, the point I want to make is the relationships between my employees, I have had employees who have been with me the whole time, and they are like family to me, very important. I want to take care of them. I want to take care of their retirement. When they leave my business, when they decide to retire, I want them to leave with a nest egg and be able to say I am sure glad I worked there, that gave me the cushion, the nest egg, that I needed for my retirement.

When I set up that retirement account, when I set up that 401(k), it was simple. Just went and set it up with someone I knew, I was associated with, and they took care of it.

If these new rules were in effect now, would you find that more difficult today to set up a plan such as this?

Ms. DOBA. Absolutely. As I stated before, I probably would not have set one up if these rules were in place at the time. It is a family. It really is a family. I have to tell you, I share with my employees about our benefits, what is coming up in policy, changes that may affect us as a company, and our employees even have stated their concern about this rule.

I think it is very concerning, like I said. Your first question, where you were talking about—I apologize—at the very beginning.

Mr. CARTER. I just want to know how difficult it is if these rules were in effect, and you have answered it.

Ms. DOBA. Yes.

Mr. CARTER. To set up this plan. I think this would without question deter our small businesses—

Ms. DOBA. Yes.

Mr. CARTER. From setting up plans like this that are so essential to us. Ms. Mohrman-Gillis, out of all due respect, you say well, if you had a contract, that would make all the difference in the world. Would it really make a lot of difference in the world? Someone who wants to be a bad actor is going to be a bad actor. That is going to happen.

I can tell you throughout the 28 years that we have this retirement plan in my business, I have taken risks in it, and I have lost some, but I have also gained quite a bit. I understand that.

I do not see where signing a contract is going to make that big of a difference. In fact, I do not see where it is going to make any difference at all except to deter people, deter businesses from wanting to start these programs, so I beg to differ with you on that.

Ms. MOHRMAN–GILLIS. If I might respond.

Mr. CARTER. You may.

Ms. MOHRMAN–GILLIS. I think signing a contract is really to ensure that financial services firms who say they agree with the best interest standard actually put in place policies and procedures that stand behind that best interest standard.

Right now, we have a structure that allows firms to create compensation incentives for their advisors that basically prompt advisors to sell products or to provide services that are not in the best interest of the client but rather that are in the best interest of the advisors. So, it is more of a way to make sure that obligation—

Mr. CARTER. I understand. My time is running out so I want to be quick. Mr. Gaudreau, you sell retirement plans to small businesses. What do you think?

Mr. GAUDREAU. If it was just a piece of paper saying we will work in the best interest of our clients, we would not even be here today. It is the details. This imposes a very, very large rubric of additional regulation that will be very costly, time consuming, resource intensive for advisors, and it is going to make it impossible for them to deal with small businesses and small and middle income investors.

Mr. CARTER. Do you think for small businesses, it is going to deter them from offering these programs?

Mr. GAUDREAU. Absolutely, to be the catalyst for the beginning—

Mr. CARTER. Thank you, Mr. Chairman.

Chairman ROE. Ms. Bonamici, you are recognized for five minutes.

Ms. BONAMICI. Thank you very much, Mr. Chairman. First, I want to thank you all of you for being here today.

I want to follow up on Mr. Scott's question. There has been a lot of discussion about this rule in the subcommittee today and really over the past several months.

As we know, there was a rule that was proposed in April, numerous requests came in to extend the comment period. That was done, and then after the extended comment period, there were four days of public hearings with an additional comment period.

And then a few months ago Secretary Perez testified before our committee, along with a panel from the industry. Secretary Perez expressed his openness to addressing the concerns that were raised. In fact, Mr. Guthrie acknowledged that the Department of Labor has been receptive about input. I am a little bit concerned because most of the testimony today sounds like it is based on the rule that was proposed in April, which I do not think anybody is saying will be the final rule.

I really want to get that out in the front. This is a critical issue. It reminds me I have a consumer protection background. I used to do consumer protection work at the Federal Trade Commission. It reminds me of some of the issues that I have been through over the years, for example, in the mortgage industry, when consumers would trust their mortgage broker. There is a disparity of knowledge and bargaining power, and they would trust they were getting the best advice possible. As we know, that did not happen in that industry.

I have met with families and individuals across Oregon, the state I am honored to represent, a district there. People are struggling to get ahead. Retirement security is a big issue. I know the sacrifice that is involved in every dollar they set aside to contribute to their future retirement.

My parents are in their late 80s. I am going through this personally.

The retirement landscape has dramatically changed in the last 40 years. When the initial fiduciary rule was implemented, a majority of retirement assets were in defined benefit plans, employer based 401(k)s did not exist, and IRAs were just created. We are really in a different world now.

Ms. Mohrman-Gillis, now that consumers have more responsibility than ever, and it seems like less education about personal finances, and I have been a long-time advocate for more personal financial education, it makes sense providing products that are in the best interest should always be a top priority.

In a hearing this committee held on this rule last summer, all of the panelists agreed that consumers should receive advice that is in their best interest.

Here is the question I ask the industry panel: "Just to be clear, does everyone agree that the best interest standard means a best interest fiduciary standard?" One industry person said yes, and the others nodded affirmatively, and bad me did not get them to answer orally. They all nodded affirmatively.

Can you please speak about why there might be opposition when it seems like the industry agrees they should be doing this, they should be acting in the best interest fiduciary standard.

Can you address that issue and why do you think there is so much opposition, and talk a little bit about what you are expecting to see later on when the final rule is actually proposed. There is a lot of speculation going on here today.

Ms. MOHRMAN–GILLIS. There is a lot of speculation. I think we come to the table with experience of working under a fiduciary standard that is very similar to the BIC exemption requirements that are in the proposed DOL rule.

We have full confidence that based on everything that DOL has said, it has taken all the input and is going to come out with a more streamlined rule, one that is going to be more applicable across business models.

In terms of the best interest standard, that is an excellent question because I do think it means different things to different people. The principles that were discussed today and are a part of this hearing really fail to meet the true best interest standard in at least two ways.

Number one, the best interest standard does not include the component that the best interest of the customer without regard to the financial or other interest of the advisor. That is not included in the principles. Also, the principles talk about disclosure, disclosure alone is not a best interest standard. You need to disclose conflicts of interest but you also need to either eliminate them or manage them in a way to mitigate the conflicts of interest.

Those two components are part of the Department of Labor rule, part of our code of professional conduct, part of what we have been doing for the past eight years, and I can tell you based on our experience that it is workable and that as you made the point——

Ms. BONAMICI. I do not mean to cut you off. My time is about to expire. I just want to make this point, which is the same point I made in the hearing earlier this summer. I just came from the Science Committee, which is why I was not here for your testimony, but I did read your testimony.

When industry agrees and we all have the same goal, this is not rocket science, we should be able to work this out, and I really get the sense that the Secretary is listening, the Department of Labor is listening to the concerns that have been raised, we should be able to get this worked out in a way that as you said, Ms. Mohrman-Gillis, what has worked in your industry, it should be able to be done, and I have confidence it will.

Thank you, and I yield back the balance.

Chairman ROE. Thank the gentlelady for yielding. Mr. Allen, you are next, five minutes.

Mr. ALLEN. Thank you, Mr. Chairman, and thank you for this hearing. Thank you for testifying.

This is obviously an important hearing because we have a huge disconnect that is obvious here between Government and private industry, and how you deal with certain issues.

I am from a small business community, so I think I should probably disclose that. I did start, in our company, a 401(k) plan and encouraged our employees to participate. I am proud to say our company has been able to maximize its contribution to that plan for 42 years, except for one year.

I will tell you after participating in these hearings, I did give some investment advice to my employees back in 2008, which I wonder if, Ms. Doba, you might comment, do you ever have your folks come in and ask you maybe what we should do.

Our folks basically said do we stay in or get out, because the market dropped substantially. Of course, I got the best investment advice that I knew to get, and I said they all say it is going to come back, I think we need to hang in there and see what happens.

I wonder what my liability would be as a small business owner just having conversations with our folks. Every year, things had gone very well and then all of a sudden, they are losing huge amounts of money, and they are very concerned about it. That will tell you a little bit about the risk that you have as far as being a financial advisor.

What I see here, and Secretary Campbell, the one thing that I do not quite understand is there is this disconnect. In your opinion, has the Secretary of Labor consulted the investment industry about this problem and said how do we solve this the right way?

Mr. CAMPBELL. Well, I am not sure exactly how much he reached out to them versus them coming to him. In any event, there have certainly been a large number of discussions and there has been a comment period.

The problem we have is that says nothing about what changes DOL will actually adopt, whether it actually agrees with the concerns that the industry has laid out, and what the final rule might look like.

We had a comment period, and it was extended, and we had some public hearings. There were lots of comments made, but whether the comment period is 90 days or 140 days, it is one comment period on this same thing. We have no idea how DOL is going to resolve at least 40 or 50 major issues, and we have not gotten into even half of those today.

The scope of this rule that the Department has proposed is so far beyond anything this portion of the Labor Department has proposed in the past, that it really is an unimaginably difficult task for them to go through the process, hear those comments, come out with a rule, and do it on the time frame they are looking at, which is essentially an one year time frame, to go from proposal to final.

Mr. ALLEN. You have worked in the Government sector and now you are an attorney?

Mr. CAMPBELL. Yes, sir.

Mr. ALLEN. You have seen both sides of it. Why do we hear from you and then we hear from Ms. Mohrman-Gillis about well, this is no big deal, this is just something the industry is going to adapt to, and then we are hearing from the professionals that my goodness, this could turn the whole thing upside down, I mean what is going on here?

Mr. CAMPBELL. I think it is a couple of things. One, you have the DOL proposal out there, so folks who want to see change in this area naturally gravitate towards the proposal despite its warts.

Those of us who are looking at how we want to actually comply in the real world with this, and this was a discussion I had with the Department when I testified at the administrative hearings, their intentions, their ideas, their themes, are one thing, but we have to actually comply with the letter of the law, with the regulation as it is written. As it was written in the proposal, we cannot figure out how to comply with it. It has too many technical problems.

I think part of the disconnect is Ms. Mohrman-Gillis has been saying we have been able to adhere to a fiduciary standard, why not the rest of you, my point is what DOL proposed is not the same fiduciary standard you adhere to. It is much beyond that with many other problems, and how those technical issues are resolved is really the crux of this, the details matter.

Mr. ALLEN. That is what we are hearing. Ms. Doba, when you picked your investment advisor, did you just pick him out of the Yellow Pages and call him up and say hey, can you help me with my 401(k) plan, or did you do a little checking on him as far as experience and success as far as dealing with those types of issues?

Ms. DOBA. I did checking on him, but he is also, like many small businesses, a family friend. When I have asked him advice, he is very cautious about what advice he will give. He will help guide me in me determining my risk assessments, but will not tell me you need to be in this particular fund. He will be like here is what is available to you out there.

I have asked him about should I be in a ROTH or a traditional 401(k). He will not give me that answer. He is like it is up to you, let's assess your risk.

Mr. ALLEN. He may not—

Chairman ROE. The gentleman's time has expired.

Mr. ALLEN. I yield back.

Chairman ROE. Mr. Messer, you are recognized for five minutes.

Mr. MESSER. Thank you, Mr. Chairman. You know, throughout this debate, I made the point that in life and in public policy, we are not only accountable for our intentions, we are also accountable for your results.

In this debate, we all want to see investors get good, sound advice. The real debate here is about what will the consequences, the results of these decisions be, and if we bring forward policies that actually end up hurting the very people that we are saying we are trying to protect, that does not make sense for anybody.

Ms. Doba, I appreciate having a good common sense Hoosier here, and appreciate your testimony already about what you believe the results of the fiduciary rule as put forward would be for your business if it did not change.

I thought one of the strong insights of your testimony was the fact that as a small business owner, you are a consumer every day.

Ms. DOBA. Yes.

Mr. MESSER. That you have to discern between selling and advice in all kinds of areas, including investment advice. Could you just expand a little bit upon why you believe that some of the fiduciary rule exceptions that would apply to businesses, apply to larger businesses ought to apply to smaller businesses as well?

Ms. DOBA. Very good question. That is where one of my big crux is with this, why is a small business being the one that is affected by this so severely. I actually take exception to the fact that it is assuming that as a small business, I am not as sophisticated as large businesses, when in fact, I feel like a small business has a much better relationship with its employees. I am much impacted by how well they are benefitting, their livelihood, their family life is going. There is not that cushion as much as a large business has.

I think we can all recognize the fact that large businesses have not always been successful themselves either, if you watch the news.

As a small business, I just am really struggling, and I still have not been able to get a straightforward answer as to why small businesses are being so targeted and affected by this.

Mr. MESSER. Why do you need to be protected from yourself? I appreciate your testimony.

Ms. Mohrman-Gillis, let me ask you a slightly different question. You represent a broad cross section of CFPs, right? Financial planners. I just wanted to ask you, you mentioned you believe industry would adapt. Do the folks you represent have—what are their account minimums for—

Ms. MOHRMAN–GILLIS. CFP professionals that serve clients all across the board. Many serve very small and middle class clients.

Mr. MESSER. What would be the minimum?

Ms. MOHRMAN–GILLIS. We have thousands of CFP professionals across the country who have either no or very low minimum assets under management——

Mr. MESSER. Let me ask you, do you believe——

Ms. MOHRMAN–GILLIS. Or provide commission based services.

Mr. MESSER. Thank you. Do you believe under this rule that some of their account minimums might go up if the fiduciary rule is put forward?

Ms. MOHRMAN–GILLIS. We believe that under this rule, not only believe, but we know based upon our experience with CFP professionals who are already operating under BIC like requirements, that they are providing services on a commission basis——

Mr. MESSER. Do you believe—I am asking you a specific question—that their account minimums might go up under this rule? That some of the folks you represent might raise the account minimum of who they are willing to serve?

Ms. MOHRMAN–GILLIS. We have Ray Ferrara who testified before the DOL. He is going to continue——

Mr. MESSER. I take that to be no. It is a very simple question. Do you think their account minimums will go up or not?

Ms. MOHRMAN–GILLIS. He basically said he is not—if he has increased costs to put in place any of the requirements for the DOL rule, he does not intend to pass those along to his clients. The answer is no, not necessarily, that——

Mr. MESSER. Thank you. Reclaiming my time, Mr. Gaudreau, what do you think? Will account minimums go up again, essentially the clientele that individuals are able to serve will shift upward under this rule?

Mr. GAUDREAU. Absolutely.

Mr. MESSER. Could you in your answer expand on where that has already happened in the real world?

Mr. GAUDREAU. It is already happening in the real world because right now broker-dealers, insurance companies, banks, and a variety of other financial institutions, sort of manufacturers of products, are already considering their own cascading fiduciary liability, and the cost this will pass along to them, the liability passed along to them. That is forcing them to say you know, small accounts, it is just not worth the institutional risk that we will have. It is the same thing for their advisors.

The fact is the typical financial planner who is fee for service will charge $1,000 to $2,500 before they will talk to somebody period. The regular middle class American is not going to write out a check to start talking about their finances.

We are a catalyst typically for businesses like Ms. Doba's to buy financial products as well as pension plans and benefits for their businesses.

If you provide us a way to make it possible to do so——

Mr. MESSER. In reclaiming my time——

Chairman ROE. The gentleman's time has expired.

Mr. MESSER. I would just make the point—we do not have to imagine that, we can look to England and see that it has happened there.

Chairman ROE. I thank the gentleman for yielding. Mr. Grothman, you are recognized for five minutes.

Mr. GROTHMAN. Okay. Mr. Campbell, just give me background on this. Did the Small Business Administration analyze the rule and provide comments to the Department as to the effect on small business?

Mr. CAMPBELL. It did, actually. The Small Business Administration submitted—the Office of the Small Business Advocacy at the SBA submitted a comment letter on the formal process to the Department of Labor, which is relatively unusual, actually, for federal agencies to issue formal comment letters to one another.

They criticized the way the Department had taken into account the effect on small businesses in the economic analysis, and also provided the results of its own focus groups talking to advisors and small business owners about what they expected this would result in, and the results of that is they expected their prices to go up and their access to investment advice to go down.

Mr. GROTHMAN. Okay, but apparently ignored so far.

Mr. CAMPBELL. Again, that is part of the comment process. We do not know yet how the Department is going to respond. We have no more bites at the apple the way it currently sits. DOL will come out with a final rule which we will see for the first time and have to live with the first time we see it.

Mr. GROTHMAN. Okay. A few months ago, Secretary Perez was before this subcommittee, and he expressed concern about so-called "hidden fees" as the reason for the proposed rule. Could you describe what he meant by those hidden fees? Can you take a shot?

Mr. CAMPBELL. I am not entirely sure what he meant by those. With respect to the 401(k) plans, the ERISA plans, there is already very clear fee disclosure required by DOL regulations that we actually initiated while I was running the agency, disclosures from service providers to plans and disclosures from plans to participants.

There are also, of course, a variety of disclosures required by other laws that are applicable in the IRA space as well, where you have securities law, insurance laws, a variety of those disclosures.

I do not think the problem here is lack of disclosure. In fact, I think most people are probably throwing away a lot of disclosures they are getting because there is too much to even begin to read.

Mr. GROTHMAN. Okay. I will give you one more question, for Ms. Doba. One more time, in this world, there are kind of different rules for the small businesses and their employees versus a large business. Can you just one more time kind of wrap things up by summarizing what the effect of the difference between big business and small business will have on small business?

Ms. DOBA. Sure, absolutely, I would be happy to. Small businesses, like I said earlier, we are already perceived as having the inability to provide great benefits to our employees. We have that perception.

A lot of times we have higher costs, we have more restrictions. Adding more potential fees coming our way to not only ourselves but our employees affects us on hiring. In engineering, we already have STEM issues on hiring. That has nothing to do with this particular subject, but it is just one other hurdle that we have to go through with fees that will affect not only myself but our employees, and as a plan participant myself.

Mr. GROTHMAN. Okay. Thanks much.

Chairman ROE. Mr. Hinojosa, you are recognized for five minutes.

Mr. HINOJOSA. Thank you, Chairman Roe, and Ranking Member Polis, for holding this important hearing, and I also want to thank our panelists for testifying today. I apologize that I came in apparently late, but I was at the Financial Services Committee, and that went long.

I want to continue the line of questioning that has occurred already. As we continue to debate the Department of Labor's fiduciary rule, it is important to note that the Department's expected fiduciary rule is necessary, long overdue, and will help millions of Americans.

We must ensure that the principles regarding the DOL's proposed fiduciary rule strike a balance in protecting the individuals from misleading or possibly harmful advice while also promoting robust access to information and personal assistance regarding retirement investments.

My first question is directed to Ms. Mohrman-Gillis. As you point out in your testimony, the retirement landscape has changed in the past 40 years. It has now more self-directed, and 401(k)s are the new normal. If consumers have more responsibility than ever before for their own retirement, should their best interest always be put first as required by the Department of Labor by their rule?

This seems to make sense to me. Can you please speak to that issue?

Ms. MOHRMAN–GILLIS. Sure, and the answer is absolutely, yes. I would also like to say advisors do not have to—consumers do not have to pay fees in order to get advice under the rule. Advisors can still provide commission based advice, they just have to do it in the best interest of the client.

We have heard about the flood gate of litigation. That is not our experience as CFP professionals who have been providing fiduciary level advice over the last eight years, nor is it the experience for the advisors who are providing fiduciary level advice. In fact, research shows that for consumers who receive fiduciary level advice, there is less likely there is going to be litigation.

A number of folks have mentioned the U.K. situation. That is apples to oranges to what the DOL rule is. The U.K. banned commissions and put in place competency standards for their advisors, and they are still having a favorable outcome to that.

The DOL rule does not ban commissions and does not put in place competency standards for advisors.

Absolutely, to your question, the retirement landscape has changed dramatically, and now more than ever consumers need a true fiduciary standard of care, particularly for tax preferred retirement assets.

Mr. HINOJOSA. Let me ask you a second question. I want to ask you about access to advice, because this issue is particularly important to me. I remember what happened in January of 2008 when we went into a deep financial crisis, and how the value of many of the employees' retirement funds took a huge drop.

Ensuring that small savers have access to un-conflicted investment advice is of paramount importance to me. Can you tell me how a fiduciary duty can increase access to retirement investment advice, and can you tell me the benefits from it?

Ms. MOHRMAN–GILLIS. So, a fiduciary duty as you said will increase access to un-conflicted investment advice, which is critically important particularly for our small savers. They need it more than anything.

Small savers, the most important decision they generally make is whether to roll over a 401(k) into an IRA. They have responsibility for that. The rollover market in today's marketplace is a $300 billion a year market. It defies credibility to think that firms and advisors will walk away from a $300 billion a year rollover market just because they are obligated to provide advice in the best interest of the retirement saver.

Mr. HINOJOSA. I did not realize that it was so large, $300 billion a year. What advice would you give us in Congress to be able to find some workable compromise so that we can be fair to employers?

Chairman ROE. Hang on to that thought. The gentleman's time has expired. I now yield myself five minutes.

I have listened to this testimony now for hours, and I always go back to my medical background, what is the chief complaint. What are we trying to fix. Apparently, what we are trying to fix is a problem, we roll this money over from a 401(k) to an IRA, people are getting conflicting advice, and it is costing us all this money.

I looked at that formula that was used to calculate this $17 billion. I can make that number any number that you want. It was not a basis, in fact. It was a 1 percent yield more in people who did not get this advice versus who did. The actual number is 0.16 percent. It did not look into the cost of that either. The number $17 billion is now going to become the Ten Commandments. It is not. It is not a real number.

I also want to say that Bernie Madoff was a fiduciary also, and a crook is a crook. If you have someone who is not looking out for the best interest, whether it is a doctor, a lawyer, or a financial advisor—Ms. Doba, you paralleled very much what we did in our practice. We started with four doctors and 12 employees. We started with a pension plan with a person we knew to come advise us how to do that.

We have employees that have been with us nearly 40 years now who have many, many six figures in their retirement plan because of what we had done. We have gotten big enough now we can have a fiduciary and do have a fiduciary. We are large enough to absorb that cost, and certainly in managed plans.

Let me give you a little number here and see if these people are going to jump forward with all these regulations. Let me just get a little of this off my chest.

When we talk about rules and regulations, I have dealt with them for 40 years practicing medicine. The *Affordable Care Act* now has 20,000 pages of rules. We spend more money in medical administration now than we do on cancer and heart disease treatment in this country. That is how expensive these rules are.

When it is unknown, as the Secretary said, we do not know what the costs are. I guarantee you that your client that said he was not going to raise any of his fees is going to raise his fees or he will go out of business because he has to pass the cost on somewhere. I understand that. I totally get that. Somebody has to pay the bill for this.

It is going to be a large bill when you comply with all these rules and regulations. Ask a community bank. I walked into a community bank the other day in Mountain City, Tennessee. There are more compliance officers in that bank after Dodd-Frank than there are loan officers. That is ridiculous.

That is my fear here. I think what this is, is a solution looking for a problem. Right now, what we have is a plethora of people who are saving. We need to go out and find savers and encourage people to retire. That is what we did.

To give you another little number here, the median retirement account balance for all working age households is $3,000. It is not the $50,000 that you brought up a minute ago. Anybody would jump on a $50,000 account, 1 percent of that is $500. One percent of $3,000 is $30.

We have to have lower-income folks. I saw this with people I hired every day. I encouraged them. I begged them not to cash out like Ms. Doba did their 401(k) and do anything because it is very expensive when you look at the cost of money over time.

Mr. Gaudreau, I want you to walk us through in my last little bit of time here about individuals that you have seen, companies and individuals, that you have helped with your business, obviously almost 100 years old.

Mr. GAUDREAU. Yes. We are part of the fabric of our community, like most of our members are across America, and probably in your District, too, Mr. Chairman.

These decisions that consumers make in the financial realm are based upon rapport and trust and relationship. These are not just simple transactions. We have worked with the DOL, tried to work with the DOL, to get this rule right, and there are many stakeholders in this discussion, and I think we are all better off and better served, including the consumer, if we collaborate on a solution that adopts these principles.

We do not disagree that we should work in the best interest of our clients. My family has been doing that for 100 years. As a matter of fact, it is a little insulting to imply that we ever have not. The fact is that we absolutely agree with that and endorse that public policy.

This is an actual change of such magnitude, by unelected regulators, and it is more than just a simple statement of trust. It is a giant rubric of regulations that will be imposed upon our industry and make it more and more difficult for the regular Americans to get financial advice.

Chairman ROE. I thank you. My time has expired. I want to thank you again, the witnesses, all of you. Quite frankly, you are all here for the same purpose, which is to try to encourage people to save for retirement. That, I applaud all of you for, and thank you for taking your time to come and be with us. It was excellent. Each of you had great points to make, and I appreciate that. Appreciate you testifying before the Subcommittee today, each and every one of you.

Mr. Polis, do you have any closing remarks?

Mr. POLIS. I would like to join the chair in thanking our witnesses for spending their morning with us. I think many of us agree that a conflict of interest is important to address, how to address that is, of course, being discussed. I am hopeful we can move forward in a bipartisan and cooperative manner.

As you know, very few Democrats support legislation that would kill the rule, and I personally believe that is counterproductive. What we are talking about, of course, is specifics of the rule or specifics of legislation.

The Department of Labor does need to make changes and communicate with stakeholders to ensure that middle and low income individuals can continue to receive high quality, non-conflicting financial advice.

What I have learned from my conversations with savers, advisors, consumer protection advocates, and constituents, is we should continue this productive, open process, which I believe the Labor Secretary has been doing, which I also believe would be strengthened with an additional comment period, as long as it is consistent with the time frame of the presidency and the tenure of the Labor Secretary.

When we disagree about how to solve a problem, we need to sit down and hammer out a solution. I hope this hearing today is very much seen in that light of furthering the open stakeholder process that should complement the efforts of the Secretary as we seek to finalize this rule, and I yield back.

Chairman ROE. I thank the gentleman for yielding. Again, I want to offer my appreciation for all of you taking the time. I know there is a lot of time and effort in preparing for these hearings, and I thank you for doing that. You have been a great panel.

I want to put into the record just the principles that we have worked on for this rulemaking.

Promoting families and individuals' saving for a financially secure retirement is an essential public policy goal.

Retirement advisors must serve in their clients' best interest and must be required to do so.

Retirement advisors must deliver clear, simple, and relevant disclosure of material conflicts, including compensation received, and all investment fees to individual's savings or retirement.

Public policies must protect access to investment advice and education for low and middle income workers and retirees.

Public policy should never deny individuals the financial information they need to make informed decisions.

Investor choice and consumer access to all investment services, such as proprietary products, commission based sales, and guaranteed lifetime income, should be preserved in a way that does not pick winners and losers.

Small business owners should have access to the financial advice and products they need to establish and maintain retirement plans and help workers save for retirement.

I think those are the principles that we need to go forward on, and we need to put the brakes on this rule before we end up with another mess that we have seen in multiple other things.

I have seen rulemaking put businesses under, and it was never intended to do that from Congress. I have become very, very weary when these agencies begin to issue rules that affect how we actually do our jobs. I have seen it in medicine. It is in the financial services, in banking, and so on.

Who ultimately pays the bills for those? Us, the consumers. We ultimately get the bill.

Thank you all very much.

Mr. POLIS. Mr. Chairman, I do have several documents to submit for the record, along with the testimony that Ms. Mohrman-Gillis mentioned in her answer to me, and this document as well.

Chairman ROE. Without objection, so ordered.

[The information follows:]

FINANCIAL PLANNING COALITION

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attention: Conflicts of Interest Rule
Room N-5655

Office of Exemption Determinations
Employee Benefits Security Administration
Attention: D-11712 and D-11713

United States Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

RE: Proposed Conflict of Interest Rule and Related Proposals, RIN-1210-AB32

Ladies and Gentlemen:

The Financial Planning Coalition (Coalition),[1] which is comprised of the Certified Financial Planner Board of Standards (CFP Board), Financial Planning Association® (FPA®) and National Association of Personal Financial Advisors (NAPFA), appreciates the opportunity to comment on the re-proposal by the Department of Labor, Employee Benefits Security Administration (the Department) to expand the definition of the term "fiduciary" under the Employee Retirement Income Security Act (ERISA) (hereinafter "Re-Proposed Rule").[2] CFP Board is a non-profit certification and standard-setting organization, which sets competency and ethical standards for over 72,000 CERTIFIED FINANCIAL PLANNER™ professionals throughout the country.[3] FPA® is the largest membership organization for CFP® professionals and those who support the financial planning process in the U.S. with over 24,000 members nationwide.[4] NAPFA is the nation's

---

[1] The Coalition is a collaboration of the leading national organizations representing the development and advancement of the financial planning profession. Together, the Coalition seeks to educate policymakers about the financial planning profession, to advocate for policy measures that ensure financial planning services are delivered with fiduciary accountability, and to enable the public to identify trustworthy financial planners.

[2] Definition of the Term "Fiduciary," 80 Fed. Reg. 21,928 (Apr. 20, 2015) (to be codified at 29 C.F.R. pt. 2510).

[3] CFP Board's mission is to benefit the public by granting the CFP® certification and upholding it as the recognized standard of excellence for the delivery of competent and ethical personal financial planning services. CFP® professionals voluntarily agree to comply with CFP Board's rigorous standards including education, examination, experience and ethics and subject themselves to disciplinary oversight of CFP Board.

[4] With a national network of over 90 chapters, FPA® represents tens of thousands of financial planners, educators and allied professionals involved in all facets of providing financial planning services. FPA® works in alliance with academic leaders, legislative and regulatory bodies, financial services firms and consumer interest organizations to represent its members.

leading organization of fee-only comprehensive financial planning professionals with more than 2,500 members.[5]

The Coalition brings a unique perspective to the table. Coalition stakeholders and members have committed to provide financial services under a fiduciary standard of conduct pursuant to each organization's code of professional conduct.[6] CFP® professionals and FPA members hold registrations and/or licenses across business models as investment adviser representatives, registered representatives of broker-dealers and/or insurance agents and in many instances hold dual or multiple registrations or licenses. Regardless of business model, or compensation model, they are obligated to provide financial planning services under a fiduciary standard of conduct. We seek to bring our experience, guiding our stakeholders and members in the application of the fiduciary standard across business and compensation models, to the Department in this comment letter.

The Coalition commends the Department for taking further steps to enhance protections for Retirement Investors. We believe that a strengthened fiduciary rule is necessary and appropriate for Advisers[7] under ERISA, and strongly support adoption of the Department's Re-Proposed Rule. The current regulatory framework allows Advisers' interests to be misaligned with Retirement Investors' interests. Under this framework, the current fiduciary definition under ERISA includes significant loopholes that allow for the sale of products that may not be in the best interest of the Retirement Investor. Importantly, while many Advisers seek to do what is best for their clients, others take advantage of regulatory gaps to steer their clients into high-cost, substandard investments that pay the Adviser well but eat away at Retirement Investors' nest eggs over time.

Many in the financial services industry who claim that they support a best interest standard argue that the Re-Proposed Rule is unworkable. The Coalition believes, based on our experience applying the fiduciary standard to CFP® professionals across business models, that the Re-Proposed Rule is both workable and essential to protect America's Retirement Investors. Importantly, the Department has demonstrated its willingness to work with industry and the public to develop a final rule that will increase fiduciary protection for tax-preferred retirement assets and at the same time works across the varied financial services business models.

---

[5] NAPFA members adhere to some of the highest standards in the profession and annually each advisor must sign and renew a Fiduciary Oath and subscribe to the Association's Code of Ethics. NAPFA-affiliated advisors are committed to the organization's core values of competency, commitment to holistic financial planning, compensation under a model that facilitates objective advice, client-centered standard of care, complete disclosure of potential conflicts of interest and explanation of fees.

[6] *See* CFP Board *Standards of Professional Conduct*, Rule of Conduct 1.4 *available at* http://www.cfp.net/for-cfp-professionals/professional-standards-enforcement/standards-of-professional-conduct/rules-of-conduct; FPA®, "Standard of Care," *available at* http://www.onefpa.org/about/Documents/Standard%20of%20Care.pdf; NAPFA, "Mission and Fiduciary Oath," *available at* https://www.napfa.org/about/FiduciaryOath.asp.

[7] Consistent with the Department's naming convention, by using the term "Adviser" the Coalition does not intend to limit its use to investment advisers registered under the Investment Advisers Act of 1940 or under state law. As used herein, an Adviser can be an individual or entity who can be, among other things, a representative of a registered investment adviser, a bank or similar financial institution, an insurance representative and company, or a registered representative of a broker-dealer and broker-dealer.

The Department's Re-Proposed Rule addresses concerns raised by firms, industry organizations and consumer and public interest organizations[8] related to the original fiduciary rule proposed by the Department in 2010.[9] Specifically, the Department listened to and addressed these concerns with a comprehensive rulemaking that includes a revised definition of who is a "fiduciary" under ERISA that expands the reach of the fiduciary duty to all retirement assets; principles-based Prohibited Transaction Exemptions (PTEs) to provide flexibility across business models for Advisers to adhere to a fiduciary standard; and a Regulatory Impact Analysis that establishes the need for the rule consistent with regulatory requirements.

Far from being unworkable, we believe the Re-Proposed Rule is both workable and essential. To make it more workable, the Coalition has focused its comment letter on areas where we believe the rule can be improved. The Coalition seeks clarification of certain issues and proposes modifications to others to allow for a more practical application of the fiduciary standard to various business models.

I. The Department's Re-Proposed Rule is Needed to Protect Consumers

During the 40 years since the Department promulgated the current fiduciary rule under ERISA, the retirement landscape has changed drastically, with a dramatic shift from defined benefit plans to savings vehicles such as 401(k) plans, which did not exist when the rule went into effect in 1974, and Individual Retirement Accounts (IRAs), which contained only $3 billion in aggregate assets at that time.[10] Retirement assets have grown significantly since 1974 when ERISA took effect. As of the end of the first quarter of 2015, assets in IRAs totaled $7.6 trillion and 401(k) plan assets totaled $6.8 trillion.[11]

Facing growing responsibility for their own retirement savings and an increasingly complex universe of financial products and services, Americans today must depend upon competent and ethical Advisers to help make decisions critical to their financial security. Fiduciary-level advice is particularly critical when Americans roll over their 401(k) plan assets into IRAs. For many Americans, whether to roll over and how to invest their retirement nest egg is one of the most important financial decisions they will make in their lifetime. Unfortunately, under the current regulatory framework, not all Advisers are required to make rollover or IRA recommendations in their clients' best interest, leaving Americans subject to conflicted advice related to their retirement savings.

[8] Letter from Kevin R. Keller, Chief Executive Officer, Certified Financial Planner Board of Standards, Inc., to Office of Regulations and Interpretations, Employee Benefit Security Administration, U.S. Department of Labor (Feb. 3, 2011), http://www.dol.gov/ebsa/pdf/1210-AB32-155.pdf; Letter from Ellen Turf, Chief Executive Officer, National Association of Personal Financial Advisors, to Office of Regulations and Interpretations, Employee Benefit Security Administration, U.S. Department of Labor (Apr. 12, 2011), http://www.dol.gov/ebsa/pdf/1210-AB32-PH057.pdf.

[9] Definition of the Term "Fiduciary," 75 Fed. Reg. 65,263 (Oct. 22, 2010) (to be codified at 29 C.F.R. pt. 2510) [hereinafter "Original Rule"].

[10] ICI, Research Perspective, "The Evolving Role of IRAs in U.S. Retirement Planning," Nov. 2009, Vol. 15, No. 3, *available at* https://www.ici.org/pdf/per15-03.pdf.

[11] ICI, "Retirement Assets Total $24.9 Trillion in First Quarter 2015," Jun. 24, 2015, *available at* https://www.ici.org/research/stats/retirement/ret_15_q1.

a. **The Current Regulatory Framework Allows Advisers' Interests to be Misaligned with Consumers' Interests**

While some segments and practices within the financial services industry are highly regulated, the current patchwork of regulatory frameworks, which has evolved over decades, does not adequately protect consumers of retail financial advice.

Importantly, the current fiduciary definition under ERISA includes significant loopholes that allow Advisers to provide advice about and sell financial products that may be suitable for Retirement Investors, but are not necessarily in their best interest.[12] For example, under the less rigorous suitability standard, Advisers are permitted by law to recommend products that are not in the best interest of the consumer, including recommending products that are more expensive to consumers and that pay more to the Advisers. In addition, compensation practices, which are completely legal under current regulations, provide substantial incentives to Advisers to place the interests of the Financial Institution and the Adviser ahead of the Retirement Investor's interests. Very simply, the current regulatory framework allows the interests of Financial Institutions and Advisers to be misaligned with the interests of our nation's Retirement Investors.

Contrary to many in the financial services industry who claim that the Re-Proposed Rule is unnecessary and that there are only a few "rogue" Advisers harming Retirement Investors, the misalignment of interests is widespread throughout the financial services industry. For example, the Financial Industry Regulatory Authority (FINRA) noted in an October 2013 Report that conflicts of interest are pervasive and "widespread across the financial services industry."[13] In addition, FINRA's recent 2015 Examination Priorities letter states that "[a] central failing FINRA has observed is firms not putting customers' interests first."[14]

Retirement Investors are harmed – primarily in the form of higher costs and lower retirement savings – when they receive conflicted advice that puts the Adviser's interest ahead their own. To illustrate the magnitude of harm to Retirement Investors, the Department has published a comprehensive Regulatory Impact Analysis that accompanies the Re-Proposed Rule and illustrates the harmful impact of conflicts of interest, including increased costs to investors under the current regulatory framework.[15]

Based upon a wide range of independent studies, the Department estimates that, as a result of conflicted advice, Retirement Investors will lose between $210 billion and $430 billion over 10 years, and between $500 billion and $1 trillion over 20 years, in the mutual fund investments in

---

[12] These loopholes arise from the current regulatory system where broker-dealer registered representatives and insurance agents, unlike investment advisers, are not regulated as fiduciaries when providing investment advice, even though broker-dealer registered representatives and insurance agents often hold themselves out as financial advisors and offer virtually identical services to investors.

[13] FINRA, "Conflict of Interest Report," Oct. 2013, *available at* https://www.finra.org/file/conflict-interest-report.

[14] FINRA, "2015 Examination Priorities Letter," Jan. 6, 2015, *available at* http://www.finra.org/sites/default/files/p602239.pdf ("Conflicts of interest are a contributing factor to many regulatory actions FINRA (and other regulators) have taken against firms and associated persons").

[15] U.S. Dep't of Labor, *Fiduciary Investment Advice: Regulatory Impact Analysis*, Apr. 14, 2015, *available at* http://www.dol.gov/ebsa/pdf/conflictsofinterestria.pdf.

their IRAs. Furthermore, a Retirement Investor who moves money out of a 401(k) plan and into an IRA based on conflicted advice can expect to lose 12 to 24 percent of the value of his or her savings over 30 years. Evidence from a wide variety of studies cited by the Department supports the conclusion that these losses are the direct result of Advisers' option to place their own financial interests ahead of the interests of Retirement Investors when offering retirement investment advice.[16]

The evidence of harm to Retirement Investors from a misalignment of interests is evident in examples of conflicted advice reported by CFP® professionals in CFP Board's Senior Exploitation Study, conducted by APCO Insight, in August 2012.[17] The study was conducted to obtain deeper insights and analysis into CFP® professionals' experiences with seniors who have been financially exploited. The study found over half of the CFP® professional respondents (56 percent or nearly 1,500) personally had worked with an older client who previously had been subjected to unfair, deceptive or abusive practices.[18] Of these, 76 percent reported financial exploitation that involved equity indexed or variable annuities.[19]

For example, a California-based CFP® professional reported on a seventy-year-old woman who was repeatedly sold annuity contracts by insurance company Advisers with high commissions of 20 to 25 percent, which would likely exceed reasonable compensation under a fiduciary standard of conduct. Some of the contracts also had twenty-year surrender charges, restricting the client's access to these assets until she was ninety years old. The CFP® professional estimated that this client lost over $10,000 and, although he helped her remove her assets from the annuity products and write letters of complaint to the insurance companies, he did not expect her to recover any of her lost funds.

[16] The Investment Company Institute (ICI) and U.S. Chamber of Commerce have both questioned the Department's Regulatory Impact Analysis. At a June 17, 2015 Hearing before the Subcommittee on Health, Employment, Labor, and Pensions, Committee on Education and the Workforce, ICI Chief Economist Brian Reid testified that none of the academic studies that the Department uses addresses the core question of whether an investor's performance is different when his or her Adviser is a fiduciary compared to when his or her Adviser is not a fiduciary and the Department fails to identify and analyze the significant harm to Retirement Investors that is likely to result from the Re-Proposed Rule. It is important to note that the Department sent a letter to relevant industry groups, including ICI, asking for the data needed to perform the Regulatory Impact Analysis; the industry groups responded that the vast majority of the data was unavailable or too expensive to provide. The Coalition believes that because the Department's estimates apply just to mutual fund investments in IRAs, the data likely significantly understate the total cost of conflicted advice related to the other savings vehicles and other financial products.

[17] APCO Insight, *Certified Financial Planner Board of Standards: Senior Financial Exploitation Study*, Aug. 2012, *available at* http://www.cfp.net/docs/news-events---supporting-documents/senior-americans-financial-exploitation-survey.pdf?sfvrsn=0. Research included both a quantitative online survey and qualitative in-depth interviews. CFP® professionals were invited to participate in the online survey via email from CFP Board. From July 24 – August 7, 2012, 2,649 CFP® professionals completed the survey. The theoretical sampling error for the full sample is ±1.9 percentage points at a 95 percent confidence interval.

[18] *Id.*

[19] *Id.* Variable annuities were included in the FINRA Exam Priorities Letter for 2015 and Secretary Perez has also spoken about the risks to consumers arising from the recommendation of these products. Mark Schoeff Jr., "Perez calls out variable annuities in argument for DOL fiduciary rule," InvestmentNews, Jun. 24, 2015, *available at* http://www.investmentnews.com/article/20150624/FREE/150629958/perez-calls-out-variable-annuities-in-argument-for-dol-fiduciary-rule.

The harm to consumers resulting from the misalignment of interests is especially important with respect to retirement assets. Congress enacted ERISA in 1974 to establish special rules to protect Americans' retirement assets in tax-preferred retirement savings vehicles. In doing so, Congress recognized that it was in the public interest to encourage all Americans to save for a secure and dignified retirement.[20] Given the importance of maximizing Americans' retirement assets, Congress intentionally established requirements for financial advice under ERISA that are distinct from and more rigorous than those that apply under insurance and securities laws to non-retirement assets, including the explicit requirement that advice be in the sole interest of the plan and plan participants. The Department's Re-Proposed Rule would close loopholes in its current regulations that allow for conflicted advice by non-fiduciary Advisers related to retirement assets in contravention of Congress' express intent.

b. Retirement Investors Cannot Easily Identify Fiduciary Advisers

In addition to a regulatory framework that permits conflicted financial advice by non-fiduciary Advisers, Retirement Investors face additional challenges in the current financial services marketplace. First, consumers are unable to distinguish Advisers who provide fiduciary-level services from those who don't. Second, Advisers exacerbate consumer confusion with marketing and communications practices that do not clearly and openly disclose the standard of conduct under which they are operating or their conflicts of interest.

A landmark 2008 SEC-sponsored study conducted by the RAND Center for Corporate Ethics, Law, and Governance found that "[e]xisting studies suggest that investors do not have a clear understanding about the distinction between broker-dealers and investment advisers and their different levels of fiduciary responsibility."[21] Subsequent studies confirm persistent and pervasive consumer confusion about financial industry titles and standards of conduct.

A study conducted by InfoGroup, on behalf of the Coalition, Consumer Federation of America ("CFA"), American Association of Retired Persons ("AARP"), and the North American Securities Administrators Association ("NASAA"), found that three out of five U.S. investors mistakenly think that "insurance agents" have a fiduciary duty to their clients; two out of three U.S. investors are incorrect in thinking that stockbrokers are held to a fiduciary duty; and three out of four investors are wrong in believing that "financial advisors" – a ubiquitous term used by financial services and insurance firms to describe their salespersons – are held to a fiduciary duty.[22] The study also

---

[20] 29 U.S.C. § 1001 (2012) ("It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.").

[21] Angela Hung, et al., RAND Corp., *Technical Report, Investor and Industry Perspectives on Investment Advisers and Broker-Dealers*, Jan. 3, 2008, *available at* http://www.rand.org/pubs/technical_reports/TR556.html.

[22] InfoGroup, *U.S. Investors and the Fiduciary Standard*, Sept. 15, 2010, http://www.hastingsgroup.com/fiduciarysurvey/docs/091510%20Fiduciary%20survey%20report%20FINAL2.pdf.

found that 75 percent of investors incorrectly believed that the fiduciary standard is already in place for "financial planners."[23]

A study conducted by Fondulas Strategic Research, on behalf of the Coalition, found significant consumer confusion about the various titles associated with financial planning. A full 82 percent of consumers believe that a "financial planner" is essentially the same as a "financial advisor," and there is only slightly less confusion between the titles "financial planner," "wealth manager" and "investment advisor." [24]

Misleading advertising in the financial services marketplace further exacerbates this consumer confusion. While many Financial Institutions claim that they support a fiduciary standard of conduct and represent their services as unbiased and un-conflicted, their regulatory filings reveal a different truth.

One large financial services firm advertises on its website that their Advisers "recommend unbiased solutions that are in your best interests." The firm's Form ADV brochure, however, states that "the differences in compensation create an incentive for financial advisors to recommend products for which they receive higher compensation" and their Advisers have a "conflict of interest based on an incentive to recommend investment products **based on the compensation received, rather than based on your needs."**

One large insurance firm, presumably to avoid being subject to the fiduciary duty under the current five-part test of ERISA, states in its Form ADV that "[a]ny recommendations provided by your Planner for your IRAs or any retirement plan assets you have the right to self-direct are **not intended to be the sole or primary basis for your investment decisions**." Additionally, the firm's code of conduct states that rather than acting in the client's best interest, Advisers must act in the best interest of the firm.

The alphabet soup of financial service titles – most of which suggest to the consumer that they are receiving advice and not being sold a product – compounded by practices in the marketplace – make it virtually impossible for consumers to identify and choose an Adviser who is obligated to provide advice under a fiduciary standard of conduct. Consequently, consumers who want and would benefit from advice in their best interest are harmed because they cannot identify a qualified fiduciary Adviser.[25]

---

[23] *Id.*

[24] Fondulas Strategic Research, *Quantitative Survey: Consumers' Beliefs About Financial Planners*, Jan. 2014 (on file with the Coalition).

[25] CFP Board's television advertisement in support of its public awareness campaign, known as the DJ ad, further illustrates how easily consumers can be misled. In filming the ad, CFP Board exposed real consumers, who were looking for financial advice, to a DJ who was made over into a "financial planner" and armed with industry jargon. Remarkably, the vast majority of people believed they were meeting with a real financial advisor, and many described him as being knowledgeable, capable and trustworthy. This experiment illustrates the vulnerability of the average consumer and the need for increased investor protection regulations. http://www.letsmakeaplan.org/if-theyre-not-a-cfp-pro-you-just-dont-know/the-experiment.

c. Consumers Want Advice in Their Best Interest and Want the Government to Act to Protect Investors

It is indisputable that consumers want advice in their best interest and want the federal government to increase regulations to protect them. Consumers believe that all Advisers, regardless of how they are licensed, should be required to act in consumers' best interests. The September 2010 InfoGroup study found that 91% of respondents thought that "a stockbroker and an investment adviser (who) provide the same kind of investment advisory services ... should have to follow the same investor protection rules" and 97% agreed that "when you receive investment advice from a financial professional, the person providing the advice should put your interests ahead of theirs and should have to tell you upfront about any fees or commissions they earn and any conflicts of interest that potentially could influence that advice."[26] Moreover, consumers want the government to play an active role in providing for a level playing field. A March 2013 survey conducted by the KRC Research Group, on behalf of the Coalition, shows that "by an overwhelming margin, Americans want the federal government to play an active role in protecting investors by increasing oversight of [financial] advisers." [27] The survey reflected that 80 percent of investors do not believe the federal government is doing enough to protect "consumers from being taken advantage of" by financial advisors and 84 percent of investors agree that "financial advisors should be regulated by the federal government to protect investors and build confidence in financial services."[28]

It is no surprise that groups that represent large numbers of consumers, including the Consumer Federation of American ("CFA") and the American Association of Retired Persons ("AARP"), enthusiastically support the rule and have provided the Department with hundreds of thousands of signatures of consumers who support the rule.[29]

In short, Retirement Investors face a perfect storm in the financial services marketplace. With ever-increasing responsibility for their own retirements and the need to choose from an increasingly complex set of financial products and services, Retirement Investors more than ever need competent financial advice that is in their best interest. Yet the current regulatory framework allows Advisers' interests to be misaligned with the interests of Retirement Investors; it does not require Advisers to clearly and openly disclose the standard of conduct under which they operate or their actual or potential conflicts of interest; and it permits market practices under which Retirement Investors are simply unable to distinguish Advisers who provide fiduciary-level services from those who do not. As discussed in more detail below, the Department's Re-Proposed Rule will help to correct this regulatory misalignment and marketplace confusion by

---

[26] InfoGroup, *U.S. Investors and the Fiduciary Standard*, Sept. 15, 2010, http://www.hastingsgroup.com/fiduciarysurvey/docs/091510%20Fiduciary%20survey%20report%20FINAL2.pdf.

[27] KRC Research, *Survey: American Investors Want More Protection*, Mar. 8, 2013, *available at* http://financialplanningcoalition.com/survey-american-investors-want-more-protection/.

[28] *Id.*

[29] AARP provided the Department with 31,205 signatures on April 21, 2015. CREDO, MoveOn, Public Citizen and Americans for Financial Reform (AFR), collectively, provided the Department over 230,000 signatures on July 16, 2015.

requiring more Advisers to operate with fiduciary-level accountability when providing advice to retirement plans, plan beneficiaries and IRA owners.

II. Expansion of Fiduciary Protection under the Department's Re-Proposed Rule will Help Protect Consumers

The Coalition supports the Department's proposal to increase ERISA fiduciary-level advice to retirement plans, plan beneficiaries and IRA owners as a much-needed reform to address the misalignment of interests, to reduce confusion in the financial services marketplace and to increase protections for Retirement Investors. The Department's Re-Proposed Rule specifically addresses the misalignment of interests in the marketplace by closing the loopholes in the current five-part test for defining a fiduciary Adviser under ERISA, thereby requiring all Advisers, who provide advice related to retirement assets, to be fiduciary Advisers under ERISA. Requiring fiduciary accountability for all advice related to retirement assets will build in needed protections for Retirement Investors. Fiduciary Advisers will help Retirement Investors navigate complex products and services in the financial marketplace by providing recommendations in their best interests. Requiring all ERISA Advisers to be fiduciaries will also help ameliorate Retirement Investors' inability to identify a fiduciary Adviser and should reduce the current conflicting and confusing marketing and disclosure practices.

Specifically, the Coalition supports the removal of the current requirement that advice be provided "on a regular basis" to trigger a fiduciary obligation under ERISA. The application of full fiduciary protection to one-time advice concerning retirement assets is an important investor protection reform. It ensures that a Retirement Investor, who may go to an Adviser for an important one-time investment decision (e.g., whether or not to distribute assets from an employer-sponsored retirement plan), will receive advice that is in his or her best interest.

The Coalition supports the removal of the "mutual understanding" requirement from the five-part test in the current rule and believes that, when looking at the issue of reliance, the determination should be based upon the reasonable expectation of the Retirement Investor. Because the Re-Proposed Rule would not require a "meeting of the minds" concerning the extent to which a Retirement Investor will actually rely on the advice when making an investment decision, an Adviser will not be able to escape his or her fiduciary obligations by claiming that the advice provided was "solely incidental" to the recommendation or that the advice was not the "primary basis" for the Retirement Investor's decision-making.

The Coalition supports extending the fiduciary standard to advice provided to IRA owners.[30] Requiring advice related to the rollover of assets from employer-sponsored retirement plans to IRAs (including both the initial rollover decision, either from an employer-based plan or existing IRA, and the allocation of assets in the IRA) to be fiduciary-level advice is a much needed investor

[30] The new proposal fits squarely within the Department's responsibility to regulate advice regarding IRAs, which was established in 1978. Reorganization Plan No. 4 of 1978, 43 Fed. Reg. 47713 (Oct. 17, 1978). This responsibility was confirmed by Congress in 2006 by the addition of a statutory investment advice exemption to ERISA and the Internal Revenue Code (IRC) through the Pension Protection Act of 2006 ("PPA"). 29 U.S.C. § 1108(g) and 26 U.S.C. § 4975(d)(17), respectively, as added by PPA.

protection reform.[31] For many Retirement Investors, their decision on whether and how to roll over employer-sponsored retirement assets will be the single most important financial decision they will ever make in their lives, with the potential to seriously affect their standard of living in retirement. There are many well-documented abuses concerning these important retirement decisions.[32]

The Coalition also supports the Department's requirement to provide Retirement Investors with a binding and enforceable contract through which they can hold Advisers accountable to provide advice in their best interests. We believe that this provision is an appropriate and necessary enforcement mechanism and that the threat of private action will provide a strong incentive for Advisers and Financial Institutions to meet their fiduciary obligations under the Re-Proposed Rule and to establish policies and procedures to mitigate conflicted advice.

Finally, the Coalition supports the Principal Transaction Exemption as proposed by the DOL. It strikes an appropriate balance between providing Advisers with the opportunity to sell products (for commission-based compensation) from their own inventory and protecting Retirement Investors from conflicted advice. We believe that compliance with the conditions of the exemption will protect consumers from abusive practices, while at the same time not unreasonably narrowing the universe of securities for which the exemption is available.

The Coalition believes that these proposed reforms, which specifically address the misalignment of interests by closing the loopholes in the current five-part test for defining a fiduciary adviser under ERISA that allow for the sale of financial products that may not be in the Retirement Investor's best interest, are a necessary step to help restore consumer trust in the industry by holding Advisers accountable, under a fiduciary standard of conduct, to Retirement Investors for the advice they provide.

III. Industry Arguments Against the Re-Proposed Rule are Misplaced

The Department faces considerable opposition to the Re-Proposed Rule. Interestingly, opponents, primarily from the brokerage and insurance industries, make essentially the same arguments in opposition to the Re-Proposed Rule as they did in opposition to the Original Rule. Opponents raise these nearly identical arguments notwithstanding the significant improvements in the Re-Proposed Rule that were made specifically in response to industry concerns. As discussed in more detail below, the Coalition finds that many of these arguments against the Re-Proposed Rule are simply unsupported, do not accurately reflect the changes in the Re-Proposed

---

[31] Advisers often obfuscate fees associated with rollover recommendations and IRAs. FINRA, Regulatory Notice 13-23, *Brokerage and Individual Retirement Account Fees*, Jul. 2013, *available at* http://www.finra.org/sites/default/files/NoticeDocument/p304670.pdf ("Broker-dealers' marketing campaigns often emphasize that fees are not charged in connection with their retail brokerage accounts and IRAs. Nevertheless, while certain types of fees may not be charged, others will be.").

[32] Government Accountability Office, *Labor and IRS Could Improve the Rollover Process for Participants*, GAO-13-30 (Mar. 2013) ("GAO Report") *available at* http://www.gao.gov/assets/660/653506.txt. The GAO Report found that Advisers "encouraged rolling 401(k) plan savings into an IRA even with only minimal knowledge of a caller's financial situation" and that Advisers claimed that 401(k) plans had extra fees and that IRAs "had no fees," or argued that IRAs were always less expensive, notwithstanding the fact that opposite is generally true.

Rule, are inconsistent with our experience in establishing a fiduciary obligation for our stakeholders and members, or are rebutted by reliable research.

a. The Re-Proposed Rule will Not Drive Advisers Out of Business

Opponents' claim that the Re-Proposed Rule will drive Advisers out of business. CFP Board heard these same arguments in 2007 when it established a fiduciary standard for CFP® professionals when providing financial planning services. At that time, major firms throughout the country as well as industry organizations representing the brokerage and insurance industries raised significant concerns with CFP Board. They asserted that CFP Board's fiduciary requirement was unworkable with their business models and that CFP® professionals would be forced to rescind their certification if required to operate under a fiduciary standard of conduct.

Contrary to these predictions, the number of CFP® professionals has grown by more than 30 percent to over 72,000 since CFP Board established a fiduciary standard. CFP® professionals, many who work at large firms that represent a cross-section of business models, are now proudly promoting that they deliver fiduciary-level services when providing financial planning.

The Coalition believes that the opponents' argument that Advisers will walk away from providing services to Retirement Investors, who collectively have $14.4 trillion in 401(k) plans and IRAs, defies credibility.[33] Rather, if our experience in putting the fiduciary standard in place is any indication, Financial Institutions and Advisers will adjust their policies and practices. Additionally, we believe that the Re-Proposed Rule will be a catalyst for innovation in the industry, as Financial Institutions and Advisers will devise new tools and strategies — assisted by modern software and new technology-based tools — to accommodate even those with only a few thousand dollars to invest.

b. The Re-Proposed Rule is a Workable, Business-Model Neutral Solution that Preserves Consumer Choice

Opponents also claim that the Re-Proposed Rule is "unworkable" because it will eliminate the broker-dealer and insurance business models. Contrary to this argument, the Re-Proposed Rule and accompanying principles-based PTEs preserve the ability of Retirement Investors to choose how they prefer to pay for retirement advice without requiring them to lose their right to best interest recommendations. The Department crafted a principles-based, business-model exemption – the Best Interest Contract (BIC) Exemption – that provides the terms under which Financial Institutions and Advisers can receive sales-based compensation for advice and still comply with the ERISA fiduciary standard.

Opponents further argue that the BIC Exemption is so unworkable that it, as a practical matter, will force Advisers into a fee-based model. Our collective experience operating under a fiduciary standard of conduct belies that argument. CFP Board and FPA are business-model and

[33] ICI, "Retirement Assets Total $24.9 Trillion in First Quarter 2015," Jun. 24, 2015, *available at* https://www.ici.org/research/stats/retirement/ret_15_q1; *see also* ICI Research Perspective, "401(k) Plan Asset Allocation, Account Balances, and Loan Activity in 2013," Dec. 2014, Vol. 20, Num. 10 (According to the Investment Company Institute, the average 401(k) account balance was $72,383 at the end of 2013).

compensation-model neutral. CFP Board's *Standards of Professional Conduct* require CFP® professionals, when providing financial planning services, to do so under a fiduciary standard of conduct.[34] CFP® professionals provide fiduciary-level financial planning services under a variety of business and compensation models, including commissioned-based compensation and revenue-sharing models. CFP Board established a Business Model Council for the purpose of working with firms to understand their business models and provide guidance to firms on how their CFP® professionals can comply with the fiduciary standard under different business models. Our experience shows that Advisers can, and many currently do, successfully provide fiduciary-level service under a variety of business models.

While not identical to the BIC Exemption, many of the current requirements of CFP® professionals are similar to proposed requirements under the BIC Exemption: to act in the best interest of the client, to exercise reasonable and prudent judgment, to execute a written contract with the client, to identify and mitigate conflicts of interest between the client and the CFP® professional and the CFP® professional's employer, to provide written disclosures including the full costs of products and services and the compensation to the CFP® professional and/or employer, and to comply with applicable regulatory requirements.[35] These similarities are reflected in the chart below.

	BIC	Analogous CFP Board Rule or Standard (if providing Financial Planning)
Fiduciary	Yes	Rule of Conduct 1.4 - Yes
Written Contract	Yes	Rule of Conduct 1.3 - Yes
Fee/Costs	Point of Sale Disclosure and Annual Disclosure	Rule of Conduct 2.2(A) and Practice Standards 100-1 and 500-1 - CFP® Professional shall disclose accurate and understandable information related to costs and compensation and any material changes to that information
Conflicts	Must Provide Written Notification of Conflicts of Interest	Rule of Conduct 2.2(B) and Practice Standards 100-1, 400-3, and 500-1 - CFP® Professional shall disclose a summary of likely conflicts of interest
Prudent Standards	Yes	Rule of Conduct 4.4 - CFP® Professional shall exercise reasonable and prudent professional judgment
Compliance with Applicable Law	Yes	Rule of Conduct 4.3 - CFP® Professional shall comply with all applicable regulatory requirements
Policies to Mitigate Conflicts	Yes	Rule of Conduct 4.1 - CFP® Professional shall provide professional services with integrity and objectivity

[34] CFP Board *Standards of Professional Conduct*, Rule of Conduct 1.4, *available at* http://www.cfp.net/for-cfp-professionals/professional-standards-enforcement/standards-of-professional-conduct/rules-of-conduct.

[35] CFP Board *Standards of Professional Conduct*, Rules of Conduct 1.3, 1.4, 2.2, 4.1, 4.3 and 4.4, *available at* http://www.cfp.net/for-cfp-professionals/professional-standards-enforcement/standards-of-professional-conduct/rules-of-conduct.

Based on our experience, we believe that Advisers and Financial Institutions are able to establish policies and procedures designed to implement the types of obligations required under the BIC Exemption. This will enable Advisers to continue to provide services under business models that include brokerage and insurance models with commission-based or revenue-sharing compensation arrangements.

c. The Re-Proposed Rule Will Not Diminish Availability of Services to Middle-Income Americans

Opponents claim that the Re-Proposed Rule will force Advisers to stop serving middle-income Americans. Opponents' primary support for this oft-repeated assertion is an industry study that is not applicable to the Re-Proposed Rule. In contrast, reliable empirical data, replicated in numerous studies, as well as current practices in the marketplace, demonstrate that a fiduciary duty will not force Advisers to abandon middle-income households and will not leave them without investment advice.

Opponents continue to rely on the Oliver Wyman study that was conducted in April 2011[36] for their assertion that the DOL rule will force Advisers to stop serving middle-income Retirement Investors. This study is premised on the Department completely eliminating commission-based compensation. However, the Re-Proposed Rule specifically permits Advisers to receive commissions for the sale of security and insurance products. The principles-based PTEs broadly permit firms to continue compensation practices typically used by broker-dealer registered representatives and insurance agents with middle-income Retirement Investors, such as commission-based advice and revenue sharing practices, as long as they adhere to basic standards aimed at ensuring their advice is in their clients' best interest.[37]

Research studies that compare fiduciary and non-fiduciary services show just the opposite – that there is no statistically significant difference in the delivery of services to middle-income Americans. A February 2014 study, conducted by Princeton Survey Research Associates International ("PSRAI") on behalf of the Coalition, examined the experience and attitudes of financial advisors who have switched from a suitability standard to a fiduciary standard of conduct

[36] Oliver Wyman Report, *Assessment of the Impact of the Department of Labor's Proposed "Fiduciary" Definition Rule on IRA Consumers*, (Apr. 2011) (data for Department use submitted Jan. 2012), *available at* http://www.dol.gov/ebsa/pdf/WymanStudy041211.pdf.

[37] The Wyman study is further flawed in multiple respects. First, the study relies upon data that is not representative of the industry. For example, in the Wyman study sample, 88 percent of investors have brokerage IRAs, which the study fails to break down into full-service versus discount brokers. However, in the latest Investment Company Institute research from January 2015, only 46 percent of investors have brokerage IRAs (32 percent full-service and 14 percent discount). ICI Research Perspective, Vol. 21, No 1A, Jan. 2015, *available at* http://www.ici.org/pdf/per21-01a.pdf. The study also greatly underestimated the costs to investors by providing only a subset of investors' costs, rather than investors' all-in costs. Davis & Harman, the firm that commissioned the study, admitted that "it was hard to do an apples-to-apples comparison" and it "wasn't feasible to collect and analyze enough data to do an analysis of all-in costs. Ian Salisbury, "Study on Retirement Cost Draws Fire," MarketWatch, Aug. 29, 2012, *available at* http://www.marketwatch.com/story/study-on-retirement-costs-draws-fire-1346276514746. Additionally, as part of its Regulatory Impact Analysis, the Department commissioned the RAND Corporation to provide an independent review of the Wyman study; the independent review found the arguments made by the study to be "unpersuasive." RAND Corp., *Potential Economic Effects on Individual Retirement Account Markets and Investors of DOL's Proposed Rule Concerning the Definition of a "Fiduciary,"* Feb. 2015, *available at* http://www.rand.org/pubs/research_reports/RR1009.html.

or who operate under both standards.[38] PSRAI conducted online interviews with a sample of 1,852 advisors drawn from Coalition stakeholders that included a broad representation of various business and compensation models.[39]

Of particular focus in the study were those respondents who switched from a suitability to a fiduciary standard (15%) and those who operate under both a suitability and fiduciary standard in their practice (48%) (hereinafter referred to collectively as "fiduciary respondents").[40] These advisors offer a more experienced (and arguably a more credible) view of the real impact of transitioning from suitability to a fiduciary standard.[41] Focusing just on the findings related to the availability of services and products and types of clients served,[42] 80 percent of the fiduciary respondents reported an increase or no change in range of services when delivering services to their customers under a fiduciary standard of conduct; 69 percent reported an increase or no change in range of products when delivering services to their customers under a fiduciary standard of conduct; and 72 percent reported an increase or no change in the number of clients served. Broken down by assets, 88 percent reported an increase or no change in clients with $100,000 - $999,999 assets under management when delivering services to their customers under a fiduciary standard of conduct, and 59 percent reported no change or an increase in clients with less than $100,000 assets under management when delivering services to their customers under a fiduciary standard of conduct.[43]

A June 2013 study conducted by the Aité Group, on behalf of the Coalition, compared financial professionals who operated under a fiduciary standard of conduct with those who did not.[44] Among other things, the study examined differences between broker-dealer registered representatives who had a fiduciary practice (i.e., who managed assets as a fiduciary for over half

---

[38] Princeton Research Associates International, *Fiduciary Standard Survey*, Feb. 2014, *available at* http://financialplanningcoalition.com/.

[39] Respondents included investment adviser representatives (29%), broker-dealer registered representatives (28%) and dually registered investment adviser/broker-dealer registered representatives (26%). *Id.* at 8. 45% of respondents reported that that clients typically pay through fees; 47% report both commissions and fees; 5% report commissions only. *Id.* at 9. The margin of error at the 95% level of confidence is plus or minus 2.5 percentage points. *Id.* at 8.

[40] *Id.* at 9.

[41] The SEC specifically asked for data on advisers who switched standards. *See* SEC Request for Data and Other Information, *Duties of Brokers, Dealers and Investment Advisers*, File No. 4-606, Exchange Act Release No. 69013 (Mar. 1, 2013) at 49. While this study was done with reference to the SEC's fiduciary rulemaking, respondents' views on operating under both standards can be informative to the application of the DOL fiduciary rule as well.

[42] The study looked at a many other factors, including the respondents' views on the fiduciary standard and the impact of extending the fiduciary standard to broker-dealers registered representatives. For example, among those who switched to a fiduciary standard, large majorities reported that the change has been mostly positive for their clients (81%), for their practice (81%) and for them personally (87%).

[43] *Id.* at 18.

[44] *Aité Fiduciary Study Findings*, in the letter from the Financial Planning Coalition, Jul. 5, 2013, to the SEC in response to the SEC Request for Data and Other Information, *Duties of Brokers, Dealers and Investment Advisers*, File No. 4-606, Exchange Act Release No. 69013 (Mar. 1, 2013), *available at* http://www.sec.gov/comments/4-606/4606-3126.pdf. The Aité Group, a leading third party researcher and data aggregator in the financial services industry, surveyed 498 broker-dealer registered representatives and registered investment adviser representatives who worked in a cross section of firms (wirehouse, bank-affiliated, independent and insurance affiliated broker-dealers, online brokerage, independent RIA firms, and self-clearing firms). The margin of error at the 95 percent confidence level is generally 4 percentage points.

of their client assets and hereinafter referred to as "fiduciary registered representatives") and other registered representatives. While there were significant differences on many factors,[45] the study found that there was no statistically significant difference between fiduciary registered representatives and other registered representatives in terms of working with mass-market clients (those with less than $100,000 in investable assets). In fact, the study found that fiduciary registered representatives work with a comparable percentage of mass-market clients to that of other registered representatives.[46]

A July 2012 study by Professors Michael Finke and Thomas Langdon compared the availability of broker-dealer services in the several states that already hold broker-dealer registered representatives to a full fiduciary standard when dealing with all customers, with those states that do not hold broker-dealer registered representatives to a fiduciary standard. The study found "no statistical differences between the two groups in the percentage of lower-income and high-wealth clients, the ability to provide a broad range of products including those that provide commission compensation, [or] the ability to provide tailored advice and the cost of compliance."[47]

In short, relevant and reliable studies simply do not support opponents' argument that a fiduciary standard would affect their ability to serve middle-income clients.

Moreover, opponents' claim is inconsistent with current practices in the marketplace.[48] There are individual Advisers as well as existing and emerging business models that successfully provide low-cost service to middle-income Americans under a fiduciary standard of conduct. Today, there are thousands of CFP® professionals and FPA and NAPFA members across the country who currently provide fiduciary-level services to everyday Americans with business models requiring no or very low minimum assets under management. Additionally, the Department has recognized a number of companies that provide fiduciary-level advice to smaller Retirement Investors.[49] While some Financial Institutions may decide that it is not profitable for them to serve middle-income Retirement Investors under the new requirements of the Re-Proposed Rule, the Coalition believes that, with $14.4 trillion currently in 401(k) plans and IRAs, there is a strong economic

[45] *Id.* The study found that the registered investment advisers and the fiduciary registered representatives, who deliver services to their customers under a fiduciary standard, experience stronger asset growth, stronger revenue growth, and obtain a greater share of client assets than the other broker-dealer registered representatives.

[46] *Id.*

[47] Dr. Michael Finke and Thomas Langdon, *The Impact of the Broker-Dealer Fiduciary Standard on Financial Advice*, Journal of Financial Planning, Jul. 2012, *available at* https://www.onefpa.org/journal/Pages/The%20Impact%20of%20the%20Broker-Dealer%20Fiduciary%20Standard%20on%20Financial%20Advice.aspx

[48] Opponents' claim that Advisers who serve lower and middle-income Americans only provide commission-based advice is also not supported by industry data. For Advisers whose core market are investors with less than $100K AUM, only 24% were commission-only, while 35% were fee-and-commission mix (10% to 50% in fee-based revenue) and 32% were fee-based (greater than 50% to 90% in fee-based revenue). *Cerulli Advisor Metrics 2014: Capitalizing on Transitions and Consolidation*, Cerulli Associates (2014), at 100.

[49] Remarks by U.S. Secretary of Labor Tom Perez at the Brookings Institution, The Hamilton Project, Forum on Promoting Financial Well-Being in Retirement, Washington, DC, Jun. 23, 2015, *available at* http://www.dol.gov/_sec/media/speeches/20150623_Perez.htm. As Secretary Perez noted during the speech, "[w]hen I talk to firms like these and tell them about the argument on the other side — that our rulemaking will make it impossible to serve the small saver — they say: *Give those small savers my e-mail address.*"

incentive for the vast majority of Financial Institutions to develop new and innovative business models to successfully serve middle-income Retirement Investors.

Finally, the argument that Advisers, who can still receive commissions for their services, can't afford to serve middle-income Retirement Investors if they are required to provide advice that is in the best interests of the Retirement Investor is fundamentally at odds with opponents' rhetoric that they support a best interest standard. Empirical evidence strongly suggests that it is precisely these less wealthy, often less sophisticated investors who are most at risk from harmful practices permitted under the current regulatory framework. Small Retirement Investors, who are disproportionately served by broker-dealers and insurance agents who are not currently required to serve their customers' best interests, are at the greatest risk of receiving conflicted advice that drains their retirement savings.[50]

d. The Re-Proposed Rule Will Not Open the "Floodgates" of Litigation

Opponents argue that the Re-Proposed Rule will open the "floodgates" for plaintiffs' attorneys to file class-action lawsuits. The significant hurdles associated with class actions will necessarily limit the use of this enforcement tool by Retirement Investors. To be certified, class action plaintiffs must satisfy stringent requirements, including commonality and typicality of facts and/or law across the entire class. These stringent requirements ensure that only those cases where the harm in question is systematic will be certified as class actions. Where the harm is not systematic, because there are differences in the facts or law for each potential claimant, then a class action will not be certified.

In fact, arbitration, not class actions, will likely be the enforcement mechanism that Retirement Investors will most likely use to enforce the BIC Exemption. The Department has permitted Financial Institutions to continue to require mandatory pre-dispute arbitration clauses in Retirement Investors' contracts. These arbitration proceedings will most likely be conducted by FINRA, a dispute resolution forum very familiar to Financial Institutions and Advisers.

Many Advisers currently operate under the ERISA fiduciary standard and there is no evidence that has been put forth by opponents that those Advisers are dealing with increased litigation risk. In fact, adherence to a fiduciary standard of conduct could reduce litigation risk. In a January 2015 letter to its members, FINRA stated "firms best serve their customers — and reduce their regulatory risk — by putting customers' interests first. This requires the firm to align its interests with those of its customers."[51] The Coalition believes that when Advisers and Financial Institutions take seriously their obligation to mitigate conflicts and put the interests of their customers first,

---

[50] Dr. Michael Finke, *Fiduciary Standard: Findings From Academic Literature*, attached to the letter from IMCA, Jul. 5, 2013, to the SEC in response to the SEC Request for Data and Other Information, *Duties of Brokers, Dealers and Investment Advisers*, File No. 4-606, Exchange Act Release No. 69013 (Mar. 1, 2013), *available at* http://www.sec.gov/comments/4-606/4606-3121.pdf (Dr. Finke reviewed a number of academic studies related to the potential benefits to consumers of a fiduciary standard, including studies showing that less sophisticated and less wealthy investors are most likely to suffer the harmful consequences of recommendations that are not based on the best interest of the investor.).

[51] FINRA, "2015 Regulatory and Examination Priorities Letter," Jan. 6, 2015, *available at* http://www.finra.org/sites/default/files/p602239.pdf

they should see their liability risks reduced as a result of the better outcomes they achieve for clients.

e. The Benefits to Retirement Investors Far Outweigh the Costs to Financial Institutions to Implement Reforms Required by the Rule

Opponents of the Re-Proposed Rule contend that the costs to the industry to implement the rule are too onerous and that Advisers and Financial Institutions will pass these costs on to their clients. However, the opponents focus only on the costs to the industry, rather than focusing on the immense quantitative and qualitative benefits to Retirement Investors of advice that is in their best interest.

The Department recognizes that there will be costs to Financial Institutions and Advisers associated with implementation of the Re-Proposed Rule. In its Regulatory Impact Analysis, the Department estimates that the compliance costs associated with the Re-Proposed Rule will total between \$2.4 billion and \$5.7 billion over 10 years.[52] The Coalition is proposing rule modifications that are intended to reduce the anticipated costs to Financial Institutions and Advisers. Moreover, the Department has already indicated that it is looking at ways to modify the Re-Proposed Rule to reduce costs. However, even assuming no cost reductions, the Coalition believes that the costs of conflicted advice to Retirement Investors under the current regulatory framework greatly outweigh the costs to the financial services industry to implement and to comply with the Re-Proposed Rule.

As noted above, based upon a wide range of independent studies, the Department estimates that, *for mutual fund investments in IRAs alone*, investors will lose between \$210 billion and \$430 billion over 10 years, and between \$500 billion and \$1 trillion over 20 years as a result of conflicted advice. Furthermore, according to the Department's analysis, a Retirement Investor who moves money out of a 401(k) plan and into an IRA based on conflicted advice can expect to lose 12 to 24 percent of the value of his or her savings over 30 years.[53]

The Department also estimates that the Re-Proposed Rule may result in gains of between \$40 billion and \$44 billion over 10 years for these IRA Retirement Investors. The potential gains to the entire retirement market are likely to be significantly greater. However, if only 75 percent of anticipated gains to IRA investors were realized, that would amount to between \$30 billion and \$33 billion over 10 years. If only 50 percent were realized, that would total between \$20 billion and \$22 billion over 10 years. Even under the most conservative estimates, therefore, the benefits to Retirement Investors of best interest advice are many times greater than the costs to industry to implement and to comply with the Re-Proposed Rule.[54]

[52] U.S. Dep't of Labor, *Fiduciary Investment Advice: Regulatory Impact Analysis*, Apr. 14, 2015, *available at* http://www.dol.gov/ebsa/pdf/conflictsofinterestria.pdf.

[53] *Id.*

[54] *Id.*

IV. The Re-Proposed Rule Reflects a Balanced Approach that Preserves Various Business Models While Ensuring that Retirement Investors Will Receive Advice that is in Their Best Interest

The Department clearly listened to many of the concerns articulated by firms, industry organizations and consumer and public interest organizations in response to the Department's 2010 Original Rule and the Department has repeatedly assured all parties that it will do the same with the Re-Proposed Rule. The Department has been clear that it plans to use the comment period to make further refinements to address industry concerns while maintaining critical protections for Retirement Investors. The Department has repeatedly assured Congress and all interested parties (including Financial Institutions, industry organizations, and consumer and public interest organizations) that it welcomes their recommendations in order to promulgate a final rule that is workable across business models.

To assist the Department in promulgating a rule that is workable across business models, the Coalition devotes the remainder of its comment letter to identifying areas where we believe the Re-Proposed Rule can be clarified or improved to allow for a more practical application of the fiduciary standard to various business models.

a. Coalition Supports the Proposed Revisions of Definition of "Fiduciary Adviser" Under ERISA with Suggestions for Modifications

Under the Department's re-proposed definition, any individual receiving compensation for providing advice that is individualized or specifically directed to a particular plan sponsor, plan participant, or IRA owner for consideration in making a retirement investment decision is a fiduciary. As noted above, the re-proposed definition closes loopholes in the current five-part test, where many Advisers have no obligation to adhere to ERISA's fiduciary standards or to the prohibited transaction rules.

i. Mutual Understanding

The Coalition understands and agrees that under the proposed definition of "investment advice," a mutual understanding between the parties that the advice will serve as the primary basis for plan decisions should no longer be required. In the future, fiduciary status should rest on four criteria: (i) an understanding by the recipient (ii) that advice may be either individualized or specifically directed to the recipient (iii) for consideration by the recipient in making investment decisions for the applicable plan or IRA and (iv) will come within one of the four listed categories of recommendations.

However, the Coalition believes that the applicable language in proposed 29 CFR § 2510.3-21(a)(2)(ii) may need to be revised, since it could be interpreted as requiring a "meeting of the minds" as provided under the current regulations. The Department should make clear that a meeting of the minds is not required. We recommend that this requirement be amended to clarify that it can be met by reliance or an understanding by the recipient that the advice is individualized or specifically directed to the recipient. We believe that when looking at the issue of reliance, the determination should be based upon the reasonable expectation of the Retirement Investor.

ii. Pre-Contract Communications with Retirement Investors

The Re-Proposed Rule states that a written contract to trigger the BIC Exemption must be entered into prior to a recommendation "as to the advisability of acquiring, holding, disposing or exchanging securities or other property, including recommendations to receive a distribution of benefits or roll over assets from a plan or IRA." The Coalition understands that the intention of the Re-Proposed Rule is to protect Retirement Investors; however, the Rule is unclear whether initial discussions, during which an Adviser is marketing or promoting his or her services to prospective Retirement Investors, constitute Covered Advice.

It is important for the Department to explicitly recognize that certain marketing and promotion activities must be allowed before a fiduciary relationship arises. The Coalition requests clarification that initial discussions, during which an Adviser is marketing or promoting his or her services, do not constitute Covered Advice. While the line between initial marketing communications and Covered Advice may at times be difficult to determine and may require a "facts and circumstances" analysis, we believe that the Department can provide broad guidelines and examples to help clarify the types of communications that constitute marketing and not Covered Advice.

Broadly speaking, Covered Advice should include advice that is individualized to or specifically directed to the recipient for consideration in making an investment or investment management decision. This broadly includes recommendations that are provided to address the objectives or needs of a client after taking into account the client's specific circumstances. Covered Advice should include, for example:

- Communications that contain recommendations to purchase or sell investment products;
- Communications about investment products that encourage clients to purchase or sell investment products as well as communications that encourage clients not to purchase or sell investment products;
- Communications that contain recommendations of a particular investment or allocation strategy directed to the client or intended for the client's consideration in making investment or allocation decisions; and
- Technology that makes specific recommendations to users based on the users' financial information.

On the other hand, communications that do not make recommendations that are individualized to or specifically directed to the recipient for consideration in making an investment or investment management decision or otherwise promote a product or service of the Adviser or Financial Institution should not be considered Covered Advice. These types of marketing communications could include, for example:

- Discussing general investment and allocation strategies without reference to specific products;

- General marketing materials that are not targeted to a specific customer or group of customers; or
- Promoting the Adviser's range of services.

While we believe that further clarification and guidance from the Department will be helpful, it cannot address with specificity all the types of communications and business activities that may constitute either Covered Advice or marketing communications. In addition, Advisers may, as a practical matter, need to provide recommendations that constitute Covered Advice prior to being able to execute a contract. To provide additional flexibility to Advisers to engage in pre-contract communications with Retirement Investors while ensuring protection of the Retirement Investor, we propose that the Department make clear that if a client is given advice prior to the execution of a contract, all the protections contained in the BIC Exemption, including the obligation to provide advice that is in the best interest of the client, apply retroactively to the advice.[55]

iii. Implementation and Enforcement Dates of Re-Proposed Rule

The Department has indicated that once the Re-Proposed Rule is finalized, there will be a delayed implementation date of eight months. The Coalition strongly supports setting a tight implementation date given the immediate need for protection of Retirement Investors. However, the Coalition is concerned that eight months will not allow Financial Institutions and Advisers sufficient time to adjust compensation arrangements, to adopt new required policies and procedures, and to prepare necessary disclosures required under applicable exemptions, including, but not limited to, the BIC Exemption, discussed below. This concern is based upon the previous experience of CFP Board in implementing its own fiduciary standard, where CFP Board established an enforcement date that was six months after the implementation date.

The Coalition suggests that the Department either retain the eight-month implementation date for the Re-Proposed Rule or allow a limited extension to no more than 12 months after the final rule is published. The Department should require Financial Institutions and Advisers to establish policies and procedures that reflect reasonable, good faith compliance with the new regulations upon the implementation date. To allow flexibility for full implementation of all the requirements of the Re-Proposed Rule, the Coalition further suggests that the Department consider establishing phased-in enforcement deadlines for certain specific requirements, which may take additional time to implement. For requirements under the BIC Exemption that may need additional time to fully implement (e.g., disclosure and recordkeeping requirements), the Department could approve the use of "contractual triggers" that would phase-in certain requirements after the date of the contract. Should the Department allow for phased-in requirements, the Coalition recommends that this flexibility should not extend to the fundamental obligation to serve the best interest of the client and that all requirements must be fully implemented and enforceable by no later than one year after the implementation date of the final rule.

[55] *See* discussion *infra* Part IV.c.i.4.

b. **Coalition Supports the Proposed Carve-Outs from the Definition of What Constitutes "Fiduciary Investment Advice" Under ERISA**

While substantially broadening the scope of the fiduciary regulation through the Re-Proposed Rule, the Department provides certain "carve-outs" that allow persons who may otherwise be deemed investment advice fiduciaries to be exempt from fiduciary status. The Coalition agrees that a majority of these carve-outs preserve certain common business practices within the retirement services industry for which fiduciary protections are not needed.

i. **General Education Carve-Out**

The Coalition believes it is vitally important that the Department encourage generalized education and information about financial concepts (e.g., asset classes, asset allocation, etc.). The Re-Proposed Rule carefully carves out education from the definition of retirement investment advice so that Advisers and plan sponsors can continue to provide general education on retirement saving across employment-based plans and IRAs without triggering fiduciary duties. Studies regularly show that the "financial literacy" of many Americans is much lower than needed to make well-informed financial decisions.[56] The Coalition appreciates that the Department makes clear that generalized educational and informational materials, which clearly disclose that such materials are not tailored to a specific customer's financial situation, do not by themselves establish fiduciary status in any plan context.

The Re-Proposed Rule includes an education carve-out that allows for the use of allocation models, but would not allow for models to be populated with specific investment options. This current industry practice has been developed to meet requests from plan participants for guidance related to proper investment selection. However, the Coalition recognizes that providing this limited educational assistance may cross a line into providing back-door advice and understands why the Department has proposed this provision in the Re-Proposed Rule. Nonetheless, the Coalition respectfully suggests that the education carve-out as proposed be expanded to allow models to be populated as long as all of the investment options available to plan participants and IRA owners in a certain asset class are included. For example, if there are three funds that would be categorized as bond funds, all three can be listed in the allocation model and the carve-out would still apply. If there is only one fund in an asset class, the carve-out would also still be available. The Coalition recognizes that this suggested change would have greater application in the employer-sponsored retirement plan context, where a selection of core investment options is usually limited to between six and forty funds.

[56] Financial literacy is especially important with regard to fees. For example, a 2012 study of 7,500 U.S. households by Cerulli Associates, in conjunction with Phoenix Marketing International, found that nearly two-thirds of investors either believed the advice they received was free (29 percent) or did not understand how the Adviser was paid (31 percent). *Cerulli Quantitative Update: Retail Investor Advice Relationships*, Cerulli Associates (2012), at 224. Even with the heightened focus on financial literacy, the more recent 2014 study found that over half of investors still either believed the advice they received was free (26 percent) or did not understand how the Adviser was paid (25 percent). *Cerulli Quantitative Update: Retail Investor Advice Relationships*, Cerulli Associates (2014), at 22.

c. Coalition Supports the Department's Principles-Based Approach to Prohibited Transaction Exemptions (PTEs) Under ERISA with Requests for Clarification and Proposed Language to Allow for a More Practical Application of the Fiduciary Standard to Various Business Models

The Coalition supports the Department's new broad, principles-based PTEs that can accommodate a range of evolving business models, while preserving a strong fiduciary standard. We agree with the Department that the principles-based approach to PTEs streamlines compliance and gives Financial Institutions and Advisers the flexibility to determine how to serve Retirement Investors' best interest.

i. Best Interest Contract (BIC) Exemption

The Coalition supports the BIC Exemption. We believe it is a flexible, adaptable, business-model neutral approach to the application of the fiduciary duty under ERISA that will balance a number of competing interests. It will preserve a strong principles-based fiduciary standard while at the same time allow compensation models that will facilitate the delivery of services to middle-income Retirement Investors by placing the burden on Financial Institutions and Advisers to commit to putting their clients' best interest first and to establish appropriate policies and procedures to mitigate conflicted advice.

The exemption places the burden of making a determination regarding whether the compensation is reasonable on the Financial Institution and Adviser, not on the Retail Investor. Additionally, as noted above, by allowing commissions under the BIC Exemption the Department has rendered the findings of the 2011 Oliver Wyman Study, which were based on the assumption that commissions would be eliminated, irrelevant.

1. Exclusion of Small Participant-Directed Plans

The BIC Exemption would provide relief to fiduciary Advisers who earn variable compensation from retail Retirement Investors, such as plan participants and IRA owners, as well as sponsors of non-participant-directed plans with less than 100 participants, such as small defined benefit plans. We note that sponsors of small 401(k) plans and other small plans with participant-directed investments are omitted.

The Coalition urges the Department to extend the BIC Exemption to cover small, participant-directed plans. If this relief is not provided, Advisers may be unable to earn variable compensation when selling investments to sponsors of these small plans. The Coalition views this as an unjustified anomaly, given that the BIC Exemption is intended to cover retail retirement clients, including the participants in such small plans.

The extension of the BIC Exemption would prevent contraction of this market and ensure the continued availability of advisory services to small plans. Moreover, the extension of the BIC Exemption to small participant-directed plans would address the dilemma faced by platforms maintained by financial advisors that would normally provide assistance in selecting a menu of investment options for a 401(k) plan. These platform providers cannot qualify under the platform provider carve-out, because their advice would be directed to the specific needs of the plan, and the BIC Exemption, as currently proposed, would be unavailable to provide relief from ERISA's prohibited transaction rules. Under these circumstances, many platform providers may feel compelled to leave plan sponsors to their own devices in selecting a plan investment menu. The Coalition believes that this especially vulnerable group needs to have as many forms of assistance available to it as possible, as long as appropriate standards — such as those established under the BIC Exemption — are in place.

2. Exclusion of Certain Assets from BIC Exemption

The Department's Re-Proposed Rule limits availability of the BIC Exemption to certain listed investment products. These products include bank deposits and CDs, mutual funds, exchange-traded funds, bank collective investment funds, insurance company separate accounts, exchange-traded REITs, corporate bonds available under registered offerings and equity securities that are publicly traded. Also included are Treasury and agency debt securities, insurance and annuity contracts, and guaranteed investment contracts (GICs).

Noticeably, this list does not include privately placed debt securities, non-traded REITs or alternative investments, such as hedge funds and private equity. Although the Coalition recognizes that such investments are being increasingly used by small plans such as defined benefit plans, we strongly support the Department's proposed limitation on investments that qualify for the BIC Exemption. The Department's analysis of such investments shows that they comprise only four percent of the retirement marketplace and that there may be valuation and/or liquidity issues that could arise. It is our position that if a provider wants to offer such investments to retail Retirement Investors, they can do so (1) under a compensation model that does not involve conflicted advice; or (2) by seeking an individual PTE from the Department to cover their proposed investment product.

3. Application of BIC to Rollover Advice by AUM Adviser

Under the Department's Re-Proposed Rule, covered recommendations relating to investments in securities or other property will include recommendations to take rollovers from a plan, as well as investment recommendations for rollover assets. Further, the proposed definition also includes recommendations relating to the investment management of the assets of a plan or IRA, including rollover assets. In CFP Board's experience, which includes investigation and discipline arising from complaints against its CFP® professionals, some of the greatest abuses have involved conflicted advice to plan participants to take a lump sum distribution from an employer sponsored retirement plan. Therefore, the Coalition sees this expansion of fiduciary investment advice, to include advice given in relation to IRAs, to be an important and necessary protection for Retirement Investors.

Generally speaking, Advisers who charge fees for services, including assets under management, a flat retainer, a project fee or an hourly fee do not receive variable compensation for their advice and thus do not generally need the protection of a PTE to provide advice under ERISA (hereinafter these fee structures are referred to as "non-variable compensation").

However, the Coalition believes that in a very limited circumstance – when an Adviser who is being paid a percentage of assets under management makes a rollover recommendation that would increase the Adviser's assets under management – this would be considered conflicted advice that would trigger the need for a PTE for that limited advice. This would include rollover advice to a participant or IRA owner, including advice to roll over assets from an employer-based plan to an IRA or roll over assets from an existing IRA to a new IRA where the advice results in an increase in assets under management. Given that an Adviser, who is compensated by assets under management, is generally subject to the requirements of a fiduciary duty under securities law and regulation,[57] the Coalition respectfully requests that the Department consider a streamlined sister exemption to the BIC Exemption applicable to this limited circumstance (For convenience, we are referring to this proposed exemption as the "AUM Adviser Rollover Exemption").

The Coalition proposes that this exemption be available to an Adviser who charges asset based fees that meet the fee leveling test under 29 CFR § 2550.408g-1(b)(3)(D).[58] Under this streamlined exemption, the Department could require the Adviser to meet only a certain subset of the requirements of the BIC Exemption. We propose that these include (1) a written contract (as further described below with suggested changes), (2) the Best Interest Standard requirement, and (3) the required disclosures. We do not believe the remaining requirements of the BIC Exemption would be needed to protect Retirement Investors including, but not limited to, the development of policies and procedures to mitigate conflicted advice, the creation of a website and the recordkeeping obligations. The Coalition notes that its proposal to create a sister exemption that shares a subset of requirements is similar to the approach taken in 29 CFR § 2550.408g-1.

The Coalition again notes that this proposed AUM Adviser Rollover Exemption would only apply to and be needed for the limited Covered Advice of providing advice to a participant or IRA owner to roll over assets from an employer-based plan or an existing IRA to a new IRA. The AUM Adviser will no longer need to rely on a PTE to provide investment advice regarding the investment or

[57] In *Financial Planning Association v. SEC*, 482 F.3d 481 (D.C. Cir. 2007), the DC Circuit vacated SEC's proposed Advisers Act Rule 202(a)(11)-1, which provided, among other things, that fee-based brokerage accounts were not advisory accounts and thus were not subject to the Advisers Act. Subsequent to the court's decision, the SEC has provided interpretive, but not final, guidance reflecting that broker-dealers offering fee-based brokerage accounts are subject to the Advisers Act with respect to those accounts. *See* Interpretive Rule under the Advisers Act Affecting Broker-Dealers, Advisers Act Rel. No. 2652 (Sept. 24, 2007) ("Release 2652") (The SEC has "long held the view that when a broker-dealer charges its customers a separate fee for investment advice, it clearly is providing advisory services and is subject to the Advisers Act"); *see also* Opinion of General Counsel Relating to Section 202(a)(11)(C) of the Investment Advisers Act of 1940, Investment Advisers Act Release No. 2 (Oct. 28, 1940) ("a broker or dealer who is specially compensated for the rendition of advice should be considered an investment adviser and not be excluded from the purview of the [Advisers] Act merely because he is also engaged in effecting market transactions in securities").

[58] Advisers may meet the fee leveling test as long as no "fiduciary adviser (including any employee, agent, or registered representative) that provides investment advice receives from any party (including an affiliate of the fiduciary adviser), directly or indirectly, any fee or other compensation (including commissions, salary, bonuses, awards, promotions, or other things of value) that varies depending on the basis of a participant's or beneficiary's selection of a particular investment option."

management of assets once inside the IRA because such ongoing advice would not result in variable compensation and therefore would not be considered conflicted advice.

4. Execution of BIC Exemption – Operationalize for Various Business Models – New and Existing Clients

One of the central requirements of the BIC Exemption is a written agreement between the Adviser, Financial Institution and the Retirement Investor. The agreement must contain certain mandatory provisions and warranties. For example, under the terms of the agreement, the Adviser must acknowledge that it is a fiduciary for purposes of ERISA or the IRC, as applicable, with respect to the advice that is provided. Further, the agreement must incorporate the "impartial conduct standards" as defined under the BIC Exemption. In order to meet the written contract requirement, the proposed regulation requires an Adviser and Financial Institution to "enter into a written contract" with a Retirement Investor prior to the Adviser making a recommendation. The preamble to the BIC Exemption states this requirement somewhat differently and notes that "[t]he contract must be executed" by the Adviser, Financial Institution and the Retirement Investor, before the recommendation occurs. However, the Coalition has a number of concerns with the contract requirement as proposed.

First, the Re-Proposed Rule should include a requirement that the contract incorporate language to bind all parties who have provided Covered Advice to the Retirement Investor, which would include the Financial Institution, the Adviser, the call center Adviser, any former Adviser, and an Adviser's team member(s). This requirement will ensure the right of Retirement Investors to hold past and present fiduciary Advisers accountable for providing advice in their best interest through a private right of action for breach of contract.

Second, the contract requirements under the Re-Proposed Rule should be tailored for the type of client. For existing clients, the Coalition recommends that the Department recognize that notification by a Financial Institution of the new legally binding obligations required by the BIC Exemption meets the execution requirement for the contract, without the need for a client signature. In other words, the Department should make clear that the BIC Exemption allows for negative consent to create legally binding protections under the contract flowing from the Financial Institution / Adviser to the client.

For new clients, the Coalition recommends that the Department build in flexibility with regard to the timing of the execution of the BIC contract to allow for client execution of the contract at the same time the client is required to sign an engagement or account opening agreement. These touch points for client signatures will vary based on the business model. To allow for flexibility but still protect the Retirement Investor, we propose that the Department make clear that if a new client is given advice prior to the execution of the contract, all the protections contained in the BIC Exemption, including the obligation to provide advice that is in the best interest of the client, apply retroactively to the advice.

The Coalition proposes the following examples for touch points where a new client's signature may be obtained in a manner that reduces the administrative burden on Financial Institutions and Advisers:

For CFP® professionals providing financial planning services and receiving variable compensation, the client's signature can be obtained when the client signs the financial planning services agreement.[59] The financial planning services agreement specifies: the parties to the financial planning services agreement; the date of the financial planning services agreement and its duration; how and on what terms each party can terminate the financial planning services agreement; and the services to be provided as part of the financial planning services agreement. The Adviser can include the required BIC exemption provisions in this agreement.

For broker-dealers and broker-dealer registered representatives, the client's signature can be obtained when the client opens his or her brokerage account. When the client opens a brokerage account, he or she must sign an account opening agreement. The account opening agreement will generally require the client to make decisions including: who will make the final decisions about what the client buys and sells in the account; how the client will pay for investments; and how much risk is the client comfortable taking. When opening a new account, the Financial Institution will also likely ask the client to sign a legally binding contract to arbitrate any future dispute between the client and the Financial Institution or Adviser. The Financial Institution can include the required BIC exemption provisions in this account opening agreement.

For insurance agents, the client's signature can be obtained when the client submits his or her annuity or life insurance (collectively "insurance") contract application. When the client applies for insurance, he or she must sign an insurance contract. The insurance contract generally includes: the specific details of the contract, such as the structure of the insurance product being sold; payment provisions (how the investment will operate and when the periodic payments will be made); and any penalties for early withdrawal (in the case of an annuity). The Financial Institution can include the required BIC exemption provisions in the insurance contract.

Third, the Coalition recommends that the Department consider tailoring its contract execution requirements to accommodate certain types of business models. For example, the Coalition believes that it may be impractical to require call center Advisers to put in place an executed contract prior to providing assistance to plan participants or prospective clients, which can include potential advice (e.g. regarding rollovers). Contract execution requirements customized for call center business models could include (1) a requirement that only the Financial Institution needs to execute a contract with a new client; (2) that any call center Adviser who provides Covered Advice to the Retirement Investor is covered by that contract; and (3) that the contract retroactively includes any Covered Advice that may have been provided by the call center Adviser prior to the execution of the contract.

5. Fee Structures that Meet the BIC Exemption Warranty

Under the BIC Exemption, the Adviser wanting to meet the BIC Exemption must, among other things, warrant that it has adopted written policies and procedures that are reasonably designed to mitigate the impact of material conflicts of interest. The Coalition strongly supports the

---

[59] *See* CFP Board *Standards of Professional Conduct*, Rules of Conduct 1.3 and 2.2(E), *available at* http://www.cfp.net/for-cfp-professionals/professional-standards-enforcement/standards-of-professional-conduct/rules-of-conduct

Department's proposed principles-based approach that provides Advisers with the flexibility to design policies and procedures that are specifically tailored to their business models. The principles articulated by the Department (e.g. "best interest," duties of "prudence" and "loyalty," and "reasonable compensation") are all concepts that are well established in ERISA jurisprudence.

Opponents of the Re-Proposed Rule have charged that as a practical matter, level fee structures are required to satisfy the warranty despite the Department's assurances in the Preamble to the Re-Proposed Rule that level fee structures are not required. For example, the Department specifically allows for variable compensation based upon neutral factors, such as the difference in time and analysis necessary to provide prudent advice with respect to different types of investments. For example, a Financial Institution could compensate an Adviser at different levels for advice related to the purchase of an annuity product versus a mutual fund based on the different level of complexity of the products, time to research the products and time to explain the products to the client.

The Department mandates that Financial Institutions "contractually warrant that [they have] adopted written policies and procedures that are reasonably designed to mitigate the impact of material conflicts of interest that exist with respect to the provision of investment advice to Retirement Investors." The Coalition believes that this offers Financial Institutions latitude to adopt policies and procedures designed to mitigate conflicts that can work within various business models and offers the examples below as policies that would not necessarily require a level fee structure:

- Prohibit the use of quotas, appraisals, performance or personnel actions, bonuses, contests, special awards or other actions or incentives to the extent they would tend to encourage individual Advisers to make recommendations that are not in the best interest of Retirement Investors.
- Utilize an asset allocation model designed by an independent third party consultant for use by Advisers.
- For product categories that are similar, develop a range of compensation amounts that the Financial Institution deems to be "reasonable compensation" based on acceptable ranges within the industry for the product category. Products can be clustered for determining the range of reasonable compensation by type, level of complexity, level of research/explanation required, risk factors, etc.
- Refrain from providing higher compensation, or providing other rewards, for the sale of proprietary products or products from providers with which the firm has entered into revenue-sharing agreements.
- Restrict differential compensation to the Financial Institution level, with strict "Chinese wall" separation between firm-level and Adviser-level compensation such that there is no opportunity for an Adviser's recommendations to be influenced by differential compensation flowing to the Financial Institution.

- Avoid compensation thresholds where an Adviser can increase his or her compensation disproportionately after reaching a certain threshold of sales. In the context of compensation grids, paying an Adviser a higher percentage of gross revenue may legitimately reward hard work and encourage higher productivity. A conflict is created, however, if an Adviser's desire to move to a higher payout level influences the number or type of recommendations he makes to customers.

- Link supervision and surveillance of Advisers' recommendations to thresholds in a firm's compensation grid structure. This can enable firms to detect recommendations, or potential churning activities that may be motivated by a desire to move up in the grid structure and, thereby, receive a higher payout percentage.

- Develop a surveillance program to identify spikes in Advisers' sales of a particular product, so that if a significant increase is discovered, an analysis can be conducted regarding recommendations of that product.

- Decline to offer products where Advisers and Financial Institutions cannot effectively mitigate conflicts arising from product.

- Use red flag processes and clawbacks to penalize employees for not properly managing conflicts of interest:

    - Red Flags: Develop metrics for bad behavior (red flags), assess employee performance against those metrics, and base compensation decisions on that performance.

    - Clawbacks: Include a contractual clause that allows a firm to revoke some or all of an employee's deferred compensation, in some cases including vested compensation.

6. Disclosure Obligations to the Retirement Investor

Under the BIC Exemption, the Financial Institution and Adviser must provide a series of disclosures including specific contractual, point of sale, annual, and website disclosures. The Coalition fully supports the contractual and annual disclosure requirements. These are reasonable and appropriate requirements that provide the Retirement Investor important protections and needed transparency related to the costs paid by the Retirement Investor and compensation received by the Financial Institution and Adviser.

However, the Coalition is concerned that components of the point of sale and website disclosures are overly burdensome and that the benefits of some of these disclosure requirements to the Retirement Investor may not justify the cost. The Coalition urges the Department to identify the disclosure requirements that can be removed from the BIC Exemption while still providing the Retirement Investor with information that is vitally needed about costs and services. As such, the Coalition suggests the following amendments to the proposed rule.

Point of Sale Disclosure: The Coalition fully supports the requirement that the "total cost" of investing in an asset be disclosed to the Retirement Investor at the point of sale. It is particularly important for the Retirement Investor to fully understand all the costs, direct and indirect, particularly those that will reduce the amounts received by the Retirement Investor.[60] However, the Coalition is concerned that requiring the "total cost" for the 1-, 5-, and 10- year periods, using reasonable assumptions about investment performance, raises a number of issues. While projected costs may be available in the mutual fund context,[61] it may be much more difficult with respect to other investment products. We believe that projections concerning investment performance would not be useful to Retirement Investors if they were based on many caveats or grossly understate performance. For these reasons, FINRA rules prohibit the projection of future investment performance, including that investment performance illustrations must not imply that gain or income realized in the past will be repeated in the future.[62]

Given the difficulties involved in projecting investment performance, the Coalition suggests that the Department limit this disclosure requirement to information that is known or reasonably known at the time of the transaction. If the Financial Institution obtains updated information, it will have an obligation under the annual disclosure requirements to disseminate such information to the Retirement Investor. Moreover, we recommend that the point of sale disclosures should rely on information available from objective third-party providers of independent investment research rather than on proprietary information developed by the Financial Institution that has the potential for conflicts of interest.

Website Disclosure: The Coalition is concerned that the website disclosures required in the Re-Proposed Rule may be overly broad and not needed for full disclosure of costs to the Retirement Investor. The rule would require website disclosure of all direct and indirect compensation that the Adviser may obtain on every Asset as well as disclosure in machine-readable format of all direct and indirect material compensation payable to the Adviser, Financial Institution and any Affiliate.

The Coalition recommends that the Department modify these requirements to remove the disclosure requirements for Adviser-level compensation. Publication of this type of information is not needed by Retirement Investors, who are already being provided with their Advisers' compensation. At the same time it could be used by competitors in ways that are damaging to Financial Institutions and Advisers. Instead, the type of information that should be disclosed on the publicly available website should be the type that would allow investors the opportunity to engage in comparison shopping across Financial Institutions by identifying the range of products

---

[60] Other important disclosures include: name of product/recommendation; purpose of product/recommendation; stated charges of the product if readily available; advantages and disadvantages of product/recommendation based on the client's goals and objectives; surrender charges that may exist and for how long; and the liquidity of product/recommendation.

[61] Mutual fund prospectuses provide 1-, 5-, and 10- year costs, but are based upon a static return. For example, the Vanguard 500 Index Fund summary prospectus provides a cost projection based upon a 5% return each year. *See* Vanguard, Vanguard 500 Index Fund Summary Prospectus, Apr. 28, 2015, *available at* https://personal.vanguard.com/pub/Pdf/sp40.pdf?2210099878.

[62] FINRA Rule 2210(d)(1)(F), *available at* http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=10648.

offered and by disclosing the range of compensation within the assets and the asset classes offered.

7. Reliance on Home Office for Disclosure

Among other things, the written contract required by the BIC Exemption must include various warranties from the Adviser. The Adviser must warrant that it will comply with all federal and state laws. It must also warrant that the Financial Institution has adopted compliance policies reasonably designed to mitigate conflicts of interest and that it has eliminated any incentives that would encourage Advisers to make recommendations that are inconsistent with the best interest fiduciary standard. Importantly, a huge amount of financial and investment performance information must be disclosed along with maintenance of a website. Compliance would be extremely difficult for an individual Adviser, even one associated with a large advisory or consultative practice.

The Coalition suggests that the Department consider amending these extensively detailed requirements to allow individual Advisers to reasonably rely on documentation prepared by their broker-dealer, platform or custodian without penalty if the details of the contract or investment disclosures are made in good faith but contain minor deficiencies. The Adviser would still be held to the standards outlined in the warranties, as would the home office.

8. Department's Public Notice of BIC Exemption

Under the BIC Exemption, a one-time notice must be filed with the Department before an Adviser or Financial Institution may receive any variable compensation based on the proposed relief. The filing does not need to identify the Financial Institution or Adviser's plan clients or IRA clients, and does not need to be approved by the Department. While there is no substantive approval process or waiting period once the notice is filed, the Coalition is concerned that the process does not entail any acknowledgement by the Department that the filing has been made, or any public transparency regarding which entities are relying on the BIC Exemption. Accordingly, the Department should establish a publicly accessible registry where filings can be electronically verified and viewed. This would allow Advisers to electronically verify and review their submission as received by the Department and would also have the added benefit of providing transparency to the public that may utilize their services.

9. Recordkeeping Obligations

Under the Re-Proposed Rule, Financial Institutions must maintain, and upon request, disclose to the Department, information related to inflows, outflows, holdings, and returns for six years from the date of a transaction subject to the BIC Exemption. Under the Re-Proposed Rule, the Department may publish this data to the public.

The Coalition supports the six-year retention requirement; this is consistent with current retention obligations under FINRA and SEC rules.[63] However, the Coalition has concerns about this information being made available to the public. The Coalition believes that the Department should

[63] *See* 17 CFR § 240.17a-3, 17 CFR § 240.17a-4, and 17 CFR § 275.204-2 (2015).

retain this information for enforcement purposes, but should not publish it due to potential disclosure of privileged information and trade secrets. We are also concerned that publishing performance data on all Advisers will be harmful to the industry and not benefit Retirement Investors. Instead, the Coalition recommends that this data be protected under the Freedom of Information Act (FOIA) guidelines. If a Retirement Investor needs this information as part of an arbitration or lawsuit, he or she will be able to receive it through normal discovery mechanisms.

10. Definition of Related Entities

The BIC Exemption addresses compensation received by Affiliates or Related Entities, with the latter defined as entities other than Affiliates in which an Adviser or Financial Institution has an interest that may affect the exercise of their best judgment as fiduciaries. The Coalition believes this definition is vague and subject to an overly broad interpretation. For example, the Coalition recognizes that many Advisers have other providers with whom they prefer to work for entirely proper reasons, including trusting their judgment and expertise. Under the Re-Proposed Rule, it could be argued that such a relationship could trigger the "Related Entity" definition.

The Coalition requests that the Department amend the Re-Proposed Rule by providing a clearer definition of Related Entity that might draw upon the specificity of the party in interest definition under ERISA. The Department should provide in the final rule examples of the kind of compensation received by a Related Entity that would violate the exemption, but the examples should not be broader than what would be allowed under the prohibited transaction rules found in ERISA § 406.[64]

ii. Proposed Low Fee Exemption

The Department has asked for comment on whether the final rule should include a new "low fee exemption" that would allow firms to accept "conflicted" payments when recommending the lowest-fee products in a given product class. The Coalition does not support the creation of a low fee exemption.

While cost is a significant factor in a prudent process to select an investment, it is not the only factor and may not be the most important. The Coalition believes that the lowest cost product may not always be in the best interest of the Retirement Investor and that this exemption may provide an incentive for Advisers to recommend a lower-fee product even though a higher-fee product may be in the client's best interest. Instead, the Coalition believes that when the Re-Proposed Rule becomes effective, the protections inherent in the best interest requirement will naturally favor lower cost products when they are in the Retirement Investor's best interest. In sum, such a model should be left to the competition of the marketplace operating under a best interest standard.

---

[64] *See* 29 U.S.C § 1106 (2012).

d. <u>Coalition Supports the Department's Expanded Enforcement Policies With Proposed Safeguards for the Consumer</u>

The Coalition commends the Department for recognizing, as part of the BIC and Principal Transaction Exemptions, the right of Retirement Investors to hold fiduciary Advisers accountable for providing advice in their best interest through a private right of action for breach of contract.

We believe this provision is an appropriate and necessary enforcement mechanism that gives teeth to the PTEs. This option is especially important for advice regarding IRA investments. Under current law, neither the Department nor the Retirement Investor who is harmed can hold the Adviser accountable under ERISA for the losses the IRA Retirement Investor suffered. The threat of private action will provide a strong incentive for Advisers and Financial Institutions to meet their fiduciary obligations under the Re-Proposed Rule and have practices and procedures in place to mitigate conflicted advice.

Given the significant barriers to the use of class actions to enforce the BIC Exemption, as noted above, the Coalition proposes the following modifications aimed at balancing the interests of Financial Intuitions and Retirement Investors by ensuring that class actions are a practical, available, and truly enforceable option for Retirement Investors.

First, we are concerned with the ability and limited resources of arbitrators and state court judges to enforce the protections that have developed in the last forty years of ERISA jurisprudence. Thus, the Coalition believes the Re-Proposed Rule should be amended to require that the BIC Exemption contract include pre-drafted language approved by the Department that spells out very clearly the Best Interest Standard. This will be as close a substitute as possible to what the BIC Exemption cannot do, which is to mandate the use of federal law.

Second, the rule should be amended to disallow venue selection clauses in BIC Exemption contracts. These types of clauses can be very detrimental to Retirement Investors looking to enforce their rights. A Retirement Investor should have the right to sue in any venue allowed under the formal court procedural rules to enforce his or her rights.

Finally, the Department should acknowledge in the Re-Proposed Rule that in certain circumstances, ERISA may preempt any state law contract claims available to a Retirement Investor under the BIC Exemption. The governing law for a claim can significantly affect a party's rights in litigation. For example, parties have six years to file a lawsuit under ERISA if they don't have actual knowledge of a claim, while under state law they might have ten years to bring a breach of contract claim. The Coalition further recommends that the Department require that the BIC Exemption contract disclose the potential for an ERISA preemption in specific language provided by the Department consistent with our earlier recommendations.

e. The Coalition Believes that the Department's Regulatory Impact Analysis Has Met the Requirements Imposed by Law

The Administrative Procedure Act (APA)[65] and Executive Orders 12866[66] and 13563[67] require federal agencies to provide the public and the Office of Management and Budget ("OMB") with a careful and transparent analysis of the anticipated consequences of economically significant regulatory actions, a "Regulatory Impact Analysis."

According to the Office of Information and Regulatory Affairs ("OIRA"), the OMB office that plays a key role in coordinating the review of Federal regulations, "the purpose of the Regulatory Impact Analysis is to inform agency decisions in advance of regulatory actions and to ensure that regulatory choices are made after appropriate consideration of the likely consequences."[68] That is, to (1) establish whether Federal regulation is necessary and justified to achieve a social goal and (2) design any such regulation in the most efficient, least burdensome, and most cost-effective manner.

A comprehensive Regulatory Impact Analysis will generally include three basic elements: (1) a statement of the need for the regulatory action; (2) a clear identification of a range of regulatory approaches; and, (3) an estimate of the costs and benefits of the proposed regulatory action and its alternatives, and should be based on the best available scientific, technical, and economic information.

The Coalition believes that the Department's Regulatory Impact Analysis has met the requirements of the APA and Executive Orders.

The Department provided a statement of the need for the regulatory action. The Department contends that the current rule, which substantially narrowed the broad statutory language conferring fiduciary status on all persons rendering investment advice for a fee to a plan or an IRA, has been overtaken by subsequent and dramatic changes in the design, operation, and marketing of employer-sponsored retirement plans with a resulting increase in the need for expert financial advice. Additionally, the Department states that "IRAs' important role in retirement security, which warrants special protections against conflicts in advice, underscores the need for the new proposal to ensure the broad application of these protections" and that these consumer protections should go beyond those applicable to other retail investment accounts.

The Department has provided a clear identification of a range of regulatory approaches. The Regulatory Impact Analysis discusses the regulatory alternatives that the Department considered before settling on the Re-Proposed Rule. These alternatives include: (1) excluding IRAs in whole or part from the rule; (2) not issuing the PTEs; (3) adopting the statutory definition of fiduciary

[65] Administrative Procedure Act, 5 U.S.C. §§ 551-559 (2012).

[66] Executive Order 12866, "Regulatory Planning and Review," 58 FR 51735, Oct. 4, 1993.

[67] Executive Order 13563, "Improving Regulations and Regulatory Review," 76 FR 3821, Jan. 21, 2011.

[68] OIRA, "Regulatory Impact Analysis: A Primer," *available at* https://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/circular-a-4_regulatory-impact-analysis-a-primer.pdf.

advice; (4) relying heavily on disclosure as an adequate consumer protection; (5) deferring this rulemaking until the SEC takes related actions; (6) treating certain ESOP valuations as fiduciary advice; (7) conditioning the PTEs on disclosure alone; (8) issuing a streamlined, "low-fee" PTE; (9) issuing a prescriptive PTE in lieu of the proposed "best interest contract" exemption; (10) prohibiting mandatory binding arbitration; (11) adjusting the date by which affected advisers must comply; and, (12) delaying the Re-Proposed Rule's compliance date.[69]

The Department has provided an estimate of the costs and benefits of the proposed regulatory action and its alternatives. As noted above, the Department estimates that the compliance cost associated with the proposal will total between $2.4 billion and $5.7 billion over 10 years.[70] If the Department adopts some of the Coalition's proposed revisions to its rules, including the contracting, disclosure and recordkeeping requirements associated with exercising the BIC Exemption, these estimated compliance costs could be reduced. Additionally, the Regulatory Impact Analysis "quantifies" gains of between $40 billion and $44 billion over 10 years and between $88 billion and $100 billion over 20 years. Under the Regulatory Impact Analysis, the benefits to Retirement Investors significantly outweigh the projected costs to the financial services industry.[71]

V. Conclusion

The Coalition commends the Department for taking steps to enhance protections for Retirement Investors. We believe that there is no justification for applying different standards of care to Advisers who are offering the same services to Retirement Investors and that a strengthened fiduciary rule is necessary and appropriate for Advisers and Financial Institutions under ERISA.

The current regulatory framework allows Advisers' and Financial Institutions' interests to be misaligned with Retirement Investors' interests. Specifically, the current fiduciary definition under ERISA includes significant loopholes that allow for the sale of products that may not be in the best interest of the Retirement Investor. Importantly, while many Advisers seek to do what is best for their customers, others take advantage of regulatory gaps to steer their clients into high-cost, substandard investments that pay the Adviser well but eat away at Retirement Investors' nest eggs over time. The Coalition believes that requiring an Adviser to work in the Retirement Investor's best interest is an essential and long overdue reform. We urge the Department to move forward expeditiously with a final rule that incorporates proposed adjustments designed to make it more workable for Advisers and Financial Institutions without sacrificing provisions designed to protect Retirement Investors.

[69] U.S. Dep't of Labor, *Fiduciary Investment Advice: Regulatory Impact Analysis*, Apr. 14, 2015, *available at* http://www.dol.gov/ebsa/pdf/conflictsofinterestria.pdf.

[70] *Id.*

[71] *Id.*

The Coalition appreciates the opportunity to comment on the Department's re-proposed changes to the definition of the term "fiduciary." We would be happy to meet with the Department to discuss these important issues further. If you have any questions regarding this comment letter or the Coalition, please contact Marilyn Mohrman-Gillis, Managing Director, Public Policy and Communications, CFP Board, at (202) 379-2235 or MMohrman-Gillis@CFPBoard.org.

Sincerely,

Kevin R. Keller, CAE Chief Executive Officer CFP Board	Lauren Schadle, CAE Executive Director/CEO FPA®	Geoffrey Brown, CAE Chief Executive Officer NAPFA

FINANCIAL
PLANNING
COALITION

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attention: Conflicts of Interest Rule
Room N-5655

Office of Exemption Determinations
Employee Benefits Security Administration
Attention: D-11712 and D-11713

United States Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

RE: Proposed Conflict of Interest Rule and Related Proposals, RIN-1210-AB32

Ladies and Gentlemen:

The Financial Planning Coalition (Coalition),[1] which is comprised of the Certified Financial Planner Board of Standards (CFP Board), Financial Planning Association® (FPA®) and National Association of Personal Financial Advisors (NAPFA), submits the following comments to supplement those filed on July 21, 2015,[2] and our testimony presented on August 10, 2015[3] on the re-proposal by the Department of Labor, Employee Benefits Security Administration (the Department) to expand the definition of the term "fiduciary" under the Employee Retirement Income Security Act (ERISA) (hereinafter "Re-Proposed Rule").[4] CFP Board is a non-profit certification and standard-setting organization, which sets competency and ethical standards for over 72,000 CERTIFIED FINANCIAL PLANNER™ professionals throughout the country.[5] FPA® is the

---

[1] The Coalition is a collaboration of the leading national organizations representing the development and advancement of the financial planning profession. Together, the Coalition seeks to educate policymakers about the financial planning profession, to advocate for policy measures that ensure financial planning services are delivered with fiduciary accountability, and to enable the public to identify trustworthy financial planners.

[2] Letter from Kevin R. Keller, Chief Executive Officer, CFP Board, Lauren Schadle, Executive Director / Chief Executive Officer, FPA®, and Geoffrey Brown, Chief Executive Officer, NAPFA, to Office of Regulations and Interpretations, Employee Benefit Security Administration, U.S. Department of Labor (Jul. 21, 2015), *available at* http://www.dol.gov/ebsa/pdf/1210-AB32-2-00702.pdf [hereinafter "Original Comment Letter"].

[3] Written Testimony of Marilyn Mohrman-Gillis, Esq. and V. Raymond Ferrara, CFP®, on behalf of the Coalition, before the Employee Benefit Security Administration, U.S. Department of Labor (Aug. 10, 2015), *available at* http://www.dol.gov/ebsa/pdf/1210-AB32-2-WrittenTestimony5.pdf.

[4] Definition of the Term "Fiduciary," 80 Fed. Reg. 21,928 (Apr. 20, 2015) (to be codified at 29 C.F.R. pt. 2510).

[5] CFP Board's mission is to benefit the public by granting the CFP® certification and upholding it as the recognized standard of excellence for the delivery of competent and ethical personal financial planning services. CFP® professionals voluntarily agree to comply with CFP Board's rigorous standards including education, examination, experience and ethics and subject themselves to disciplinary oversight of CFP Board.

largest membership organization for CFP® professionals and those who support the financial planning process in the U.S. with over 24,500 members nationwide.[6] NAPFA is the nation's leading organization of fee-only comprehensive financial planning professionals with more than 2,500 members.[7]

The additional comments focus on how the multiple industry alternative "best interest" proposals fall short of a true fiduciary standard.

Several industry commentators have provided the Department with alternative "best interest" standard proposals.[8] Unfortunately, these proposals put forward by three industry organizations and a financial services firm will not result in a true fiduciary standard under ERISA. The alternative proposals all lack specificity regarding how to implement the standard and would undo many of the consumer protective provisions of the Re-Proposed Rule.

First, while each of the alternative proposals includes a "best interest" standard based upon the duty of prudence, they omit a key and essential component of the "best interest" standard. Under the Re-Proposed Rule, the Best Interest Contract Exemption provides:

"Best interest is defined to mean that the Adviser and Financial Institution act with 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 the needs of the Retirement Investor, when providing investment advice to them. Further, under the best interest standard, the Adviser and Financial Institution must act *without regard to the financial or other interests of the Adviser, Financial Institution or their Affiliates or any other party.* Under this standard, the Adviser and Financial Institution must put the interests of the Retirement Investor ahead of the financial interests of the Adviser, Financial Institution or their Affiliates, Related Entities or any other party."[9]

---

[6] With a national network of over 90 chapters, FPA®'s 24,500 members represent tens of thousands of financial planners, educators and allied professionals involved in all facets of providing financial planning services. FPA® works in alliance with academic leaders, legislative and regulatory bodies, financial services firms and consumer interest organizations to represent its members.

[7] NAPFA members adhere to some of the highest standards in the profession and annually each advisor must sign and renew a Fiduciary Oath and subscribe to the Association's Code of Ethics. NAPFA-affiliated advisors are committed to the organization's core values of competency, commitment to holistic financial planning, compensation under a model that facilitates objective advice, client-centered standard of care, complete disclosure of potential conflicts of interest and explanation of fees.

[8] Letter from David Bellaire, Esq., General Counsel, Financial Services Institute, to Office of Regulations and Interpretations, Employee Benefit Security Administration, U.S. Department of Labor (Jul. 21, 2015), *available at* http://www.dol.gov/ebsa/pdf/1210-AB32-2-00724.pdf (FSI Proposal); Letter from Richard Foster, Senior Vice President, Financial Services Roundtable, to Office of Regulations and Interpretations, Employee Benefit Security Administration, U.S. Department of Labor (Jul. 21, 2015), *available at* http://www.dol.gov/ebsa/pdf/1210-AB32-2-00665.pdf (FSR Proposal); Letter from Ralph Derbyshire, Senior Vice President, Fidelity Investments, to Office of Regulations and Interpretations, Employee Benefit Security Administration, U.S. Department of Labor (Jul. 21, 2015), *available at* http://www.dol.gov/ebsa/pdf/1210-AB32-2-00658.pdf (Fidelity Proposal); Securities Industry and Financial Markets Association, "Proposed Best Interests of the Customer Standard for Broker-Dealers," Jun. 3, 2015, *available at* http://www.sifma.org/issues/item.aspx?id=8589954937 (SIFMA Proposal).

[9] 80 Fed. Reg. at 21,970 (emphasis added).

None of the alternative proposals include the requirement that the advice be provided "without regard to the financial or other interests of the Adviser, Financial Institution, any Affiliate, Related Entity, or other party."[10] Without this central component of a fiduciary obligation, there is no requirement to take into account the effect of an Adviser's[11] variable compensation or conflicts of interest on the investment advice. Under the alternative proposals, Advisers can still recommend products that, due to higher commissions for the Adviser, are less favorable to the client than available alternatives.

Significantly, Congress recognized the requirement that the advice be provided "without regard to the financial or other interests of the Adviser" as a fundamental component of the fiduciary standard in Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act). The Dodd-Frank Act requires Advisers, when providing personalized investment advice about securities to retail customers, to "act in the best interest of the customer without regard to the financial or other interest of the broker, dealer, or investment adviser providing the advice."[12] By excluding this fundamental component of the "best interest" standard, the alternative proposals are in direct opposition to a true fiduciary standard as defined under both ERISA and securities laws.

Second, there is no requirement for a written contract under any of the alternative proposals. The alternative proposals all rely on a written statement that the firm and Adviser will work in the "best interest" of the client. This would leave the IRA owner without meaningful legal recourse to enforce a "best interest" obligation against a firm or an Adviser. Under current law, there is no private right of action under ERISA for IRA owners. Without a requirement for a binding contract, there would be no mechanism for IRA owners to enforce an Adviser's statement that he or she provides "best interest" advice.[13] The alternative proposals would allow firms and Advisers to avoid fiduciary

[10] 80 Fed Reg. at 21,970.

[11] Consistent with the Department's naming convention, by using the term "Adviser" the Coalition does not intend to limit its use to investment advisers registered under the Investment Advisers Act of 1940 or under state law. As used herein, an Adviser can be an individual or entity who can be, among other things, a representative of a registered investment adviser, a bank or similar financial institution, an insurance representative and company, or a registered representative of a broker-dealer and broker-dealer.

[12] 15 U.S.C. § 80b-11(g)(1) (2012). Contrary to opponents' arguments that they will be unable to receive any compensation under this language, ERISA has long recognized that a fiduciary does not necessarily breach her duty by taking an action that incidentally benefits the fiduciary herself, as long as the fiduciary conducted a careful and impartial investigation, and reasonably concluded that the action was in the beneficiaries' best interest. *See e.g.*, Donovan v. Bierwirth, 680 F.2d 263, 271 (2d Cir. 1982) ("Although officers of a corporation who are trustees of its pension plan do not violate their duties as trustees by taking action which, after careful and impartial investigation, they reasonably conclude best to promote the interests of participants and beneficiaries simply because it incidentally benefits the corporation or, indeed, themselves, their decisions must be made with an eye single to the interests of the participants and beneficiaries.").

[13] Under the alternative proposals, clients would have no enforceable obligation and would be left with the difficult task of relying on the equitable doctrine of promissory estoppel. For retirement investors to bring a claim based upon promissory estoppel, the investor must show that a promise or representation is made; the client's reliance on this promise is detrimental and reasonable; and the firm or Adviser reasonably should have expected the detrimental reliance. *See e.g.*, Ascom Hasler Mailing Systems, Inc. v. U.S. Postal Service, 885 F. Supp. 2d 156 (D.D.C. 2012) (Promissory estoppel is an equitable doctrine and may be invoked only when injustice otherwise would not be avoidable).

liability, thereby undermining the intent of the Department to provide for an enforceable fiduciary obligation for investment advice provided to IRA owners.

Third, the alternative proposals rely primarily on disclosure to meet their proposed "best interest" standards. For example, under the FSI Proposal, Advisers are allowed to obtain the consent of prospective clients for conflicts at account opening and can meet the "best interest" standard by simply disclosing conflicts to their clients[14] and under the Fidelity Proposal, there is no requirement to mitigate conflicts of interest.[15] This type of disclosure-based standard fails to meet the fundamental requirements of a "best interest" standard under both ERISA and securities laws. To meet a true "best interest" standard, an Adviser must not only disclose conflicts, but must have in place policies and procedures that are reasonably designed to mitigate the impact of conflicts on the Adviser's recommendations. Notwithstanding any disclosures the Adviser may make, the Adviser must still provide advice with the care, skill, prudence, and diligence that a prudent person would exercise and do so without regard to the Adviser's financial interests. A disclosure-based regime, which does not mitigate compensation practices and incentives that give rise to conflicts of interest among Advisers, does not meet the basic requirements of a true fiduciary standard.

In addition, specific proposals contain additional problematic provisions that are inconsistent with a "best interest" standard. For example, under the SIFMA Proposal, the recommendation of only proprietary products "shall not" be considered a violation of the best interest standard.[16] This proposal is fundamentally at odds with a true "best interest" standard under ERISA. It is also inconsistent with Congress' guidance to the SEC in section 913(g) of the Dodd-Frank Act, which authorized the SEC to establish a fiduciary standard for brokers and dealers. Congress provided that "[t]he sale of only proprietary or other limited range of products by a broker or dealer shall not, *in and of itself*, be considered a violation of the [fiduciary standard as established by the SEC]."[17] A recommendation from a limited menu of products must still meet the fundamental requirement that it be in the best interest of the client.

In addition, under the SIFMA Proposal, Advisers are not required to recommend the least expensive alternative.[18] While the Coalition agrees that the cost of a product is just one factor of many to be considered and that the lowest cost product may not always be in the best interest of the client, cost is an important factor in a recommendation. We believe that this blanket absolution from an obligation to recommend the least expensive alternative may be abused. For example, under this proposal, an Adviser would be free to recommend a mutual fund with a six percent commission, even though the Adviser has access to a similarly performing mutual fund with a four percent commission. Under the proposal, as long as the Adviser discloses that he is recommending the higher-cost fund, the recommendation would be deemed to be in the client's best interest.

---

[14] FSI Proposal, *supra* note 8.

[15] Fidelity Proposal, *supra* note 8.

[16] SIFMA Proposal, *supra* note 8.

[17] 15 U.S.C. § 78o(k)(2) (2012) (emphasis added).

[18] SIFMA Proposal, *supra* note 8.

Fidelity's proposed alternative fails to meet a number of fundamental requirements of the "best interest" standard under ERISA. In addition to proposing a disclosure-only regime with no requirements to mitigate conflicts, it specifically allows for the Adviser to disclaim or otherwise limit his fiduciary liability and allows for compensation levels that may exceed reasonable compensation for products and services, because the Adviser would only be required to look at the specific products he offers.

Under the Fidelity Proposal, firms and Advisers would be permitted to establish the scope and terms of the relationship through a pre-engagement contract negotiated outside the fiduciary standard.[19] Under this proposal, Advisers could simply state, as part of the contract, that the advice is biased. This proposal would permit a continuation of current Fidelity procedures, in which the firm informs prospective clients that "[a]lthough consultations are one-on-one, guidance provided by Fidelity is educational in nature, is not individualized and is not intended to serve as the primary or sole basis for your investment or tax-planning decisions."[20]

Taken as a whole, the combination of provisions in the Fidelity Proposal would permit an Adviser to recommend any of its proprietary mutual funds or annuities, regardless of conflicts, the cost of the products or whether the recommended products are in the best interest of the client, as long as the Adviser discloses that he can only sell Fidelity products. Under the proposal, each of the recommended proprietary mutual funds or annuities would automatically meet the reasonable compensation prong even if the cost of the products exceeded pricing of similar products available in the marketplace.

Under the FSR Proposal, Advisers are allowed to receive any compensation that is currently allowed under applicable SEC or FINRA regulations.[21] Compensation practices that are permitted under SEC or FINRA[22] regulations do not necessarily meet the reasonable compensation requirement under ERISA.[23] As noted by Professor Mercer Bullard, under current securities laws, "broker-dealers have developed a wide variety of compensation structures that incentivize financial advisers to make recommendations that pay them the highest compensation" and that "[d]ifferences in compensation often bear no relationship to the services provided."[24] It is precisely

[19] Fidelity Proposal, *supra* note 8.

[20] Fidelity Investments, "Saving for Retirement," https://communications.fidelity.com/tem/2013/saveforretirement/.

[21] FSR Proposal, *supra* note 8.

[22] FINRA Rule 2121 requires Advisers to "buy or sell [a product] at a price that is fair;" however, when the Adviser recommends proprietary products, "in the absence of other bona fide evidence of the prevailing market, a member's own contemporaneous cost is the best indication of the prevailing market price of a security." So in practice, any product that has no marketplace comparable may be deemed to be sold at a "fair" price. FINRA Rule 2121, "Fair Prices and Commissions, "http://finra.complinet.com/en/display/display.html?rbid=2403&element_id=11539.

[23] Proposed Best Interest Contract Exemption, 80 Fed. Reg. 21,928, 21,976 (Apr. 20, 2015) (to be codified at 29 C.F.R. pt. 2510) ("Any compensation received in connection with a purchase, sale or holding of the Asset by a Plan, participant or beneficiary account, or an IRA, is reasonable in relation to the value of the specific services provided to the Retirement Investor in exchange for the payments and not in excess of the services' fair market value."); 29 C.F.R. § 2550.408c-2 (2014) ("Generally, whether compensation is 'reasonable' under [ERISA] depends on the particular facts and circumstances of each case.").

[24] Written Testimony of Mercer Bullard, MDLA Distinguished Lecturer and Professor of Law, University of Mississippi School of Law, before the Subcommittees on Capital Markets and Government Sponsored Enterprises, and Oversight and Investigations, Committee on Financial Services, United States House of Representatives (Sept. 10,

these compensation structures, which are permitted under SEC or FINRA regulations that the Department is attempting to rectify in its Re-Proposed Rule.

In addition, under the FSR Proposal, existing accounts would be exempt from the proposed "best interest" standard, regardless of whether the Adviser provides a recommendation to acquire, hold or dispose of assets in that account.[25] This provision is written broadly enough that it would render the strengthened fiduciary standard under the Re-Proposed Rule inapplicable to any current client. Under this proposal, firms and Advisers would be permitted to provide current clients a lower standard of care and less protection than new clients – a result that would undermine the Department's goal of requiring fiduciary-level advice for all retirement assets under ERISA.

In sum, all of the alternative proposals fall short of a true "best interest" standard. They do not meet the basic requirements of a fiduciary standard under either ERISA or the BIC Exemption and they significantly fall short of the Department's policy goals to more closely align the incentives of firms and Advisers with the interests of our nation's Retirement Investors.

* * * *

The Coalition appreciates the opportunity to file supplemental comments on the Department's re-proposed changes to the definition of the term "fiduciary." If you have any questions regarding this comment letter or the Coalition, please contact Marilyn Mohrman-Gillis, Managing Director, Public Policy and Communications, CFP Board, at (202) 379-2235 or MMohrman-Gillis@CFPBoard.org.

Sincerely,

Kevin R. Keller
Kevin R. Keller, CAE
Chief Executive Officer
CFP Board

Lauren Schadle
Lauren Schadle, CAE
Executive Director/CEO
FPA®

Geoff Brown
Geoffrey Brown, CAE
Chief Executive Officer
NAPFA

2015), *available at* http://financialservices.house.gov/uploadedfiles/hhrg-114-ba16-ba09-wstate-mbullard-20150910.pdf.

[25] FSR Proposal, *supra* note 8.

FINANCIAL PLANNING COALITION

Testimony of Marilyn Mohrman-Gillis, Esq.
Before The Employee Benefits Security Administration,
U.S. Department Of Labor
Hearing on the Definition of Fiduciary Investment Advice
Monday, August 10, 2015

Assistant Secretary Borzi and members of the panel, thank you for the opportunity to testify at this important hearing. My name is Marilyn Mohrman-Gillis. I am Managing Director for Public Policy and Communications for the Certified Financial Planner Board of Standards. I am testifying today on behalf of the Financial Planning Coalition, which is comprised of CFP Board, the Financial Planning Association® and the National Association of Personal Financial Advisors.

The Coalition formed in 2009 around a set of principles that includes support for the fiduciary standard in the delivery of financial advice. We believe that a strengthened fiduciary rule under ERISA is essential for America's Retirement Investors, and we strongly support adoption of the Department's re-proposed rule.

We believe that the Coalition brings a unique perspective to the table. Our stakeholders and members have committed, by virtue of their Certified Financial Planner™ certification or their FPA or NAPFA membership codes of conduct, to provide financial planning services under a fiduciary standard. They provide fiduciary-level services across business models – as investment advisers, broker-dealers and insurance producers – and across compensation models – including commission and fee-based models.

When CFP Board adopted a fiduciary standard of conduct for CFP® professionals in 2007, many firms and industry organizations made arguments similar to those being made about the Department's re-proposed rule today. They asserted that CFP Board's fiduciary requirement was unworkable with their business models and that CFP® professionals would be forced to rescind their certification if required to operate under a fiduciary standard.

Contrary to those predictions, the number of CFP® professionals has grown by more than 30 percent to over 72,000 since CFP Board established a fiduciary standard. And many firms, to their credit, are recognizing the value of competent and ethical advice and are supporting CFP® certification for their Advisers.

Based on our own experience working with firms on compliance with CFP Board's rules, we believe the re-proposed rule can work for Advisers. That doesn't mean it's perfect and, in our comment letter, the Coalition offered the Department concrete suggestions to make the re-proposed rule more workable across business models.

Many argue that the rule will eliminate the broker-dealer business model and force Advisers into only fee-based models that will be more expensive for consumers. This is not consistent with the rule itself or with our experience in implementing a fiduciary standard. The Best Interest Contract Exemption is a principles-based, business-model neutral exemption that allows Advisers to continue to receive commissions and still comply with the fiduciary standard under ERISA.

To those who say that the BIC requirements are unworkable, we point to CFP Board's *Standards of Professional Conduct,* which contain requirements that are similar to those under BIC Exemption. Under CFP Board's *Standards,* CFP® professionals, when providing financial planning, are required to:

- Act in the best interest of the client;
- Exercise reasonable and prudent judgment;
- Execute a written contract with the client;
- Identify and mitigate conflicts of interest; and
- Provide written disclosures including the full costs of products and services and compensation paid to the CFP® professional and the employer.

In short, CFP® professionals today are operating under these BIC-like requirements with commission-based – not just fee-based business models.

Our experience also belies the notion that Advisers, who are required to obligate themselves to act in the best interest of the client, will be unable to serve middle-class clients. Today, there are thousands of CFP® professionals and FPA and NAPFA members across the country who provide fiduciary-level services to everyday Americans either under commission-based business models or for fees with no or very low minimum asset requirements. If our experience is any indication, firms and Advisers are more likely to adjust their policies and practices than to abandon middle-class clients.

Retirement Investors face a perfect storm in today's financial services marketplace. With ever-increasing responsibility for their own retirements and the need to choose from an increasingly complex set of financial products and services, Retirement Investors more than ever need competent financial advice that is in their best interest. Yet the current regulatory framework allows Advisers' interests to be misaligned with the interests of Retirement Investors resulting in the loss of billions of dollars in retirement savings.

The need for a strengthened fiduciary rule under ERISA is long overdue. The Coalition urges the Department to move as expeditiously as possible to make needed adjustments to the re-proposed rule and promulgate a final rule to protect Retirement Investors from further harm.

FINANCIAL PLANNING COALITION

Testimony of V. Raymond Ferrara, CFP®
Before The Employee Benefits Security Administration,
U.S. Department Of Labor
Hearing on the Definition of Fiduciary Investment Advice
Monday, August 10, 2015

Assistant Secretary Borzi and members of the panel, thank you for the opportunity to testify. My name is Ray Ferrara and I am Chairman and CEO of ProVise Management Group LLC, based in Clearwater, Florida. I am a Certified Financial Planner™ Professional and a member of the Financial Planning Association®. Previously, I served on the Financial Planning Association® Board of Directors and served on the CFP Board, Board of Directors from 2009-2014 and was Chair in 2014. I am a practitioner and small business owner and I testify today on behalf of the Financial Planning Coalition.

This testimony today will focus on my experience providing advice to retirement plans under ERISA as well as my experience in providing financial advice under a fiduciary standard of conduct across different business models. Even though a majority of Advisers try to do the right thing, the Department's re-proposed rule is needed to protect retirement investors.

Many in the industry say the re-proposed rule is unworkable, too costly and will force Advisers to abandon middle-class clients. Based on our firm's actual experience, we don't share these views; we believe that, with some refinements and clarifications, the rule is workable.

Provise is a financial planning firm that provides advisory, brokerage and insurance services under compensation models that include flat fee, assets under management and/or commissions. The firm's minimum requirement for assets under management to serve clients on a fee basis is $25,000. For clients with less than $25,000, we provide commission-based services.

Since 1988, ProVise has been a registered investment adviser with the Securities and Exchange Commission. Most of our financial planners are registered representatives of a broker-dealer – which is a member of the Financial Industry Regulatory Authority – and are licensed to sell insurance products. Ten out of twelve of our financial planners hold the CFP® certification. Although not legally required to act as a fiduciary when providing brokerage or insurance products such as mutual funds and annuities for commission-based compensation, we strive to do so because it is the right thing to do for our clients.

Many prospective individual clients come to us as they are considering rolling their assets out of an ERISA retirement plan. Unfortunately, some come to us after receiving advice that is not in their best interest. As an example, a state employee was advised to move 100% of the assets in her retirement plan into a single product, which carried a large and long surrender charge.

Fortunately, in this case, she was referred to us for a second opinion before the money was moved out of the plan. We were able to structure a retirement option, which met the prospective client's goals and objectives, but had no surrender charge and much lower costs on an on-going basis.

ProVise also advises 18 small business owners on their 401(k) plans who collectively have nearly $100 million and 1,850 participants with an average account balance of $51,400. Whether providing advice on a commission- or fee-basis, we do so in the best interest of the client. Under a DOL re-proposed rule, we expect to continue to serve these individual and small business clients.

We believe that, with some needed adjustments and refinements, the BIC exemption will allow us to continue to serve our commission-based clients. Many of the BIC requirements are similar to the *Standards of Professional Conduct* that I have voluntarily agreed to comply with as a CFP® professional. ProVise enters into a written agreement with our clients outlining the scope of service; we disclose likely conflicts of interest; we disclose accurate and understandable information related to our compensation; and we make a commitment to provide financial planning services under a fiduciary standard of conduct.

For over 25 years, we have profitably absorbed the small additional costs of serving as fiduciaries and have not experienced undue compliance issues. Under the re-proposed rule, we will most likely need to incur minor costs to develop a best interest contract and make sure our policies and procedures and disclosures comply with the rule. For those who have not practiced under a fiduciary standard in the past, their costs may be higher, but the consumer benefits far outweigh these costs.

Finally, the argument that this rule will diminish the availability of services to middle-class Americans is simply not credible. ProVise has successfully served middle-class clients under a fiduciary standard for years. The re-proposed rule still allows us, and everyone else to, provide advice using a commission or fee model. For anyone claiming that they are unable to serve middle-class clients under the re-proposed rule, ProVise and scores of CFP® professionals and FPA and NAPFA members across the country would be happy to help fill the gap.

In closing, we fully support the Department's efforts to strengthen consumer protection under ERISA and look forward to working with the Department as it refines the re-proposed rule.

FINANCIAL PLANNING COALITION

September 29, 2015

Re: OPPOSE H.R. 1090, the "Retail Investor Protection Act"

To Members of the House of Representatives Financial Services Committee:

The Financial Planning Coalition, which is comprised of the Certified Financial Planner Board of Standards, the Financial Planning Association® and the National Association of Personal Financial Advisors, supports the Department of Labor's (DOL) efforts to strengthen protections for working families and retirees by requiring the financial advisers they turn to for retirement investment advice to act in their best interests. While there are modifications and clarifications that are needed to make it more operational for advisers, the DOL's proposed rule is long overdue.

The "Retail Investor Protection Act" inappropriately links the DOL and the Securities and Exchange Commission (SEC) rulemakings by prohibiting the DOL from adopting a rule to protect America's retirement investors until two months after the SEC issues a final rule on whether brokers, when providing personalized investment advice, should be held to the same fiduciary standard as investment advisers. H.R. 1090 would also establish requirements for SEC rulemaking under Section 913 of Dodd-Frank Act that far exceed the regulatory impact analysis required under current law for proposed regulations, thereby setting requirements at a level designed to thwart an SEC rulemaking in opposition to Congress' intent under Section 913.

The SEC is not required to issue a final rule, has yet to propose a rule (almost five years since Congress authorized it to issue a rule), and may never do so. In contrast, the DOL, after years of study and an extensive economic analysis, has released a comprehensive proposed rule to close loopholes in its 40 year-old rule and extend long overdue fiduciary advice to plans, plan beneficiaries, and IRA holders under the Employee Retirement Income Security Act (ERISA).

The DOL is the expert agency, charged with implementing Congress' original intent under ERISA to provide fiduciary-level advice for tax-preferred retirement assets. That fiduciary principle – wisely recognized by Congress in 1974 – is even more important in today's retirement marketplace where retirement investors are largely responsible for their own retirement savings.

The need for a strengthened fiduciary rule under ERISA is long overdue. We urge Congress to refrain from congressional intervention – through H.R. 1090 or any other vehicle – and let the DOL do its job and promulgate a final rule to protect retirement investors.

Sincerely,

Kevin R. Keller

Kevin R. Keller, CAE
Chief Executive Officer
CFP Board

Lauren Schadle

Lauren Schadle, CAE
Executive Director/CEO
FPA®

Geoff Brown

Geoffrey Brown, CAE
Chief Executive Officer
NAPFA

FINANCIAL PLANNING COALITION

October 26, 2015

Re: OPPOSE H.R. 1090, the "Retail Investor Protection Act"

To Members of the House of Representatives:

The Financial Planning Coalition, which is comprised of the Certified Financial Planner Board of Standards (CFP Board), the Financial Planning Association® (FPA) and the National Association of Personal Financial Advisors (NAPFA), **supports the Department of Labor's (DOL) efforts to update its 40 year old rule to ensure that investors receive fiduciary advice on their tax-preferred retirement savings.** While there are modifications and clarifications that are needed to make it more operational, the DOL has indicated its intent to streamline the final rule.

H.R. 1090, the "Retail Investor Protection Act" sponsored by Rep. Wagner will not, as the name suggests, protect investors. Rather it would prohibit the DOL from fully realizing Congress' intent under ERISA to provide fiduciary advice to retirement savings until two months after the Securities and Exchange Commission (SEC) issues a rule under securities laws to extend the fiduciary standard to broker-dealers. This would in effect kill the DOL rule because the SEC is not required to issue a fiduciary rule for broker-dealers, it has yet to propose a rule (over five years since Congress authorized it to issue a rule), and it may never do so. In contrast, after years of study, the DOL produced a revised proposed rule accompanied by a comprehensive economic analysis, and provided an extensive notice and comment rulemaking process. It is now in the final stages of making long overdue and needed investor protection reforms for retirement savers.

A recent vote in the House Financial Services Committee (only one Democrat voted in support of H.R. 1090 in contrast to thirteen Democrats who supported the same bill in 2013) reflects a growing understanding by Democrats that the re-proposed rule will benefit – not harm – consumers, particularly small savers. In addition, almost 100 House Democrats signed a letter calling for sensible changes to the rule, while signaling support for allowing the DOL to proceed to a final rule. The engagement of Congress and stakeholders to improve the rule has been effective. Secretary Perez has stated publicly that the DOL will be making changes to clarify and streamline the re-proposed rule and address legitimate operational concerns.

The need for fiduciary-level advice for tax-preferred retirement assets – wisely recognized by Congress in 1974 – is even more important in today's retirement marketplace where retirement investors are largely responsible for their own retirement savings. **We urge Congress to refrain from Congressional intervention through H.R. 1090 or any other legislation that would delay, derail or interfere with this important and long overdue rule** to protect our Nation's retirement savers.

Sincerely,

Marilyn Mohrman-Gillis
Managing Director, Public Policy and Communications
CFP Board

Karen Nystrom
Director of Advocacy
FPA®

Geoffrey Brown, CAE
Chief Executive Officer
NAPFA

FINANCIAL PLANNING COALITION

October 29, 2015

Re: DO NOT SIGN – Dear Colleague Letter Urging DOL to Provide Additional Comment Period for Fiduciary Rule

To Members of the House of Representatives:

It has come to our attention that a Dear Colleague is being circulated asking Members to sign a letter to Department of Labor (DOL) Secretary Perez urging DOL to provide an additional short comment period before promulgating the final ERISA fiduciary rule. **We are writing to urge you not to sign this letter.**

The request for an additional comment period is unnecessary given the extraordinarily lengthy comment and hearing process that has already occurred, which included 120 days of open public comment and four days of public hearings with 25 panels and 75 witnesses. The highly interactive rulemaking process has worked precisely as intended. Based on public statements made by Secretary Perez and other DOL officials, the DOL is carefully considering the constructive input that it has received and has committed to make changes to streamline the rule and make it more operational.

While we understand that the intent behind the letter is not to delay the publication of a final rule, we are concerned that the practical result of a third proposed rule would be to invite another cycle of attacks from those who wish to defeat, not improve the rule. It would also impose additional obligations on the part of the DOL to review and address yet another round comments before reaching a final rule.

The approach proposed by the letter is not consistent with the requirements of the Administrative Procedure Act, and is not consistent with good governance principles. Courts disfavor requiring additional comment periods in a fashion that could result in an agency "find[ing] itself stuck in an infinite feedback loop of public comments." *See, e.g., Alaska v. Lubchenco*, 825 F. Supp. 2d 209, 224 (D.D.C. 2011). Further, courts have held that an Agency "need not renotice changes that follow logically from or that reasonably develop the rules it proposed originally. Otherwise, the comment period is a perpetual exercise rather than a genuine interchange resulting in improved rules." *Connecticut Light & Power Co. v. Nuclear Regulatory Com.*, 673 F.2d 525, 533 (D.C. Cir. 1982).

The DOL should be allowed, without further pressure from Congress, to balance the need for any additional comment with the strong and urgent need to update its 40 year old rule to ensure that fiduciary-level advice is provided for tax-preferred retirement savings. For all these reasons, we urge you NOT to sign the letter to Secretary Perez.

Thank you for your consideration of our views.

Sincerely,

Marilyn Mohrman-Gillis
Managing Director, Public Policy
and Communications
CFP Board

Karen Nystrom
Director of Advocacy
FPA®

Geoffrey Brown, CAE
Chief Executive Officer
NAPFA

FINANCIAL PLANNING COALITION

November 16, 2015

Re: REJECT – Rider on Funding Bill or Any Legislation to Delay Final DOL Fiduciary Rule

To Members of the House of Representatives:

The Financial Planning Coalition strongly supports the Department of Labor's (DOL) re-proposed rule that will require financial professionals to provide investment advice related to retirement income that is in the best interests of their clients. After a lengthy administrative process, the DOL is poised to issue a final rule to update a 40-year old rule to implement Congress' intent under ERISA that advice related to tax-preferred retirement savings be provided at a fiduciary level. **We urge you to reject any legislative proposal related to the DOL rulemaking – whether standalone legislation or appropriations "riders" on the omnibus funding bill – including any legislation based on a "declaration of principles" that are currently circulating in Congress. Congressional action is unnecessary and would derail, not advance, a final rule to require retirement advisors to serve their clients' best interests.**

The DOL has engaged in a comprehensive, deliberative, fully open and transparent administrative rulemaking process. Over a lengthy five year period, the DOL has issued a re-proposed rule after incorporating an initial round of comments and extensive study, provided two additional comment periods for its latest re-proposed rule, conducted four days of public hearings consisting of 25 panels with 75 witnesses, conducted hundreds of meetings with interested parties, consulted with and received technical guidance from the Securities and Exchange Commission, testified before Congress and held many group and individual meetings with Members of Congress of both parties.

This extensive and robust rulemaking process is working precisely as intended. The DOL has publicly indicated that it plans to make changes to address issues raised by us and by other stakeholders. For example, the DOL publicly stated that it intends to simplify the mechanics and timing of the best interest contract and that it will review expanding the types of assets that would be allowed in retirement accounts and extending the transition time for firms to comply with the new rule. Any legislative effort directing the outcome of this open, transparent, and fully participatory administrative process – before the DOL has an opportunity to consider and incorporate public input into a final rule – is unnecessary and premature.

Congressional intervention in the middle of an administrative rulemaking, particularly through a funding bill (the only practical vehicle for this legislation), is not consistent with the principles of good governance or the principles of separation of powers provided under the U.S. Constitution. If Congress disagrees with a federal administrative agency's interpretation or implementation of a statute, the Administrative Procedure Act provides a process for Congressional review of a final agency rule before the rule becomes effective and is implemented.

Members of the House of Representatives
November 16, 2015
Page 2

Legislation based on the "declaration of principles" as proposed would weaken, not strengthen the fiduciary standard under ERISA. These principles refer only to disclosure of conflicts of interest; but are completely silent on a fundamental component of the fiduciary standard – an obligation to mitigate compensation practices and incentives that give rise to conflicts of interest. A final DOL fiduciary rule is the correct solution to ensure that advisors are truly required to serve their clients' best interests. **We urge you to reject this or any other legislative proposal – whether stand alone or in the funding bill – that will serve to delay or defeat the promulgation of a final DOL fiduciary rule.**

Sincerely,

Marilyn Mohrman-Gillis
Managing Director, Public Policy and Communications
CFP Board

Karen Nystrom
Director of Advocacy
FPA®

Geoffrey Brown, CAE
Chief Executive Officer
NAPFA

FINANCIAL
PLANNING
COALITION

November 16, 2015

Re: REJECT – Rider on Funding Bill or Any Legislation to Delay Final DOL Fiduciary Rule

Dear Senator:

The Financial Planning Coalition strongly supports the Department of Labor's (DOL) re-proposed rule that will require financial professionals to provide investment advice related to retirement income that is in the best interests of their clients. After a lengthy administrative process, the DOL is poised to issue a final rule to update a 40-year old rule to implement Congress' intent under ERISA that advice related to tax-preferred retirement savings be provided at a fiduciary level. **We urge you to reject any legislative proposal related to the DOL rulemaking – whether standalone legislation or appropriations "riders" on the omnibus funding bill – including any legislation based on a "declaration of principles" that are currently circulating in Congress. Congressional action is unnecessary and would derail, not advance, a final rule to require retirement advisors to serve their clients' best interests.**

The DOL has engaged in a comprehensive, deliberative, fully open and transparent administrative rulemaking process. Over a lengthy five year period, the DOL has issued a re-proposed rule after incorporating an initial round of comments and extensive study, provided two additional comment periods for its latest re-proposed rule, conducted four days of public hearings consisting of 25 panels with 75 witnesses, conducted hundreds of meetings with interested parties, consulted with and received technical guidance from the Securities and Exchange Commission, testified before Congress and held many group and individual meetings with Members of Congress of both parties.

This extensive and robust rulemaking process is working precisely as intended. The DOL has publicly indicated that it plans to make changes to address issues raised by us and by other stakeholders. For example, the DOL publicly stated that it intends to simplify the mechanics and timing of the best interest contract and that it will review expanding the types of assets that would be allowed in retirement accounts and extending the transition time for firms to comply with the new rule. Any legislative effort directing the outcome of this open, transparent, and fully participatory administrative process – before the DOL has an opportunity to consider and incorporate public input into a final rule – is unnecessary and premature.

Congressional intervention in the middle of an administrative rulemaking, particularly through a funding bill (the only practical vehicle for this legislation), is not consistent with the principles of good governance or the principles of separation of powers provided under the U.S. Constitution. If Congress disagrees with a federal administrative agency's interpretation or implementation of a statute, the Administrative Procedure Act provides a process for Congressional review of a final agency rule before the rule becomes effective and is implemented.

United States Senate
November 16, 2015
Page 2

Legislation based on the "declaration of principles" as proposed would weaken, not strengthen the fiduciary standard under ERISA. These principles refer only to disclosure of conflicts of interest; but are completely silent on a fundamental component of the fiduciary standard – an obligation to mitigate compensation practices and incentives that give rise to conflicts of interest. A final DOL fiduciary rule is the correct solution to ensure that advisors are truly required to serve their clients' best interests. **We urge you to reject this or any other legislative proposal – whether stand alone or in the funding bill – that will serve to delay or defeat the promulgation of a final DOL fiduciary rule.**

Sincerely,

Marilyn Mohrman-Gillis
Marilyn Mohrman-Gillis
Managing Director, Public Policy and Communications
CFP Board

Karen L Nystrom
Karen Nystrom
Director of Advocacy
FPA®

Geoff Brown
Geoffrey Brown, CAE
Chief Executive Officer
NAPFA

Chairman ROE. With that, the meeting is adjourned.

[Additional submissions by Dr. Roe follows:]

EDUCATION & THE WORKFORCE
COMMITTEE

FOR IMMEDIATE RELEASE
November 5, 2015

CONTACT: Press Office
(202) 226-9440

Bipartisan House Members Outline Legislative Principles to Ensure Retirement Advisors Protect Clients' Best Interests

WASHINGTON, D.C. –Republican and Democratic lawmakers today outlined a series of legislative principles that will help strengthen the retirement security of working families and ensure retirement advisors protect their clients' best interests. The congressional effort is taking place as bipartisan concerns grow over a regulatory proposal by the Department of Labor that many individuals fear will make it harder for low- and middle-income families to plan for retirement. Recognizing the need to strengthen protections for those seeking investment advice, Representatives Phil Roe (R-TN), Richard Neal (D-MA), Peter Roskam (R-IL), and Michelle Lujan Grisham (D-NM) are working together to introduce a bipartisan legislative solution that reflects the following principles:

- Promoting families and individuals saving for a financially-secure retirement is an essential public policy good.
- Retirement advisors must serve in their clients' best interests and must be required to do so.
- Retirement advisors must deliver clear, simple, and relevant disclosure of material conflicts, including compensation received and all investment fees to individuals saving for retirement.
- Public policies must protect access to investment advice and education for low- and middle-income workers and retirees.
- Public policies should never deny individuals the financial information they need to make informed decisions.
- Investor choice and consumer access to all investment services – such as proprietary products, commission-based sales, and guaranteed lifetime income – should be preserved in a way that does not pick winners and losers.
- Small business owners should have access to the financial advice and products they need to establish and maintain retirement plans and help workers save for retirement.

The members working on this bipartisan effort released the following joint statement:

> *We are concerned that the Department of Labor's current fiduciary proposal may have unintended negative consequences that could harm individuals and families saving for retirement. We acknowledge the Department of Labor's pledge to change aspects of the regulation before final issuance, but feel more must be done to adequately address concerns about the rule's impact on the ability of low- and middle-class families to save for retirement.*
>
> *The Department of Labor has said it will change certain aspects of the regulation before final issuance. However, if the final rule has flaws, damage can be done upon the rule's release due to the immediate changes the retirement savings industry would have to make and the likelihood that those changes could limit access to services and education for those saving for retirement. To protect the retirement savings of all Americans, we intend to introduce a bipartisan legislative solution.*
>
> *Our legislative proposal will ensure that all Americans have access to the financial advice they need to prepare for retirement, protect individuals from conflicted advice, and require advisors serve the best interests of retirement savers. We look forward to the work that lies ahead and urge all our colleagues to join this important effort.*

# # #

ACLI
Financial Security...for Life.

Statement for the Record
U.S. House Committee on Education and Workforce
Health, Education, Labor and Pensions Subcommittee Hearing
"Principles for Ensuring Retirement Advice Serves the Best Interests of Working Families and Retirees"
December 2, 2015

The American Council of Life Insurers (ACLI) is pleased to submit this statement for the record for today's hearing titled "Principles for Ensuring Retirement Advice Serves the Best Interests of Working Families and Retirees." We thank Subcommittee Chairman Phil Roe and Ranking Member Jared Polis for holding this important hearing and for their leadership on this issue. ACLI strongly supports the bipartisan principles outlined and encourages Members of Congress to sponsor upcoming legislation based on those principles.

ACLI thanks members of this Subcommittee, as well as members of the full Committee, that have signed onto letters or otherwise engaged the Department of Labor (DOL) regarding stakeholders' concerns about the complexities of the proposed rule. Specifically, we thank Chairman John Kline, Representatives Joe Wilson, Virginia Foxx, Duncan Hunter, Glenn Thompson, Tim Walberg, Matt Salmon, Brett Guthrie, Todd Rokita, Lou Barletta, Joe Heck, Luke Messer, Bradley Byrne, Dave Brat, Buddy Carter, Mike Bishop, Glenn Grothman, Steve Russell, Carlos Curbelo, Elise Stefanik, Rick Allen, Joe Courtney, Marcia Fudge, Frederica Wilson, Mark Pocan, Mark Takano, Hakeem Jeffries, Katherine Clark, and Alma Adams.

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.

On behalf of the U.S. life insurance industry, we share the Administration'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 will not assist savers and retirees with securing guaranteed lifetime income throughout retirement. On November 5, Chairman Roe joined with Representatives Neal, Roskam, Lujan Grisham, Carter, and Larson to outline legislative principles to ensure retirement advisors protect clients' interests. ACLI supports these bipartisan principles and looks forward to working Members of Congress in pursuit of a legislative alternative that would lay the foundation for a practical rule.

American Council of Life Insurers
101 Constitution Avenue, NW, Washington, DC 20001-2133
www.acli.com

The DOL withdrew its first proposal in September 2011 to allow additional time for stakeholder input. Nearly 200 bipartisan Members of the House and Senate 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 20,2015, 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. In fact, the proposal has no economic analysis of the impact on annuities even though the rule mentions annuities 172 times. The new proposal severely narrows the scope of existing PTEs that have supported worker access to retirement savings programs and valuable educational assistance. It also relies on a new proposed PTE that, absent significant changes, is not workable.

ACLI expressed concerns about the proposal in a comment letter submitted to DOL on July 21, 2015. ACLI reiterated these concerns when it participated in the public hearings held by DOL in August . On September 24, ACLI submitted a supplemental letter, which responds to a number of questions our representatives received during the public hearing.

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 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.

The proposal would likely result in fewer commission-based services in the marketplace, leaving only fee-based and managed account services. Many low- and moderate-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 of, or, more likely, limit the availability of transactional commission-based services.

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.

American Council of Life Insurers
101 Constitution Avenue, NW, Washington, DC 20001-2133
www.acli.com

The industry wants to 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 and follow Congress' lead as it moves forward on a legislative alternative. Afterwards, DOL can 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 middle-income Americans without the education and the advice they want and need. Consistent with the principles outlined by Chairman Roe, we urge the Administration to support the following principles and Congress to include in legislation:

- 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 clarifying that marketing and sales activities do not constitute advice.

- 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 partner with the Administration and Congress as we all work toward a common goal – providing financial security and peace of mind to American families.

American Council of Life Insurers
101 Constitution Avenue, NW, Washington, DC 20001-2133
www.acli.com

InvestmentNews
The Leading Information Source for Financial Advisers

DOL's fiduciary exemption is not a workable option for advisers

InvestmentNews Reprints

This copy is for your personal, non-commercial use only. To order presentation-ready copies for distribution to your colleagues, clients or customers, click the link below.

- Order a reprint article

Too complex and cumbersome, provision would exclude investments such as alternatives

By Dale Brown | *December 1, 2015 - 10:41 am EST*

Despite months of media attention and frequent discussion within our industry, many financial advisers are only beginning to grasp the implications of the Labor Department's effort to expand its definition of fiduciary under ERISA. The rule, as written, will deny millions of small and mid-sized investors access to quality, affordable retirement advice.

Much has been written about the DOL proposal's Best Interest Contract Exemption, or "BICE," which in theory presents a path for advisers to recommend a limited slate of investment options to IRA investors outside of a fee-based compensation structure. In practice, the BICE is too complex and burdensome to provide a workable option for advisers who seek to continue serving clients on a commission basis, but the only current alternative —

banning all product sales based on commissions, revenue sharing or other forms of compensation altogether — would be much worse.

(More: The three biggest fiduciary stories of 2015)

Unfortunately, the DOL's current proposal includes only basic investment vehicles such as Treasuries, CDs and exchange-traded funds on the list of assets eligible for the BICE. A wide range of other products, including alternative investments and income-generating assets that have become key elements of many retirement investors' financial plans, were left off the list — effectively outlawing these products from retirement accounts.

NO CLEAR RATIONALE

With no clear rationale as to why these products were excluded from the BICE, it appears the DOL has determined that the excluded investments would never, under any circumstances, be in the best interest of any retirement investor. This conclusion overlooks the role many of these investment vehicles play in allowing clients to diversify their holdings and reduce overall portfolio risk.

It also unnecessarily ties financial advisers' hands. These professionals, who work with clients every day to help them pursue their financial dreams, are in the best position to understand their unique retirement savings needs and recommend the best investments in the context of those needs. As currently written, the BICE would limit a financial adviser's ability to make recommendations that reflect their clients' goals, risks and unique circumstances.

Clearly, the DOL's proposed rule poses real and significant problems for advisers and their Main Street clients. And we're not the only ones who think so.

Earlier this month, a bipartisan group of representatives in Congress proposed a succinct list of core principles to act as a guide for future legislative efforts around establishing a fiduciary standard for retirement advice. The group, consisting of Reps. Peter Roskam (R-Ill.), Richard Neal (D-Mass.), Phil Roe (R-Tenn.), and Michelle Lujan Grisham (D-N.M.), plans to introduce legislation based on these principles, including these powerful, common-sense observations:

• Investor choice and consumer access to all investment services such as commission-based sales and guaranteed lifetime income should be preserved in a way that does not pick winners and losers.

• Public policy must protect access to investment advice and education for low- and middle-income workers and retirees.

• Public policy should never deny individuals the financial information they need to make informed decisions.

These simple statements reflect an understanding of one key facet of financial planning that every adviser knows: decisions on investment products are best made after careful consideration and discussion between investors and the qualified, professional financial advisers who understand their goals.

UNIFORM FIDUCIARY STANDARD NEEDED

To be successful, we need a uniform fiduciary standard — something FSI has been calling for since before Dodd-Frank — to achieve the goal of investor protection while preserving clients' ability to receive qualified advice that can help them pursue their financial objectives.

The Labor Department and the administration appear set on implementing the DOL's expanded fiduciary standard in some form, despite significant misgivings on the part of our industry and many members of Congress. A bill sponsored by

Rep. Ann Wagner, R-Mo., which would have halted the DOL's rulemaking on this issue until the Securities and Exchange Commission proposed its own uniform fiduciary standard, passed the House of Representatives last month, but President Obama has promised to veto it.

Despite these headwinds, our industry can still influence the shape of the final rule through continued dialogue with the DOL. There also may be opportunities to mitigate the rule's potential damage through future legislative solutions.

Dale Brown is president and chief executive of the Financial Services Institute Inc.

Reproductions and distribution of the above news story are strictly prohibited. To order reprints and/or request permission to use the article in full or partial format please contact our Reprint Sales Manager at (732) 723-0569.

Financial Services Roundtable

Statement for the Record

House Education and Workforce Subcommittee on Health, Employment, Labor, and Pensions hearing "Principles for Ensuring Retirement Advice Serves the Best Interests of Working Families and Retirees."

December 2, 2015

The Financial Services Roundtable[1] ("FSR") welcomes the opportunity to share our thoughts with the House Education and Workforce Subcommittee on Health, Employment, Labor, and Pensions regarding the United States Department of Labor's (the "Department") proposed "Conflicts of Interest" rule (the "Proposal").

Consistent with FSR's long-held support for harmonizing the regulatory régime applicable to securities broker-dealers and investment advisers when providing personalized investment advice to consumers,[2] FSR supports a "best interest" standard that would be applicable to investment products and services provided to clients, administered in a coordinated manner by federal agencies and self-regulatory organizations that serve as front-line regulators of the financial services industry.

While FSR and its members support a best-interest standard, the Proposal raises significant public policy and practical implementation concerns. These concerns include the likely adverse impact on individual choice regarding how to pay for retirement products and services and decreased access to financial services for low and moderate-income clients.

FSR also is concerned the Proposal would eliminate conversations with departing employees, employees nearing retirement, and retirees. The Proposal restricts the ability of financial professionals to give specific investment recommendations to former employees and employees nearing retirement related to their benefits in an employer-sponsored retirement plan (usually a 401(k) plan or other thrift savings plan account). These employees would not receive meaningful guidance from financial professionals as a result. If financial professionals cannot provide meaningful guidance, then where are the former employees and employees nearing retirement supposed to get this information? Former employees and employees nearing retirement would be at risk of

---

[1] The FINANCIAL SERVICES ROUNDTABLE represents the largest integrated financial services companies providing banking, insurance, payment and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. FSR member companies provide fuel for America's economic engine, accounting for $92.7 trillion in managed assets, $1.2 trillion in revenue and 2.3 million jobs. Learn more at FSRoundtable.org.

[2] *See* FINANCIAL SERVICES ROUNDTABLE, *Study Regarding Obligations of Brokers, Dealers, and Investment Advisers pursuant to section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010* [File No. 4-606] (Aug. 30, 2010), *available at* http://www.sec.gov/comments/4-606/4606-2659.pdf (supporting "harmonization of the regulations for broker-dealers and investment advisers when providing personalized investment advice to retail customers); *see also*, FINANCIAL SERVICES ROUNDTABLE, *Duties of Brokers, Dealers, and Investment Advisers*, Securities Act Release No. 69013 [File No. 4-606] (July 5, 2013), *available at* http://www.sec.gov/comments/4-606/4606-3125.pdf.

just "cashing-out" assets in employer-sponsored retirement plans.[3] Such lump sum distributions are subject to current income taxation and possibly substantial tax penalties. If they did not "cash-out," employees nearing retirement might not fully understand the availability of products and services to help them best manage their retirement plan assets to last their lifetime. Most at risk in this regard are younger workers and members of minority communities.[4]

Given the need to ensure Americans increase savings,[5] and the demonstrable benefits Americans derive from working with financial professionals,[6] these detrimental impacts deeply concern FSR members.

---

[3] *See* OLIVER WYMAN, *The role of financial advisors in the US retirement market* at 2 (July 10, 2015) ("OLIVER WYMAN 2015") (finding that "advised individuals aged 35-54 years making less than $100K per year had 51% more assets than similar non-advised investors"); LIMRA SECURE RETIREMENT INSTITUTE, *Matters of Fact: Consumers, Advisors, and Retirement Decisions (and Results)* at 10 (May 2015) (noting that "[f]inancial professionals/advisors are highly influential in helping individuals to make informed rollover decisions").

[4] *See* BIPARTISAN POLICY CENTER, "A Diversity of Risks: The Challenge of Retirement Preparedness in America" at 31 (Sept. 2014) (noting "cash-outs severely damage the retirement readiness of workers, especially those in the lower parts of the income distribution"); QUANTRIA STRATEGIES, LLC, "Access to Call Centers and Broker Dealers and Their Effects on Retirement Savings," at 13 (Apr. 9, 2014) ("QUANTRIA Study") (finding that "[cash-outs] are more likely to occur among individuals who (1) have a low account balance, (2) are under age 30, or (3) have lower wages. Higher cash-out rates are also an issue for African-Americans and Hispanics"). *See, also* FINRA, "Rollovers to Individual Retirement Accounts: FINRA Reminds Firms of Their Responsibilities Concerning IRA Rollovers" [Regulatory Notice 13-45] at 2 (Dec. 2013) (providing guidance on recommendations and marketing activities for IRA services, which "is intended to help firms ensure that they have policies and procedures in place that are reasonably designed to achieve compliance with FINRA rules"), *available at* http://www.finra.org/sites/default/files/NoticeDocument/p418695.pdf.

[5] *See*, OXFORD ECONOMICS, *Another Penny Saved: The Economic Benefits of Higher US Household Saving* at vi (June 2014), *available at* http://www.oxfordeconomics.com/anotherpennysaved (noting that an increase in the nation's saving rate over the next 25 years "would add a discounted $7 trillion to America's economy, equal to about half of today's GDP;" a result that would "generate greater [U.S.] household wealth, [and] better insulate the [U.S.] economy from international capital shocks).

[6] *See, e.g.*, LIMRA SECURE RETIREMENT INSTITUTE, *Matters of Fact: Consumers, Advisors, and Retirement Decisions (and Results)* at 3 (May 2015) (noting that "Households that use financial advisors are three times as likely as non-advised households to have $250,000 or more in retirement savings ... and are more than twice as likely to have $100,000 or more"); FRANCIS M. KINNIRY JR., COLLEEN M. JACONETTI, MICHAEL A. DIJOSEPH, AND YAN ZILBERING, *Putting a value on your value: Quantifying Vanguard Advisor's Alpha*, The Vanguard Group at 16 (2014), *available at* http://www.vanguard.com/pdf/ISGQVAA.pdf (finding that based on "actual client behavior, . . . investors who deviated from their initial retirement fund investment trailed the target-date fund benchmark by 150 [basis points]. This suggests that the discipline and guidance that an advisor might provide through behavioral coaching could be the largest potential value-add of the tools available to advisors. In addition, Vanguard research and other academic studies have concluded that behavioral coaching can add 1% to 2% in net return.").

The Proposal would also impose substantial burdens on small businesses, and decrease the likelihood small businesses will adopt or continue retirement savings plans.[7] For example, the Department's proposed revisions to the "seller's exemption" would apply only to large plans with at least 100 employees.[8] As a consequence, financial professionals would be unable to provide meaningful assistance to small business owners. Financial professionals provide information and guidance regarding how small businesses can establish a retirement plan and the "menu of investments" available for such a plan. Without adequate guidance to help them navigate the complex process of identifying an appropriate menu of investments from thousands of potential choices, small business owners may "give up" and offer no plan.[9]

FSR proposed for the Department's consideration a simpler framework that would achieve their stated public policy goals in a more straightforward manner.[10] The Simple Investment Management Principles and Expectations (SIMPLE) proposal requires financial professionals to put their customers' interests first and allows professionals and firms to receive reasonable compensation for their services. It requires financial professionals and firms to provide customers with clear and concise disclosures in "plain English", and requires them to adopt reasonably-designed internal controls and compliance procedures tailored to their business and operations. SIMPLE also further empowers regulators to hold financial professionals and firms accountable for any violation of rules.

---

[7] BRADFORD P. CAMPBELL, "Locked Out of Retirement: The Threat to Small Business Retirement Savings" at 4 (2015) (noting that "small business SEP IRA and SIMPLE IRA arrangements that currently depend on these advisors for affordable assistance are likely to disproportionately bear the costs of excessive regulation—their small scale means they are more expensive to serve"), *available at https://www.uschamber.com/sites/default/files/us_chamber_-_locked_out_of_retirement.pdf*; GREENWALD & ASSOCIATES, "The Impact of the Upcoming Re-Proposed Department of Labor Fiduciary Regulation on Small Business Retirement Plan Coverage and Benefits" at 3 (May 14, 2014) (finding that: (a) about 30% of small businesses would likely drop retirement plans for their employees; (b) almost 50% would change their plans to reduce the matching contribution, offer fewer investment options, and increase fees for participants; (c) the rule would deter almost 50% of small businesses that have not established a plan from offering one; and (d) any new plans would likely impose higher fees on participants but not offer matching contributions for almost 40% of small businesses).

[8] *See*, OLIVER WYMAN 2015 *supra* note 6 at 1 (noting that "over 19 million people who work for businesses with fewer than 50 employees do not currently have access to a workplace retirement plan").

[9] *See*, Greenwald & Associates *supra* note 10.

[10] *See*, FINANCIAL SERVICES ROUNDTABLE, Comments on Revised Investment Advice Definition and Related Exemptions (July 21, 2015), available at http://fsroundtable.org/fsr-letter-to-dolcomments-on-revised-definition-of-investment-advice-and-related-exemptions

The Department's proposal is well-intended, but it is too long, extremely complicated and impractical. We expect that it will limit retirement investment services and guidance, limited retirement investment products commonly available today, require customers to review enormous volumes of disclosures on all potential investments, and require customers to sign a contract with a financial professional before even general conversations about retirement goals could take place. FSR believes these impacts could deter retirement savings at a time when more saving for retirement is urgently needed.

While we believe the FSR simpler approach would meet the Department's policy goals without imposing the burdens of the Proposal on Retirement Investors or the financial professionals and institutions that serve them, we maintain that federal regulatory efforts to change the rules governing the sale of retail investment products should begin with the industry's primary regulator, the Securities and Exchange Commission (SEC). Such an approach would help ensure the regulator with the most expertise regarding such issues weighs-in and that involvement will help ensure efforts by the Department and other regulators will be better integrated and coordinated.

We understand that realities dictate the Department is prepared to move ahead of the SEC, which is why we encourage Congress to use its oversight and legislative authority to ensure retirement savers are not unintentionally harmed by the Proposal. We strongly support the legislative principles circulated by Chairman Roe, Rep. Neal, Rep. Roskam, Rep. Lujan Grisham and a group of bipartisan House members. The principles lay the groundwork for a long-term bipartisan solution to this critically important public policy priority. A failure to get this right will have a lasting impact on retirement savers and their access to quality professional advice and retirement planning services.

* * * * *

[Whereupon, at 11:58 a.m., the Subcommittee was adjourned.]