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United States House of Representatives Committee on Education and the Workforce
Subcommittee on Health, Employment, Labor, and Pensions
"Restricting Access to Financial Advice: Evaluating the Costs and Consequences for Working Families"
June 17, 2015

Thank you Chairman Roe, Ranking Member Polis, and Members of the Subcommittee for the opportunity to provide Better Markets' views about the Department of Labor's proposed Fiduciary Duty Rule.

Better Markets is a nonprofit, nonpartisan organization that promotes the public interest in the domestic and global capital and commodity markets. It advocates for transparency, oversight, and accountability in the financial markets. To do this, Better Markets engages in the rulemaking process, public advocacy, independent research, and litigation. For example, it has filed more than 150 comment letters with the financial regulatory agencies and it has submitted amicus briefs in numerous cases involving challenges to financial reform rules. Our website, www.bettermarkets.com, includes information on these and the many other activities of Better Markets.

I am the President and CEO of Better Markets. Prior to starting Better Markets in October 2010, I held three senior staff positions in the Senate: Chief Counsel and Senior Leadership Advisor to the Chairman of the Democratic Policy Committee; Legislative Director to the Secretary of the Democratic Conference; and Deputy Staff Director and General Counsel to what is now known as the HELP Committee. Previously, I was a litigation partner at the law firm of Skadden, Arps, Slate, Meagher & Flom, where I specialized in securities and financial markets in the U.S. and Europe. Prior to obtaining degrees at Brandeis University and Harvard Law School, I enlisted in the U.S. Air Force while in high school and served four years active duty as a crash-rescue firefighter. I grew up in central Massachusetts.

I would like to share the Better Markets perspective on three important issues relating to the DOL's proposed update to its fiduciary duty rule.

First, it is simply inappropriate that any financial adviser in this country is allowed to provide retirement investment advice to a worker or retiree that does not put the best interest of the client first. Yet that is what the current DOL rules have allowed for 40 years. As a result, advice is too often driven by conflicts of interest. Those conflicts are fundamentally unfair, they are not what investors expect or deserve from their advisers, and they are intensifying what already looms as a retirement crisis in this country.

Second, the DOL's proposed rule closes loopholes that are archaic and unjustifiable, especially in light of the massive changes that have occurred in the retirement landscape over the past 40 years. For example, IRA account owners need unbiased advice just as much as 401(k) participants, and there is no reason why the rule shouldn't afford all retirement savers the same protections. The DOL's proposal closes this and other huge gaps in the existing rule, while allowing the brokerage

industry to preserve the business model it has fought so hard to protect, based on commission compensation.

Finally, after years of meeting with and listening to the industry, the DOL's proposed rule makes many accommodation to the industry's core concerns, but the rule still faces significant industry opposition. However, the industry's arguments against the rule are simply not valid. Make no mistake: the rule will not deprive small businesses or investors—including those with modest savings—of valuable investment advice or education. Nor is there any basis for claiming that the SEC should update the fiduciary standard under ERISA. Only the DOL has that authority, and only the DOL can adopt a rule that protects all types of retirement assets, not just securities. Moreover, the SEC has not yet decided whether to embark on a rulemaking under its own statutory authority, a process that will take years in any event.

Every day that passes without a final, updated rule is costing hard-working Americans literally tens of millions of dollars in retirement savings. They should not have to wait any longer for the protections they sorely need to plan for a more secure and dignified retirement.

Conflicts of interest among financial advisers are causing massive harm to American workers and retirees.

Among the most basic and self-evident truths in financial regulation is that all investors deserve honest, conflict-free investment advice – advice that serves their best interest, not that of the broker, adviser, or anyone else. This principle applies above all to retirees, who are often highly focused on and legitimately concerned about their retirement needs; particularly vulnerable to unscrupulous sales tactics and confusing legal terms; and, most importantly, poorly positioned to recover financially if they suffer losses in their retirement accounts.

Yet, every day in this country, financial advisers are allowed to steer their clients into retirement investments that pay lucrative commissions for the adviser but saddle clients with overpriced and underperforming financial products. It is taking a massive toll on American workers and retirees struggling to prepare for an independent and dignified retirement.

The harm is real and widespread.

Consider one example, the story of a gentleman name Ed from Pennsylvania. Ed worked in various management roles following his military service. For years he received investment advice about his retirement assets from a financial adviser at a brokerage firm. Ed thought that his adviser was looking out for his best interest. However, he recently discovered that he was being charged 5 percent in commissions for every investment dollar he set aside for retirement, along with 1.0 percent to 1.5 percent annually for all the funds the broker recommended, and then another 1 percent for his so-called retirement investment advice. He decided to look for better advice, and found an adviser who works under the fiduciary standard, who charges a mere 0.70 percent in total fees. That's a vast improvement over the commissions and fees he was previously paying, and over the years, it will add up to thousands of dollars in retirement savings to would otherwise end up in the broker's pocket.

Ed is just one illustration of the problem, but millions of Americans are experiencing similar treatment at the hands of their advisers, and the collective toll is huge. Just focusing on the IRA market, the White House estimates that between $1.05 and $3.26 trillion in IRA assets are affected by such conflicted advice,[1] and as much as $33 billion is lost to IRA investors each year.[2] The DOL, in its nearly 250-page Regulatory Impact Analysis, predicts that conflicts of interest which cause this type of underperformance will cost IRA investors as much as $430 billion over 10 years if the loopholes are not closed.[3] That's $42 billion a year, every year being lost to hard-working Americans just trying to save for retirement.

The DOL rule is intended to keep that money in retirement accounts not the pockets of brokers putting their interests above their clients. That is why it is imperative for the DOL to act now.

Investors expect better.

This indefensible situation is made worse because investors may not know that these conflicts of interest are allowed to exist or that advisers may make recommendations that don't serve their clients' best interests. One study found that 49 percent of investors believed registered investment advisers were required by law to act in the client's best interest, while 59 percent believed "financial advisors or financial consultants" had the same legal requirement.[4] Sadly, they are all wrong. Only registered investment advisers have the legal duty to act in their clients' best interests while financial advisors or consultants – titles often used by broker-dealer representatives – do not. One recent study found that nearly 80 percent of respondents were concerned when told that IRA advisers are held to a different standard than defined contribution plan advisers.[5] These other advisers not subject to a best interests fiduciary standard, instead following a much weaker suitability standard, which enables advisers to put other interests—such as the promise of lucrative commissions—ahead of their clients.

Conflicts of interest are intensifying the retirement crisis.

This situation is also unacceptable because it is contributing to a retirement crisis that already threatens devastating consequences. As this Subcommittee well knows, the retirement outlook for many Americans is bleak.[6] Every day, 10,000 Baby Boomers turn 65, but many lack sufficient savings for retirement. The Government Accountability Office (GAO) issued a report just last month showing that, of households nearing retirement (age 55 to 64), only 59 percent have **any**

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1 The White House, *The Effects of Conflicted Investment Advice on Retirement Savings* (Feb. 2015), at 19, *available at* https://www.whitehouse.gov/sites/default/files/docs/cea_coi_report_final.pdf.

2 *Id* at 20.

3 The Department of Labor, *Fiduciary Investment Advice: Regulatory Impact Analysis* (Apr. 14, 2015), at 8, *available at* http://www.dol.gov/ebsa/pdf/conflictsofinterestria.pdf.

4 ANGELA HUNG ET AL., INVESTOR AND INDUSTRY PERSPECTIVES ON INVESTMENT ADVISERS AND BROKER-DEALERS 89 (2008).

5 S. Kathi Brown, *Fiduciary Duty and Investment Advice: Attitudes of 401(k) and 403(b) Participants*, AARP (Sept. 2013), at 6-7, *available at* http://www.aarp.org/content/dam/aarp/research/surveys_statistics/general/2013/Fiduciary-Duty-and-Investment-Advice-Attitudes-of-401k-and-403b-Participants-AARP-rsa-gen.pdf.

6 House Committee on the Education and the Workforce, *Time to Modernize Multiemployer Pension System* (Apr. 29, 2015), *available at* http://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=398799

retirement savings.[7] 14 percent have other resources or a defined benefit plan, but a full 27 percent of near retirement households have neither retirement savings nor a pension.

Among those households with savings, GAO reports 20 percent have saved less than $50,000, and another 19 percent have saved less than $200,000. Another study found 44 percent of Late Baby Boomers and Gen-Xers lack adequate retirement income.[8]

It is not only those in or nearing retirement who are facing a crisis; of all Americans, 36 percent report they have nothing saved for retirement.[9] 23 percent of traditional IRAs and 28.6 percent of Roth IRAs have less than $5,000.[10] In 2012, among all workers only 39.4% of workers participated in a workplace retirement plan.[11] It is these workers who are most at risk of relying on Social Security for a significant portion of their retirement income.

The retirement savings crisis, of course, affects the poorest most deeply; between 77 and 87 percent of lowest-income households are at risk for having insufficient retirement savings,[12] and only 15.4 percent of Americans in the lowest two income-quintiles have a 401(k) plan, and 14.75 percent have an IRA.[13] However, between 13 and 17 percent of the highest-income households are at risk of having insufficient savings during retirement as well.[14]

Similarly, the crisis especially impacts minorities. Only 38 percent of all African American and 31 percent of Latino households hold assets in an IRA or 401(k), compared with 64 percent for white households.[15] And, of those few minority households that do, the average black head of household has $20,000 saved for retirement, and the average Latino has just $17,600 (while the average white head of household has $112,000 in retirement savings).[16]

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7 Government Accountability Office, *Retirement Security: Most Households Approaching Retirement Have Low Retirement Savings"* (May 2015), at 9, *available at* http://www.gao.gov/assets/680/670153.pdf.

8 Employee Benefit Research Institute, *Retirement Income Adequacy for Boomers and Gen Xers: Evidence from the 2012 EBRI Retirement Security Projection Model* (May 2015), *available at* http://www.ebri.org/pdf/notespdf/EBRI_Notes_05_May-12.RSPM-ER.Cvg1.pdf.

9 Nanci Hellmich, *A third of people have nothing saved for retirement*, USA TODAY (Aug. 18, 2014), *available at* http://www.cnbc.com/id/101926802#_gus

10 INVESTMENT COMPANY INSTITUTE, THE IRA INVESTOR PROFILE: TRADITIONAL IRA INVESTORS' ACTIVITY, 2007–2012, at 47 (March 2014), available at http://www.ici.org/pdf/rpt_14_ira_traditional.pdf.

11 Miller, M. Reuters, *Column: Why minorities are losing the retirement race* (Dec. 12, 2013), *available at* http://www.reuters.com/article/2013/12/12/us-column-miller-minority-idUSBRE9BB0KJ20131212.

12 Employee Benefit Research Institute, *Retirement Income Adequacy for Boomers and Gen Xers: Evidence from the 2012 EBRI Retirement Security Projection Model* (May 2015), at 4, *available at* http://www.ebri.org/pdf/notespdf/EBRI_Notes_05_May-12.RSPM-ER.Cvg1.pdf.

13 United States Census Bureau, *Table 2. Percent Holding Assets for Households, by Type of Asset Owned and Selected Characteristics: 2011, available at* http://www.census.gov/people/wealth/files/Wealth_Tables_2011.xlsx

14 Employee Benefit Research Institute, *Retirement Income Adequacy for Boomers and Gen Xers: Evidence from the 2012 EBRI Retirement Security Projection Model* (May 2015), at 4, *available at* http://www.ebri.org/pdf/notespdf/EBRI_Notes_05_May-12.RSPM-ER.Cvg1.pdf.

15 National Institute on Retirement Security, *Race and Retirement Insecurity in the United States* (Dec. 2013), at 7, *available at* http://www.nirsonline.org/storage/nirs/documents/Race%20and%20Retirement%20Insecurity/race_and_retirement_insecurity_final.pdf.

16 *Id.*

A solution to this crisis has different components. First, of course, is encouraging and enabling American workers to set aside as much as they can for retirement. For this reason, Congress has provided preferential tax treatments for retirement accounts, in the hopes that it will encourage workers to invest for retirement. But equally important is making sure that people get the most out of what they have managed to save (on a tax advantaged basis). If financial advisers are allowed to siphon off a large portion of their clients' retirement savings, then the prospects for a secure, dignified and independent retirement become even more remote.

The loopholes in the old rule are especially damaging, in light of dramatic changes in the retirement landscape.

More than ever, retirement savers are responsible for managing their own savings.

Today, Americans saving for retirement are under immense pressure to invest their funds prudently so they have the chance to live out a comfortable and dignified retirement. However, they often lack the expertise necessary to make such complex financial decisions. It wasn't always this way.

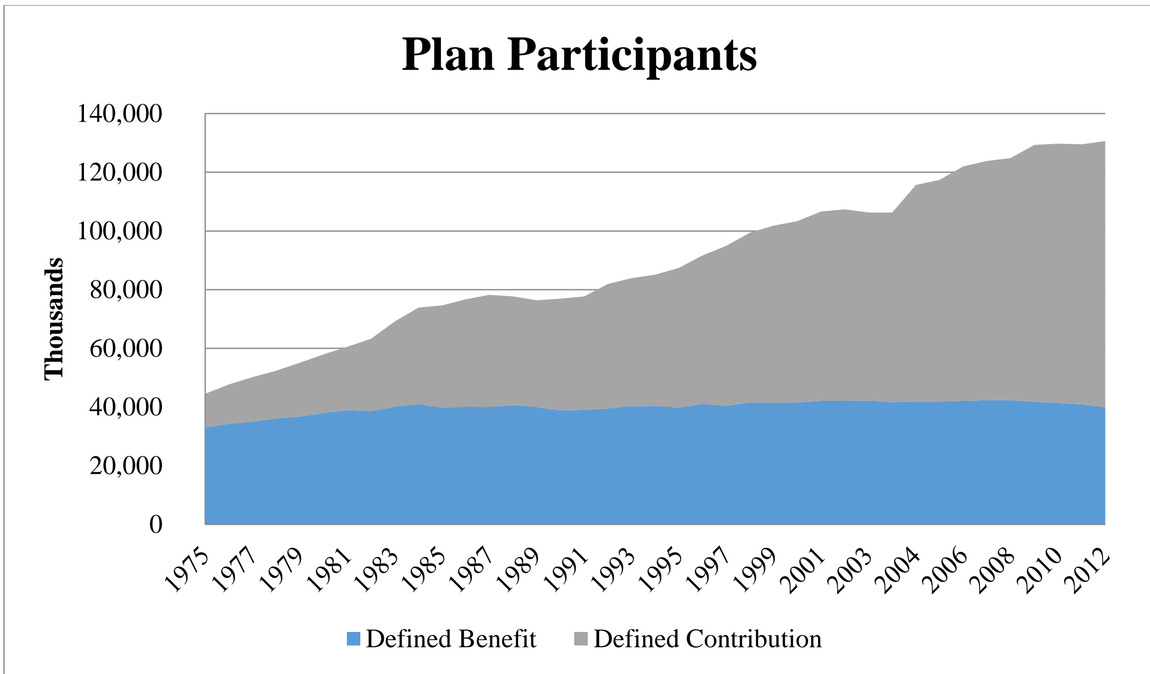
Forty years ago, in 1975, the vast majority of all workers – 74 percent – were in large defined-benefit (DB) plans.[17] Companies like General Motors, with sophisticated investment management staff, invested on behalf of all their workers, spreading risk and reward from the market so that all employees would be assured of a comfortable retirement. In 1975, 33 million individuals participated in these DB plans, while only 11 million workers took part in defined-contribution (DC) plans.[18] Furthermore, individual retirement accounts (IRAs) had only just been created in 1974, and 401(k) plans were not yet in existence.

As of 2012, 90 million people, or more than two-thirds of workers with retirement plans, now have DC plans and are expected to manage their investments and weather the ups and downs of the market individually.[19] The growth of DC plans in the past forty years stands in stark contrast to the number of participants in DB plans, which has remained flat since 1975:

[17] U.S. Department of Labor Employee Benefits Security Administration, *Private Pension Plan Bulletin Historical Tables and Graphs 5* (DEC. 2014), *available at* http://www.dol.gov/ebsa/pdf/historicaltables.pdf.

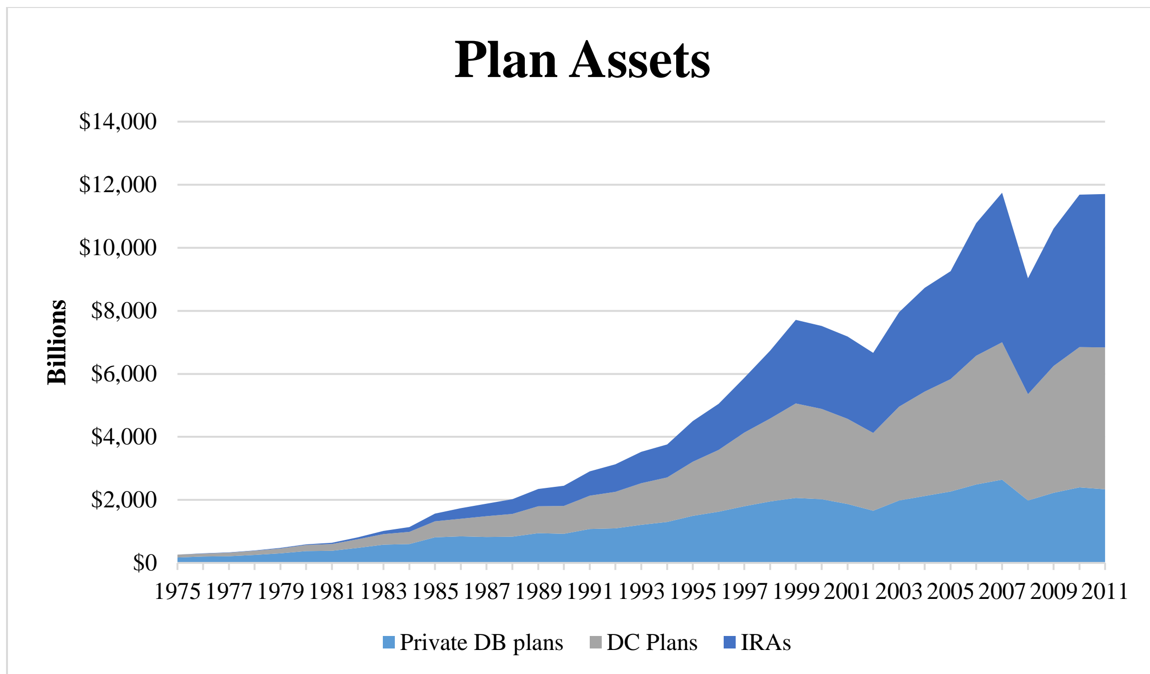
[18] *Id.* at 5.

[19] *Id.*



SOURCE: U.S. DEPARTMENT OF LABOR EMPLOYEE BENEFITS SECURITY ADMINISTRATION

Similarly, DB plans held 72 percent of retirement plan assets 1975, whereas they held only 34 percent in 2011. Including IRA assets, DB plans in 2011 held only 20 percent of private retirement assets.



SOURCE: INVESTMENT COMPANY INSTITUTE[20]

Including government pension plans and annuities, U.S. retirement assets total nearly $20 trillion.[21]

This monumental shift away from DB plans means that Americans are forced to invest their retirement assets on their own and bear the consequences of those investment decisions. The challenge is more and more daunting, as financial products become more varied and complex.

However, Americans are ill-prepared to manage trillions of dollars' worth of retirement assets on their own. Most have not received the formal education or training to qualify them to manage and invest their retirement nest egg, and, as a result, many turn to professional financial advisers for help. But under the old rule, with its loopholes, they are very likely to receive biased and self-serving advice from their advisers.

The loopholes have no justification, especially in today's world.

The Employee Retirement Income Security Act (ERISA) was enacted in 1974 to establish minimum standards of protection for retirement plan participants and beneficiaries. It provided for the accountability of plan administrators and advisers through the imposition of a best interest standard, also known as fiduciary duty. Indeed, one of the stated purposes of the Act was to protect "the interests of participants in employee benefit plans and their beneficiaries . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans."[22]

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[20] Investment Company Institute, *Table 1, The U.S. Retirement Market, Fourth Quarter 2012*, *available at* www.ici.org/info/ret_12_q4_data.xls.

[21] Investment Company Institute, *2013 Investment Company Fact Book* (53d ed. 2012), at 113-14.

[22] Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829, § 2(b).

In 1975, the DOL promulgated a rule to determine who the fiduciary duty covers, still in effect today. Then, the fiduciary duty rule was designed to address the popular defined-benefit retirement plans, which pay out a certain amount upon retirement and are managed by a professional without employee input. As seen above, in recent years there has been a significant shift from defined-benefit plans to defined-contribution plans, such as 401(k)s, and IRAs, which derive their value from employer and employee contributions and provide employees and retirees with greater responsibility over investment decisions. Despite the magnitude of the shift in retirement plans, the rule, and who ERISA's fiduciary duty covers, remains as it was in 1975.

As a result, financial advisers only are held to a best interest standard for advice when they meet all five factors of the test in DOL's outdated rule. A fiduciary duty applies when a person:

(1) makes recommendations on investing in, purchasing or selling securities or other property, or give advice as to their value;
(2) on a regular basis;
(3) pursuant to a mutual understanding that the advice;
(4) will serve as a primary basis for investment decisions; and
(5) will be individualized to the particular needs of the plan.

Too often, advisers exploit this test in various ways, often by simply claiming that their advice is not "individualized," is not the "primary basis" for an investment decision, is not provided on a "regular basis," or is not really "advice" at all. Accordingly, there are many instances when an adviser provides retirement advice that does not have to be in the client's best interests.

For example, if a retirement plan or beneficiary seeks one-time, individualized advice on a complex investment, the adviser has no fiduciary duty because that advice is not provided on a "regular basis."[23] Similarly, a plan or beneficiary may regularly consult with the adviser and even rely on the adviser's advice as the primary basis for investment decisions, but unless the adviser agreed or understood that the advice would serve as the "primary basis" for investment decisions, the adviser would not be considered a fiduciary.[24]

Further evidence suggests that advisers purposely exploit these and other loopholes in the five-part test. A DOL inspector general report identified an egregious example where advisers with "significant undisclosed conflicts of interest attempted to avoid meeting the criteria for ERISA fiduciary status under the current five-part test by simply stating in their adviser contract that they were not fiduciaries."[25] In addition, one ERISA attorney informed the GAO "that although service providers give investment recommendations, they will include a provision in their contract that

[23] Testimony of Phyllis C. Borzi, Assistant Secretary of Labor, Employee Benefits Security Administration Before the House Committee on Education and the Workforce, Subcommittee on Health, Employment, Labor, and Pensions, July 26, 2011, *available at* http://www.dol.gov/ebsa/newsroom/ty072611.html.

[24] *Id.*

[25] U.S. Department of Labor, Office of Inspector General, EBSA Needs to Do More to Protect Retirement Plan Assets from Conflicts of Interest, Report No. 09-10-001-12-121, September 30, 2010.

states that the investment recommendations provided are not intended to be the primary basis for decision making" as a way of avoiding the duty.[26]

Over time, additional loopholes have developed where the law has failed to keep pace with industry abuses and savers' needs. In 1996, the DOL issued an interpretive bulletin to clarify that "education" is not "advice" sufficient to trigger the ERISA fiduciary duty.[27] But, as with the five-part test, advisers have abused this exemption, providing thinly-veiled sales pitches under the guise of "educational" information. For example, when educating workers about different financial products, a company may compare their products favorably against a competitor's products.

The DOL proposal addresses these problems, while accommodating industry concerns.

DOL is to be commended for recognizing the need to update its fiduciary duty rule, to expand its scope, and to adequately protect our current and future retirees from conflicts of interests that drain billions from their savings annually and threaten their retirement security. Its strong proposal appropriately closes many of the loopholes found in the current rule.

The proposal expands who the fiduciary duty applies to when giving retirement investment advice by replacing the five-part test with a functional definition of investment advice. Under the revised definition, a person renders "fiduciary investment advice" when he or she receives compensation for providing a recommendation that is individualized or specifically directed to a DB or DC plan.

The advice need not be provided on a regular basis, nor must there be a mutual understanding that the recommendation serve as the "primary basis" for investment decisions. The rule also applies the fiduciary duty to IRA accounts, and – very importantly – advice relating to rollovers to IRA accounts. This is a major step toward protecting retirement savers, given the enormous amount of retirement savings held in IRA accounts, now and in the future.

Covering rollovers into IRA accounts is especially important. Many savers take that step when they are nearing retirement and need to decide how best to consolidate and manage assets that have built up in a number of 401(k) accounts. This is a critical juncture, and without the new rule in place to cover advice about rollovers and IRA investments, the law will not require that new retirees get advice in their best interests. As a result, their rolled-over assets may be placed in high-cost, sub-par investments for the duration of their retirement, eating up a large portion of their savings.

These rollovers are a very significant segment of the retirement asset space. The GAO reported that "from 1996 to 2008, over 90 percent of funds flowing into traditional IRAs came from rollovers primarily from employer-sponsored retirement plans,"[28] with nearly $273 billion in

[26] U.S. Government Accountability Office, *GAO-11-119, 401(K) Plans: Improved Regulation Could Better Protect Participants from Conflicts of Interest* (2011), at 24.

[27] 29 C.F.R. 2509.96-1(d).

[28] U.S. Government Accountability Office, *GAO-11-119, 401(K) Plans: Improved Regulation Could Better Protect Participants from Conflicts of Interest* (2011), at 10, *citing* Investment Company Institute, *The U.S. Retirement Market, Second Quarter 2012, available at* http://www.ici.org/info/ret_12_q2_data.xls.

assets rolled over in 2008 alone.[29] In 2013, it is estimated that $358 billion was rolled over.[30] Over the next five years, $2.5 trillion is projected to be rolled over.[31]

The proposal also contains an important carve-out so as not to restrict the flow of bona fide financial education to investors. For example, the proposal allows advisers to continue to provide investment education to clients about financial and investment concepts – such as compound interest or the costs and benefits of IRA rollovers – while insuring that sales pitches aren't provided under the guise of "advice."

The DOL accomplished all of this while at the same time accommodating the industry's principal concern: that the rule allow them to continue charging commission-based compensation. Through the Best Interest Contract Exemption (BICE), the rule proposal would allow financial advisers to be compensated through a set fee, through a commission, or through revenue sharing, so long as the advice provided is in the client's best interest, those fees are reasonable, conflicts are mitigated, and proper disclosure is made. This preserves current business models dependent on these types of compensation, such as those used by broker-dealers and insurance agents, while also holding them to the best interest standard that all workers and retirees deserve.

The arguments in opposition to the rule are unfounded.

Led by SIFMA and other industry organizations, strong opposition to the rule persists. However, there are many baseless and even misleading claims being circulated and it is important to set the record straight.

The Rule will not deprive low income savers of valuable financial advice.

Some opponents argue that extending the fiduciary duty broadly and fairly to all advisers will raise costs and thus reduce the availability of such financial advice, to the detriment of low and middle income savers. There are many reasons that this claim is baseless.

- First, brokerage firms don't actually serve small account holders now. For example, many brokerage firms require their reps to focus exclusively on pulling in large accounts with at least $100,000 or more.
- Second, evidence that shows that the imposition of a fiduciary duty on brokerage firms and others does not in fact cause them to abandon their clients. One study demonstrates that the application of a fiduciary duty to broker-dealers has little, if any, effect on the availability of investment advice to clients, including those with moderate levels of income or assets.[32] That, of course, makes sense: just because a business cannot extract excessive profits due to undisclosed conflicts does not mean they will not "settle for" making reasonable compensation for providing conflict-free advice.

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[29] Investment Company Institute, The IRA Investor Profile: Traditional IRA Investors' Activity, 2007-2011 (2013), at 9, *available at* http://www.ici.org/pdf/rpt_13_ira_investors.pdf.

[30] Jason Zweig, *Who's Training Your Retirement Navigator?*, The Wall Street Journal, Feb. 14, 2014.

[31] Cerulli Associates, "Retirement Markets 2014: Sizing Opportunities in Private and Public Retirement Plans," (2014).

[32] Michael Finke & Thomas Langdon, *The Impact of the Broker-Dealer Fiduciary Standard on Financial Advice* (Mar. 9, 2012), http: //ssrn.com/abstract=2019090.

- Third, conflicted advice isn't worth preserving in the marketplace, and it isn't actually cheaper than "best interest" advice, when you factor in the large hidden commissions along with the higher annual fees that typically go along with the investments that brokers are incentivized to recommend.
- Finally, and most important, even if the brokers or insurance agents can't or won't help small savers under the best interest standard, other advisers will step in. For years, in fact, many advisers have embraced the fiduciary duty and are perfectly happy to work with modest savers, to provide them with advice under the best interest standard, and charge reasonable fees. Moreover, a new generation of innovative advisory firms – including for example Rebalance IRA, Wealthfront, and Personal Capital – is emerging that uses technology to reach more workers and retirees with low-cost, high quality advice as fiduciaries.

In fact, since the inception of financial regulation in the United States, bankers, broker-dealers, and other members of the financial services industry have issued dire warnings that regulation will choke the life out of our financial markets, financial products, and, indeed, consumers of those products. Yet the industry has not only adapted to new regulations again and again, but has thrived in the process. Moreover, whenever profitable opportunities arise (for example if brokers refuse to provide their clients with conflicted-free advice), then other market participants enter the market, fill the otherwise unmet need and make the profits. Entry has been a hallmark of our financial markets from the beginning and there is every reason to expect that would happen here.

The Best Interest Contract Exemption (BICE) is a reasonable and workable accommodation to industry.

Some commenters have also claimed that the proposal's Best Interest Contract Exemption is unworkable. The BICE – the part of the proposal which allows advisors to receive commissions and other forms of payments – requires anyone providing advice to plans or IRAs sign a contract with their clients stating they will provide advice in the client's best interests, adopt policies and procedures designed to minimize conflicts of interest, provide enhanced disclosures, and limit investments to those considered relatively transparent and liquid. This provisions allow clients to receive fiduciary advice and permit advisers to receive compensation for their services in a manner of their choosing.

Some have argued that the BICE will make clients wary as they have to sign a contract before providing advice.[33] Others have stated that the mere act of signing a BICE contact would be confusing to clients, as it is not something they are used to. These claims border on the absurd. Suffice it to say that the financial services industry has never been shy about asking clients to sign reams of account documents as a condition of providing their services when it serves the adviser's interest in locking in the client to a host of waivers and stipulations. Moreover, investors will

[33] Think Advisor, *FINRA's Ketchum Blasts DOL Fiduciary Plan; White House Says 'Work With Us'* (May 27, 2015), *available at* http://www.thinkadvisor.com/2015/05/27/finras-ketchum-blasts-dol-fiduciary-plan-white-hou.

likely be pleased to receive the written commitments set forth in the BICE, which are designed to protect the clients' best interest.[34]

In addition, some have asserted that smaller advisers who charge commissions would not be able to meet the requirements of the BICE. However, if a small adviser chooses to offer investors a menu of reasonably priced, high quality investments, albeit limited in number, then they should be able to meet these requirements. Under the exemption, advisers could still recommend higher risk products like variable annuities, so long as they fit within the client's best interest.

There is no basis for predicting a surge in litigation against advisers under the rule.

The industry also has pointed to a possible onslaught of litigation should advisers become subject to the fiduciary standard. This is unfounded. Advisers who already abide by the best interest standard have simply not been subject to unreasonable litigation liability. Further, the rule clearly states that recommendations are assessed for compliance on the circumstances prevailing at the time advice is rendered—not based on future performance of the product sold. The rule also allows advisers to insist on mandatory arbitration clauses, a forum that is well-known to favor industry over claimants and to reduce liability risk. The bottom line is this: If an adviser violates his or her obligation to serve the best interest of the client, and damages result, then the client deserves a remedy and the adviser should be held accountable.

The SEC lacks the ability and the intention to address conflicts of interest, even among brokers.

Some have said the Securities and Exchange Commission (SEC) should take the lead on setting fiduciary standards prior to the DOL taking action. This ignores the DOL's unique mandate under the law to ensure retirement assets are well-protected by requiring those who advise Americans saving for retirement to act as fiduciaries. ERISA intentionally sets higher standards for retirement accounts than those existing under securities laws administered by the SEC, reflecting the importance of and preferential tax treatments for retirement nest eggs. Furthermore, only DOL, through ERISA, has jurisdiction to apply a fiduciary duty to advisors of *all* retirement assets, including insurance products. Any SEC rule will only cover securities transactions.

SEC Chair Mary Jo White has affirmed these distinct missions, stating during her recent testimony before the Senate Financial Services and General Government Subcommittee several weeks ago that the DOL and SEC "are separate agencies with separate statutory mandates."[35] Chair White has additionally noted that the agencies have had extensive communication during the rulemaking process, with the SEC "providing extensive technical assistance" to the DOL since the beginning of the process, especially about the "broker-dealer model" and about "the impact that various ways of defining a fiduciary duty could have on the availability of reliable reasonably priced services."

This argument is really about delay. The SEC hasn't even decided whether to propose a rule, and if they do eventually tackle the problem, it will take years for the process to unfold. Meanwhile, Americans are losing literally millions of dollars in retirement savings every day. They can't

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[34] The BICE applies only to retirement accounts and plans. It does not apply to any other investments.

[35] U.S. Senate Committee on Appropriations, *FSGG Subcommittee Hearing: FY16 Budget Requests for the SEC and CFTC* (May 5, 2015), *available at* http://www.appropriations.senate.gov/webcast/fsgg-subcommittee-hearing-fy16-budget-requests-sec-cftc.

afford to wait, and the DOL has the solution. We should strongly support the DOL rule, not stand in its way.

Conclusion

Thank you again for the opportunity to appear before you today. I look forward to answering your questions.