Consumer Federation of America

August 6, 2020

Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave. N.W., Suite 400
Washington, D.C. 20210

Re: Application No. D-12011
Improving Investment Advice for Workers & Retirees

Ladies and Gentlemen:

We are writing on behalf of the Consumer Federation of America[1] to express our strong opposition to the regulatory package put forward by the Department regarding investment advice to workers and retirees about their workplace retirement plan and Individual Retirement Account (IRA) investments. Far from "improving investment advice for workers and retirees," the final rule reinstating the 1975 regulatory definition of fiduciary investment advice under the Employee Retirement Income Security Act (ERISA) and the proposal to greatly expand conflicts of interest investment advice fiduciaries can engage in when advising retirement investors seriously threaten the financial security of millions of Americans who struggle to afford a dignified and independent retirement. The only beneficiaries are the powerful financial firms who would remain free under this regulatory approach to siphon billions of dollars each year out of the retirement accounts of working Americans to line their own pockets.

Between them, these two actions would ensure that most of the advice that retirement savers rely on is tainted by conflicts of interest. We know from past experience that the 1975 regulatory definition of fiduciary investment advice, with its five-part test, is easily gamed by financial firms that like to market themselves as trusted advisers while avoiding any fiduciary obligations to their clients. By reinstating that deeply flawed definition, the Department is ensuring that these firms, as well as their employees and agents, will only be investment advice fiduciaries when they choose to be. Many if not most rollover recommendations, and virtually all of those involving rollovers into non-securities, will get a regulatory free pass as a result of the Department's decision to reinstate this outdated, loophole-filled definition. Meanwhile, the Department's decision to base its proposed new prohibited transaction exemption on the

[1] The Consumer Federation of America (CFA) is a non-profit association of more than 250 national, state and local pro-consumer organizations. It was established in 1968 to advance the consumer interest through research, advocacy, and education.

Securities and Exchange Commission's (SEC's) deeply deficient Regulation Best Interest (Reg. BI) means that, even when firms do operate as investment advice fiduciaries, they would be free to engage in a wide variety of practices that encourage and reward harmful advice. Because the proposal doesn't include any enforcement mechanism for IRA investors, firms would have little incentive to comply, and millions of IRA investors harmed by the conflict-driven advice unleashed by this proposal would have no ability to recover their losses.

The rushed process the Department has adopted to implement these changes denies interested parties a meaningful opportunity to comment on a rulemaking package that will affect millions of workers and retirees. The 1975 definition has already been reinstated through a final rule, without any consideration given to the changes that are needed to ensure retirement savers are adequately protected. For the proposed new class exemption, the Department is providing only 30 days to comment, far too short a time period to allow thoughtful and comprehensive comments on this complex and highly technical proposal. This suggests that the Department, confident of its support from financial industry groups, doesn't feel the need to hear the views of other affected parties. But this is far too important an issue, and the potential negative consequences – billions of dollars a year in lost retirement savings – are too vast, for it to be addressed through such a rushed and reckless process.

For all of these reasons, we urge you to withdraw in their entirety both the final rule reinstating the definition of fiduciary investment advice and the proposed exemption to permit investment advice fiduciaries to engage in a broad range of conflicts of interest. If the Department is truly interested in improving investment advice for workers and retirees, as it suggests, it should start from scratch on a regulatory approach that prioritizes protecting retirement savers over enriching financial firms and investment professionals.

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I. Background

In a retirement system that places the burden on workers to fund their own retirement, workers and retirees know that the decisions they make about a host of important issues will determine their ability to afford a decent quality of life at the end of their working years. How much should they save? How should they allocate that money? When they change jobs, should they take a rollover or keep their retirement money in their 401(k) plan? Once they retire, how should they invest to provide income throughout retirement? How much can they safely withdraw from their retirement account each year and expect their savings to last? And what investments are best for them, in light of their financial situation, investing time horizon, risk tolerance, and retirement goals? How they answer these questions will determine their ability to afford an independent and dignified retirement.

As survey after survey has shown, however, the typical worker and retiree is ill-equipped to answer those questions for themselves. According to the 2018 National Financial Capability Study, for example, "only 30% of the general population demonstrates understanding of basic financial concepts such as the workings of interest rates, inflation, and risk diversification."[2] Fewer still possess the higher level of financial sophistication needed to make sound investment decisions about something as critical to their financial wellbeing as saving for and spending in retirement. And those who invest exclusively through tax-advantaged retirement accounts

[2] Jill E. Fisch, et. al, Global Financial Literacy Excellence Center and FINRA Investor Education Foundation, New Evidence on the Financial Knowledge and Characteristics of Investors (Oct. 2019), https://bit.ly/3hBIWMQ.

demonstrate lower levels of financial literacy than the broader investing population.[3] It should hardly be surprising then that millions of American workers and retirees each year turn to financial professionals for advice about their retirement investments.

Unfortunately, the choice of whom to rely on for retirement investment advice can be just as confusing, and just as important, as decisions about how to invest. Indeed, for many investors, the choice of advisers will be the last investment decision they make, after which they will rely virtually without question and with little or no independent investigation on the recommendations they receive from their trusted advisers. But our regulatory system fails to clearly differentiate between those financial professionals who are regulated as advisers, subject to the fiduciary duty appropriate to their advisory role, and those who are regulated as mere salespeople. While the latter group argue in court that they are merely "engaged in arm's length sales transactions, no different from car dealers,"[4] they are quick to market themselves to unsuspecting investors as trusted advisers (using titles such as financial consultant, financial planner, or retirement adviser).[5] And, despite the disclaimers they make when seeking to avoid regulation as fiduciaries, they also often function as advisers in relationships of trust and confidence, as they are quick to acknowledge outside the courtroom.[6] Our regulations permit this. As a result, investors have no way to distinguish between the two groups, and the regulatory distinctions have no reasonable basis.

Instead of either eliminating or clarifying those distinctions, the SEC's recent regulatory actions have further muddied the water. Brokers remain free to market themselves in ways that make them indistinguishable from investment advisers, despite the SEC's decision to continue to regulate them as mere salespeople under a non-fiduciary and undefined "best interest" standard. That standard continues to allow firms to incentivize their investment professionals in ways that encourage and reward harmful advice. Meanwhile, early evidence from the new Customer Relationship Summaries (Form CRS) confirms the validity of our warnings to the SEC that the new disclosures are going to be incomprehensible to the typical investor. Most of those we have reviewed are so visually unappealing they will discourage investors from reading them at all.[7] The disclosures in most we've reviewed are far from the plain English description of services promised by the SEC when it adopted the rule, while the worst read like marketing brochures rather than factual disclosures. Far from clarifying distinctions between brokers and investment advisers, language prescribed by the SEC fails to identify important differences in the legal obligations brokers and advisers owe their customers, and the rules generally mislead investors into expecting protections the rules do not provide.

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[3] Gary Mottola, FINRA Investor Education Foundation, A Snapshot of Investor Households in America (Sept. 2015), https://bit.ly/2X3ljFd.
[4] Brief for Chamber of Commerce Plaintiffs-Appellants at 22, 39, *Chamber of Commerce of United States of Am. v. United States Dep't of Labor*, 885 F.3d 360 (2018) (No. 17-10238).
[5] Micah Hauptman and Barbara Roper, Consumer Federation of America, Financial Advisor or Investment Salesperson? Brokers and Insurers Want to Have it Both Ways (Jan. 18, 2017), https://bit.ly/39zvfLW.
[6] Kenneth Bentsen, CEO, SIFMA, *Is it Time to Adopt a Uniform Fee-Only Standard for Financial Advice?*, Wall Street Journal. (Mar. 18, 2018), https://on.wsj.com/39BGUKa.
[7] Much of this lack of visual appeal is the fault of the SEC, which imposed an arbitrary limit on the length of the Form CRS that forced firms to use up every available inch of space to cover the topics they are required to address.

By reinstating the 1975 definition of fiduciary investment advice and basing its new exemption on the SEC's deeply deficient Reg. BI, the Department's regulatory package imports this same anti-investor regulatory environment into the market for retirement investment advice. While it justifies this approach based on the "regulatory efficiencies" it will deliver, it doesn't even deliver the long-promised harmonized standard for retirement investment advice that industry groups once hailed as essential to avoid investor confusion. On the contrary, the Department indicates that it will interpret its proposed new best interest standard consistent not just with Reg. BI, but also with the Investment Advisers Act fiduciary standard and the National Association of Insurance Commissioners' (NAIC) model suitability rule for annuities sales. Because there are material differences in these three standards, retirement savers will bear the burden of determining what standard applies to the advice they receive based on the type of financial professional providing the advice and the type of investment product being recommended. In short, the proposed exemption will increase, rather than reduce, investor confusion regarding the financial professionals they rely on for advice about their retirement investments.

Unless the rule reinstating the definition is rescinded and the proposed exemption is withdrawn, the inevitable result is that millions of American workers and retirees will be victimized by retirement investment advice that is tainted by conflicts of interest and by sales recommendations dressed up as advice. Workers and retirees who struggle to make ends meet will suffer billions of dollars a year in lost retirement savings as a result, while powerful financial firms reap the rewards.

II. The Department should rescind the outdated and deeply flawed 1975 definition of fiduciary investment advice.

We strongly oppose the Department's decision to reinstate the 1975 regulatory definition of fiduciary investment advice. The definition was not developed with the current retail retirement investment advice landscape in mind. Its five-part test enables broker-dealers and insurance agents to function as investment advice providers in positions of trust and confidence without being held to the fiduciary standard appropriate to their role. It does nothing to prevent them from marketing themselves to unsuspecting workers and retirees as trusted advisers even when they are regulated exclusively as salespeople. It also ensures that many if not most rollover recommendations, including virtually all those not already covered by securities regulations, will not be held to a fiduciary standard. Retirement savers who reasonably rely on these conflicted sales recommendations as trusted investment advice will suffer extensive financial harm as a result of recommendations to invest in products that expose them to high costs, unnecessary risks, and substandard performance. The Department should therefore rescind the definition.

A. The 1975 regulatory definition of fiduciary investment advice is outdated and is not appropriate for the current retail retirement investment advice market.

The retirement landscape was vastly different in 1975, when the Department wrote the definition for non-discretionary fiduciary investment advice under ERISA. Congress had just authorized IRAs for the first time the previous year, and 401(k) plans had not yet been created. In other words, the primary ways in which workers today save and invest for retirement either did not yet exist or had barely gotten a foothold. Instead, the retirement landscape was dominated by defined benefit pension plans in which a professional manager was responsible for investing the fund assets. The definition of investment advice fiduciary, with its five-part test, reflects that world. As a result, it doesn't adequately address either 1) the desperate need workers and retirees have for reliable advice untainted by conflicts of interest or 2) the inability of these average working Americans to distinguish the recommendations that would be considered fiduciary investment advice under this convoluted definition from those that would not.

Workers and retirement savers desperately need reliable investment advice, both because they bear far greater responsibility for ensuring their own retirement security than they did when the definition of fiduciary investment advice was drafted and because the world of investing has grown far more complex in the intervening years. By 2017, for example, there were 529,018 401(k) type workplace retirement plans in which participants directed all (516,465) or some (12,553) of the investments, according to the Department's data.[8] More than $5.3 trillion in retirement assets was held in such accounts.[9] Americans held another $11 trillion in IRAs at the end of 2019, accounting for 34 percent of the $32.3 trillion in dedicated retirement assets, according to the Investment Company Institute.[10] That makes IRAs the largest pool of assets in the U.S. retirement market, according to ICI. Between them, IRAs and defined contribution plans account for a little over 60 percent of all retirement assets.[11]

Rollovers from workplace retirement plans play a major role in funding IRAs, making the application of the definition to rollover recommendations particularly important. Nearly six in ten (59 percent) households that owned traditional IRAs in 2019 indicated that their IRA contained money rolled over from a workplace retirement plan. Of those, 86 percent indicated they had rolled over the entire account balance in their most recent rollover, according to ICI.[12]

The investment choices available to investors have also gotten far more complex since the definition was drafted. There were just a few hundred mutual funds available in 1975, for example.[13] That had grown to 6,834 by 1999 and to 21,292 in 2019.[14] And the variety of fund types available has also greatly increased from the almost exclusively equity-oriented funds of the 1970s, when ERISA was drafted.[15] Exchange Traded Funds (ETFs) didn't exist in 1975. As of 2019, there were 4,396. And these include exotic (and risky) variants, such as inverse and non-transparent ETFs, that have been inappropriately sold to unsophisticated retail investors. Annuities have seen a similar growth in the number and complexity of options available, with higher cost, more complex options that pay advisers more increasingly displacing the simpler,

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[8] Employee Benefits Security Administration, U.S. Department of Labor, Private Pension Plan Bulletin Historical Tables and Graphs 1975-2017 (Sept. 2019), https://bit.ly/3f72mb1 at 32.
[9] *Id.*
[10] ICI Research, Ten Important Facts About IRAs (May 2020), https://bit.ly/30esFId.
[11] *Id.*
[12] *Id.*
[13] James McWhinney, *A Brief History of Mutual Funds*, Investopedia, https://bit.ly/3jMVVNB.
[14] Investment Company Institute, Investment Company Fact Book, A Review of Trends and Activities in the Investment Company Industry, 60th Edition (2020), https://bit.ly/2X9tSOP.
[15] Gordon H. Sellon, Jr., Federal Reserve Bank of Kansas City, *Changes in Financial Intermediation: The Role of Pension and Mutual Funds*, Economic Review (Third Quarter 1992), https://bit.ly/3jIvBEt.

lower cost version generally favored by personal finance experts.[16] Meanwhile, Real Estate Investment Trusts (REITs) and Business Development Companies (BDCs), which can be costly, illiquid, and structured in ways that promote internal and external conflicts of interest, are also sold in the retail market. And a whole world of alternative investments is also increasingly available to retail investors, without the transparency or other protections typically required in securities sold to members of the general public.[17] As the Financial Services Institute (FSI) stated in a comment letter to the SEC, "Financial products and services are complex. Investors face a massive amount of available options and conflicting information that can be overwhelming and confusing; even very highly-skilled experts and experienced investors can become lost in this ever-changing landscape of financial products and services."[18]

Faced with these difficult and weighty investment decisions, and lacking a high level of financial sophistication, millions of Americans do exactly what one would expect – they turn to financial professionals for advice about their retirement investments. The five-part test in the definition of fiduciary investment advice under ERISA ensures that many of the financial professionals they rely on for this advice will not have to meet the high fiduciary standard Congress adopted when enacting ERISA. Investment advisers will be held to a weaker (and poorly enforced) fiduciary standard under the Investment Advisers Act. Brokers will be held to a non-fiduciary "best interest" standard under Reg. BI. Insurance agents will be held to weak sales standards under state insurance laws. And others who advise IRA investors to put their money in gold, or art, or bitcoin may fall outside those regulatory structures entirely. None of these other regulatory regimes comes close to matching ERISA's obligation to act with undivided loyalty when advising workers and retirees about their retirement investments. But that distinction will be lost on the typical retirement saver.

The Department needs to update the definition to reflect that changed reality. Specifically, the definition should be revised to ensure that all the services retail investors reasonably rely on as fiduciary investment advice – including all rollover recommendations – are captured by the definition.

B. Loopholes in the definition allow firms to evade their fiduciary obligations even when they are clearly functioning in an advisory capacity.

ERISA broadly defines as an investment advice fiduciary anyone who "renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such [retirement] plan, or has any authority or responsibility to do so." When the Department adopted rules implementing ERISA, however, it greatly narrowed that definition

[16] Michael Kitces, *Why the DOL Fiduciary Rule Won't Kill Annuities, It Will Make Them Stronger!*, Nerd's Eye View (Apr. 21, 2016), https://bit.ly/3g8Z6gG.

[17] With the Department's recent publication of an information letter on private equity in funds sold through 401(k) plans, that risk and complexity is migrating into workplace retirement plans as well, without adequate protections to protect retirement savers from harm. *See* Letter from AFL-CIO, et al, to Secretary of Labor Eugene Scalia (Jun. 24, 2020), https://bit.ly/331EVgW.

[18] David T. Bellaire, Executive Vice President & General Counsel, Financial Services Institute, Comment Letter to SEC regarding Request for Information Regarding Duties of Brokers, Dealers, and Investment Advisers (July 5, 2013), https://bit.ly/39vTsm2.

by imposing a five-part test that must be met before an individual or firm is deemed to be giving fiduciary investment advice. In addition to conditions included in the statutory definition that are appropriate to the context – such as requirements that the advice be individualized, provided for compensation, and relate to retirement account assets – the regulatory definition added unjustified requirements that provide financial professionals with an easy escape hatch to avoid their fiduciary obligations even when they are clearly functioning in an advisory capacity.

Of particular concern are provisions requiring that the advice be provided on a *regular basis* and subject to a *mutual agreement* between the adviser and the advice recipient that the advice will serve as a *primary basis* for the investment decision. These provisions have enabled many financial professionals who are clearly engaged in "render[ing] investment advice" to retirement plans, plan participants, and IRA investors "for a fee or other compensation" to escape the fiduciary obligation appropriate to their advisory role. In particular, broker-dealers, insurance agents, and others who provide individualized advice in the context of investment sales have used these loopholes in order to preserve their ability to provide services to retirement savers, including advice about rollovers, without having to comply with their fiduciary obligation under ERISA to act "solely in the interests" of those retirement savers and "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."

In some cases, firms resort to gamesmanship to avoid any fiduciary obligations. In particular, they have used the "mutual agreement" requirement to evade fiduciary obligations where they would otherwise apply. For example, it has in the past been common practice for firms to include disclaimers that their recommendations are not intended to form the primary basis for the investment decision and to point to those disclaimers as absolving them of fiduciary obligations even when they know the customer is acting in reliance on the recommendation. By putting the burden on investors to show that there was a mutual agreement that the advice would serve as a primary basis for their investment decision, the definition makes such gamesmanship possible. In other instances, the effect of the definition's loopholes is automatic and requires no such gamesmanship. In particular, advice that is provided on a one-time basis – such as many rollover recommendations or advice to plan fiduciaries about plan investment menus – is automatically excluded by the "regular basis" prong of the definition. But, while it is reasonable to suggest that the specifics of an adviser's fiduciary obligations should vary based on the nature of the relationship, there is simply no logical justification for the position that one-time advice should not be held to a fiduciary standard at all solely because of its one-time nature.[19]

There is no evidence that investors make these distinctions. For example, there is no evidence that they rely less on or place less trust in one-time advice or that they are any less likely to rely heavily on advice where the financial professional disclaims any intent for it to serve as a primary basis for the investment decision. The definition should be revised to reflect that reality.

[19] For example, while it is reasonable to suggest that one-time advice would generally not include an obligation to provide ongoing monitoring of the investment, it is not reasonable to suggest that it shouldn't have to meet fiduciary standards of loyalty and prudence.

C. Loopholes in the definition allow firms to evade their fiduciary obligations even when they market themselves as trusted advisers.

One reason investors fail to make these distinctions is that brokers and insurers who rely on these loopholes to avoid fiduciary obligations aggressively market themselves to investors, including retirement savers, as trusted advisers engaged in long-term relationships of trust and confidence. In short, the time when clear functional distinctions existed between advisory relationships and sales relationships has long since passed. The Department's definition of fiduciary investment advice has failed to keep pace with that fundamental shift in the retirement advice marketplace.

The 1975 definition represents a distant past, when investment advisers provided advice in positions of trust and confidence, while broker-dealers and insurance agents limited themselves to providing arms-length sales recommendations.[20] Those functional differences were once clearly evident in the titles they used and the way they described their services. Based on those functional differences, the regulatory framework imposed different requirements and legal obligations appropriate to their different roles. Investment advisers were subject to a fiduciary duty under the Investment Advisers Act of 1940 (Advisers Act). Broker-dealers were subject to a more relaxed sales-based suitability standard under the Securities Exchange Act of 1934 (Exchange Act) and rules of the Financial Industry Regulatory Authority (FINRA) and its predecessor, the National Association of Securities Dealers. And insurance agents were regulated at the state level, by state insurance commissions, under even more permissive rules aimed at preventing abusive sales practices.

Over the last three decades, however, broker-dealers and insurers have deliberately blurred the once clear line between sales recommendations and investment advice. They did so to remain competitive in a market where investors were demanding advice, not sales. By the 1980s, for example, investors had no need for a full-service broker-dealer to buy or sell securities. They could do so at far less cost through a discount broker. To remain relevant, full-service brokers had to emphasize their value as advisers. To do so, they began offering advisory services, such as financial planning, adopting new titles for their sales reps to make them sound more like advisers, and marketing themselves as offering services that are primarily advisory in nature. In a 1991 two-page ad in *The New York Times*, for example, broker-dealer Shearson-Lehman encouraged readers to, "Think of your Shearson-Lehman Financial Consultant more as an advisor than a stockbroker."[21] In a 2000 ad in *Kiplinger's Personal Finance*, Prudential Securities proclaimed that, "it's advice, not execution, that's at the heart of our relationships."[22] Realizing that they could sell more insurance products if they portrayed their services as more advisory in nature, insurers also got into the act. And regulators permitted them to undergo this transformation while continuing to regulate them exclusively as salespeople.

Today, all aspects of brokers' and insurers' communications with the investing public, including retirement savers, are designed to send the message that they are trusted advisers,

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[20] Arthur B. Laby, *Reforming the Regulation of Broker-Dealers and Investment Advisers*, 65 The Business Lawyer 395 (2010) ("Laby").
[21] The ad appeared in the June 5, 1991 issue of *The New York Times*.
[22] The ad appeared in the February 2000 issue of *Kiplinger's Personal Finance.*

committed to providing objective, trustworthy investment advice, rather than mere sales pitches. For example, both brokers and insurers routinely refer to their employees and agents, not as sales representatives or agents, but as "financial advisors," "wealth managers," or "retirement consultants," and indicate that they have a level of expertise that can and should be relied upon by their less sophisticated clients.[23] These firms rarely if ever describe themselves as engaged in mere product sales, preferring instead to describe their services as providing "advice" about investing and retirement "planning." And they market those services as designed to serve customers' best interests. In holding themselves out as impartial experts, they seek to occupy positions of trust and confidence with their customers. In short, in their eagerness to attract clients and increase sales, these brokers and insurers do everything they can to create the reasonable belief and expectation on the part of investors that they are providing fiduciary investment advice rather than non-fiduciary investment sales.[24]

Here are just a few examples we found when reviewing the websites of major broker-dealers and insurers of how they market themselves to investors, including retirement savers, in ways that are designed to encourage those investors to rely on them as a source of trusted advice.

- D.A. Davidson: "Trust is the cornerstone of the relationship between you, as an investor, and the D.A. Davidson & Co. financial professionals working for you. Your needs should always come first."[25]

- Voya: "With a Voya retirement consultant, you know you're getting a qualified professional who is ... able to offer good advice and make sound financial decisions on your behalf. You'll build an ongoing, one-on-one relationship as your advisor gets to know you and your situation, and you can work together to tailor financial advice specifically to meet your needs."[26]

- UBS: "The UBS Wealth Management Americas approach is based on the trusted relationship of our Financial Advisors and their clients. Our experienced Advisors are committed to understanding clients' needs and delivering insightful, informed advice to help them realize their dreams."[27]

- Mass Mutual: "Join millions of people who place their confidence and trust in us."[28]

- Raymond James: "[I]t's developing a long-term relationship built on understanding and trust. Your advisor is there for you throughout the planning and investing process, giving you objective and unbiased advice along the way."[29]

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[23] Hauptman and Roper, Financial Advisor or Investment Salesperson?; *see also* Arthur B. Laby, *Selling Advice and Creating Expectations: Why Brokers Should Be Fiduciaries*, 87 Washington Law Review 707, 753-758 (2012).
[24] *Id.*
[25] Your Rights, D.A. Davidson, http://bit.ly/2MgVxpr (last visited August 21, 2016)
[26] VOYA, Working with a Financial Advisor Can Help You Keep Your Goals on Track, https://go.voya.com/3jPyun5 (last visited August 21, 2016).
[27] UBS, About Us, http://bit.ly/2AHvRkF (last visited August 21, 2016).
[28] Mass Mutual, http://bit.ly/2KskJrj (last visited August 21, 2016).
[29] Why a Raymond James Advisor, Raymond James, https://bit.ly/30Rp95z (last visited January 3, 2020).

Under the 1975 definition of fiduciary investment advice, financial professionals at these same firms (and the many others that engage in similar marketing) would be free to make a one-time recommendation, for example one-time advice to roll assets out of a retirement plan to purchase an annuity, without being held to a fiduciary standard under ERISA or the tax code.

Even the financial trade associations that have fought so hard to preserve a lower standard of care for brokers and insurers have made statements that seem to acknowledge the inappropriateness of treating the advice offered by brokers and insurers differently than that offered by fiduciary investment advisers. In a *Wall Street Journal* editorial, for example, Kenneth Bentsen, CEO of the Securities Industry and Financial Markets Association (SIFMA), stated that "there is no evidence that the advice an investor would receive [from a broker versus adviser] would differ either in kind or quality."[30] But if there is no such difference, why shouldn't the advice both offer be held to a uniform fiduciary standard? Another plaintiff in the challenge to the 2016 conflict of interest rule, the National Association of Insurance and Financial Advisors (NAIFA), argued in court that its members were mere salespeople who could not reasonably be held to a fiduciary standard while urging investors on its website to "Contact a NAIFA member for advice you can trust."[31]

Financial firms that want to be perceived as trusted advisers by retirement savers should not be able to use loopholes in the definition to evade regulation as an investment advice fiduciary under ERISA. But, unless the Department rescinds the 1975 definition of fiduciary investment advice, that is precisely what they will continue to do.

D. Investors do not distinguish fiduciary advisers from non-fiduciary salespeople.

The brokerage and insurance industries' campaign to blur the line between product sales and investment advice has unquestionably "succeeded." After decades of being told they should trust their "financial advisor" to put their interests first, the majority of investors are unable to determine whether their own financial professional is a salesperson or a true adviser, whether the service being offered constitutes mere product sales or fiduciary investment advice, how these different services are regulated, and how the different regulatory landscapes affect them. As a result, they are all too likely to place their trust in advice that is tainted by conflicts of interest and sales recommendations dressed up as advice. And they can suffer serious financial harm when this occurs.

Extensive research dating back many years – including research commissioned by the SEC – has repeatedly shown that investors do not distinguish between broker-dealers and investment advisers. Nor do they understand the different legal standards that apply to the advisory activities of these two different types of financial professionals or the implications of working with financial professionals who operate under these different legal frameworks.[32] For

[30] Bentsen, *Is it Time to Adopt a Uniform Fee-Only Standard for Financial Advice?*
[31] NAIFA, NAIFA: Advisors You Can Trust, (last visited August 21, 2016). Website has since moved and content has changed, but NAIFA still refers to its members as advisors.
[32] *See, e.g.*, Siegel & Gale, LLC, & Gelb Consulting Group, Inc., *Results of Investor Focus Group Interviews About Proposed Brokerage Account Disclosures: Report to the Securities and Exchange Commission* (Mar. 10, 2005),

example, in 2005 the SEC engaged Siegel & Gale LLC to conduct focus group testing designed to help the SEC better understand "how investors differentiate the roles, legal obligations, and compensation" among several types of financial services professionals. Siegel & Gale found that, "Respondents in all focus groups were generally unclear about the distinctions among the titles brokers, financial advisors/financial consultants, investment advisers, and financial planners."[33] As one participant explained, "I don't know the difference. I mean I've got a guy that gives me advice. I don't know what he is."[34]

A few years later, the SEC engaged the RAND Corporation to examine advisers' business practices and determine whether investors understood the differences between them. RAND similarly concluded that most investors who responded to their survey and participated in their focus groups, including those who had employed financial professionals for years, "do not have a clear understanding of the boundaries between investment advisers and broker-dealers."[35] One source of the problem, according to RAND focus group participants, is that "common job titles for investment advisers and broker-dealers are so similar that people can easily get confused over the type of professional with which they are working."[36]

More recent survey research by the RAND Corporation, commissioned by the SEC as part of the Reg. BI rulemaking, confirms these findings. In fact, it suggests that investor knowledge about key differences between broker-dealers and investment advisers has deteriorated in the intervening years.[37] It states, for example, "Contrary to our prior expectation, this subsample of respondents seemed less informed about the marketplace for professional financial advice in 2018 than they were in 2007… In 2007, these respondents were more likely to correctly report that [broker-dealers (BDs)] typically charge commissions on transactions and much more likely to correctly report that [investment advisers (IAs)] typically are paid based on the amount of assets that their client holds. Between 2007 and 2018, there was a marked decline in the rate at which these respondents correctly distinguished typical differences between IAs and BDs."[38]

That investors fail to make these distinctions is hardly surprising. It is simply not reasonable to expect workers and retirees to understand that the "Retirement Adviser" (insurance agent) recommending that they roll their money out of their 401(k) to purchase an annuity is just a salesperson, with no obligation to act in their best interest and huge financial incentive to

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https://bit.ly/3hKJ2lw; *see also* Angela A. Hung, et al., RAND Institute for Civil Justice, *Investor and Industry Perspectives on Investment Advisers and Broker-Dealers* (Oct. 2008), at 111, https://bit.ly/307OpVS.

[33] Siegel and Gale, LLC, and Gelb Consulting Group, Inc., *Results of Investor Focus Group Interviews About Proposed Brokerage Account Disclosures: Report to the Securities and Exchange Commission* (Mar. 10, 2005), https://bit.ly/30WfnPr.

[34] *Id.*

[35] Angela A. Hung, *et al.*, *Investor and Industry Perspectives on Investment Advisers and Broker-Dealers* at 111.

[36] *Id.*

[37] *See* Brian Scholl, Office of the Investor Advocate & Angela A. Hung, RAND Corp., The Retail Market for Investment Advice 59-60 (Oct. 2018), https://bit.ly/3hGGNj4.

[38] *Id.* at 59-60. While we are not aware of comparable research regarding the impact of insurance agents' use of titles designed to portray them as advisers, it stands to reason that the effects would be similar. Certainly, we've seen no evidence that they are not.

recommend the rollover.[39] Nor is it reasonable to expect that they will understand that the "Financial Consultant" (broker) who is advising them about their retirement investments gets paid considerably more when recommending some investments than he does when recommending others, let alone how they should take that into account when evaluating his recommendations. And fewer still are likely to understand that their "Financial Adviser" (dually registered as a broker-dealer and investment adviser) is expected to place a certain percentage of her clients' assets in proprietary products when better options are available, even in fee accounts that are supposedly held to a fiduciary standard.

The SEC has sought to address this problem through disclosure, in the form of a new Customer Relationship Summary (Form CRS), despite overwhelming evidence that disclosure is ineffective in addressing investor confusion. For example, RAND in 2008 found that investors' inability to distinguish between different types of financial professionals persisted even after they were presented with fact sheets designed to clarify key differences between broker-dealers and investment advisers. Even after reading the fact sheets, most participants did not know which type of investment professional they had.[40] That had not changed by 2018, when RAND researches once again found that presenting participants with fact sheets describing key differences between broker-dealers and investment advisers did little to dispel investor confusion.[41]

When, as part of its 2018 study, RAND researchers conducted in-depth interviews with a subset of survey participants to determine their understanding of CRS disclosures, they found that many, if not most, investors failed to understand key information that would help them determine whether a brokerage or advisory account would best suit their needs. In particular, most did not understand key differences between the fiduciary standard for investment advisers and the best interest standard for broker-dealers, nor did they understand the harmful impact that conflicts of interest can have on the recommendations they receive.[42] Despite these findings, the SEC proceeded with a regulatory approach it had every reason to know would be ineffective in dispelling investor confusion. Our informal review of Form CRS disclosures since the rule was implemented June 30 indicates that concerns about the quality and clarity of these disclosures were more than justified.

By reinstating the 1975 definition of fiduciary investment advice, the Department is perpetuating a retirement advice landscape in which financial firms that are indistinguishable to the typical retirement saver will be held to different standards, with some held to a fiduciary standard while others are regulated as mere salespeople when performing essentially identical advisory functions. The definition needs to be updated to reflect this market reality.

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[39] The new model "best interest" standard from the National Association of Insurance Commissioners is nothing more than a suitability standard, which insurance producers meet by recommending a product that they have a reasonable basis to believe "meets the consumer's needs."
[40] Angela A. Hung, et al., *Investor and Industry Perspectives on Investment Advisers and Broker-Dealers* at 111.
[41] *See* Scholl and Hung, *The Retail Market for Investment Advice* at 25-26.
[42] *See, e.g.*, Letter from Barbara Roper and Micah Hauptman, CFA, to Securities and Exchange Commission (Dec. 7, 2018), https://bit.ly/303ZfMK.

E. Investors, including retirement savers, place their trust in financial professionals, regardless of whether they are regulated as fiduciary advisers or mere salespeople.

The success of the brokerage and insurance industry's campaign to rebrand themselves as advisers can also be seen in the fact that investors place a high level of trust in all types of financial professionals, including those regulated as salespeople, and they rely on all types of financial professionals as if they were fiduciary advisers. The SEC has acknowledged, for example, that, "In seeking financial advice, a retail investor places not only money but also trust in a financial professional."[43] It cited one industry study of over 800 investors, which found that "96% of U.S. investors report that they trust their financial professional and 97% believe their financial professional has their best interest in mind."[44]

The SEC cites additional evidence that levels of trust tend to be higher among the most vulnerable populations of investors, and that trust and reliance go hand in hand. It notes, for example, that "some studies find that trust in financial professionals is greater when investors have lower financial literacy or when purchasing complex products, such as insurance products. Further, as trust in financial professionals grows, investors may be more likely to delegate all investment decisions to the financial professional, irrespective of their level of financial education."[45] In other words, advice that the Department explicitly states would not be treated as fiduciary investment advice under the reinstated definition – advice to a financially unsophisticated worker to roll assets out of his retirement plan and into an insurance annuity – is precisely the sort of advice that is most likely to be relied on as trusted advice by the retirement saver, and thus most in need of being held to a fiduciary standard.

The 1975 definition of fiduciary investment advice enables financial firms to inappropriately avoid their fiduciary obligations in circumstances in which investors clearly rely on them as a source of trusted advice. The Department needs to revise the definition to ensure that these sorts of advice relationships are captured by the rule.

F. Investors are harmed when they reasonably but mistakenly rely on conflicted sales recommendations as unbiased, trustworthy, and high-quality advice.

When vulnerable workers and retirees place their trust in brokers and insurance agents and justifiably rely on their highly-conflicted sales recommendations as if they constituted trustworthy retirement investment advice, these retirement savers can suffer enormous financial harm. This includes buying high-cost, low-quality securities and insurance investments based on those recommendations, recommendations that enrich the financial firm and its representatives but undermine retirement savers' financial security. Such conflicts of interest can take a huge financial toll on retirement savers, on both an individual and systemic basis, costing them billions of dollars a year overall in lost retirement savings.

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[43] Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 Fed. Reg. 33,318, 33,431-33,432 (July 12, 2019).
[44] *Id.*
[45] *Id.*

There is a wealth of evidence that demonstrates that conflicts of interest that pervade the broker-dealer and insurance business models influence these advisers' recommendations and often do so in ways that are harmful to investors, including retirement savers. Immediate evidence can be found, for example, in the vast range in cost and quality that can exist among investments – i.e., a particular class of mutual funds or variable annuities – that are recommended by these sales-based advisers. These otherwise similar products may impose different fees on the investor, or achieve comparable investment results with significant differences in volatility, or provide different guarantees, impose different surrender periods and fees, or, in the case of variable annuities, offer the investor a greater or lesser degree of choice among underlying investment options that are of varying quality. These differences in features can profoundly impact costs, risks and overall performance.[46]

If advisers were truly acting in customers' best interests, as they proclaim, we would expect to see these differences compress, as advisers would tend to recommend those investments that provide the best combination of quality and cost. Instead, we see evidence of a market characterized by reverse competition. Rather than competing to be bought, by offering a good product at a reasonable price, some investments compete to be sold, by offering higher compensation to sellers. In order to afford that higher compensation, however, investment sponsors increase costs to investors, counting on investors' lack of cost sensitivity or hiding those costs inside complex, opaque products. This is particularly evident in the annuities market, according to a recent analysis, where "the best products with the lowest cost are often NOT the ones that actually get sold in practice."[47] While it was once common for insurers to produce good annuities that were transparent and had "very reasonable costs, ... they got squeezed out of the marketplace" by other lower quality products that paid higher commissions. Products that are more complex and opaque tend "to get loaded up with a lot of fees and expenses on the back end that no one can see because the thing is too darn opaque and complex to evaluate."[48]

A major part of the problem is that annuities are sold subject to some of the weakest sales standards and the greatest compensation-related conflicts of interest. Yet these opaque, complex, illiquid, and high-cost investments, which play a major role in the retirement advice marketplace, would effectively be written out of the regulation by the reinstatement of the 1975 regulatory definition of fiduciary investment advice. The Department needs to update the definition to ensure that advice about insurance investments, which according to the SEC is more rather than less likely to be relied on by retirement savers as trusted advice, is included in the definition.

G. Applying the five-part test to rollover recommendations deprives retirement savers of critically important protections when the risks and conflicts are greatest.

One practical effect of reinstating the 1975 definition of fiduciary investment advice, with its requirement that advice must be provided on a regular basis to be considered fiduciary investment advice, is that many if not most rollover recommendations will not be held to a

[46] *See, e.g.*, Letter from AARP, CFA, CFP Board, FPA, Fund Democracy, and NAPFA, to the SEC, Section 913 Fiduciary Rulemaking – Evidence of Investor Harm, April 14, 2014, at 2, http://bit.ly/2gPXyhx.
[47] Kitces, *Why The DoL Fiduciary Rule Won't Kill Annuities, It Will Make Them Stronger!*
[48] *Id.*

fiduciary standard under ERISA. Few if any rollovers to non-securities will meet all five parts of the five-part test. On the contrary, the Department is explicit in carving out virtually all recommendations to roll assets out of a retirement plan to purchase an annuity. It is not even clear that most rollover recommendations by brokers would be held to a fiduciary standard under ERISA, since it is at best ambiguous whether a brokerage account represents an ongoing advisory relationship in which advice is offered on a regular basis.[49] By effectively exempting most rollover recommendations where the adviser receives sales-based incentives, the final rule reinstating the 1975 definition ensures that retirement savers will be deprived of fiduciary protection when it is needed most – when the risks and conflicts are greatest.

In the Preamble to the proposed new prohibited transaction exemption, the Department acknowledges the many reasons rollover recommendations should be covered by a fiduciary standard. It notes, for example, that, "Amounts accrued in an ERISA-covered Plan can represent a lifetime of savings, and often comprise the largest sum of money a worker has at retirement. Therefore, the decision to roll over ERISA-covered Plan assets to an IRA is potentially a very consequential financial decision for a Retirement Investor." Moreover, when retirement savers move their money from a retirement plan, they leave the portion of the market where costs are typically lowest and where, at least in theory, ERISA's fiduciary protections ensure that they have an appropriate selection of investment options to choose from.[50] As the Department states, "Retirement Investors may incur transaction costs associated with moving the assets into new investments and accounts, and, because of the loss of economies of scale, the cost of investing through an IRA may be higher than through a Plan. Retirement Investors who roll out of ERISA-covered Plans also lose important ERISA protections, including the benefit of a Plan fiduciary representing their interests in selecting a menu of investment options or structuring investment advice relationships, and the statutory causes of action to protect their interests."

Retirement savers who rely on conflicted advice and make faulty rollover investments late in their working life or at the point of retirement, will find it difficult to recover from that decision. As the Department acknowledges, "Retirement Investors who are retirees may not have the ability to earn additional amounts to offset any costs or losses." This is particularly the case if they roll their assets into an illiquid investment, such as an annuity, where they can face significant financial penalties if they seek to reverse a bad decision.

Meanwhile, financial firms anxious to gain access to the trillions of dollars held in workplace retirement plans have strong incentives to encourage rollovers, even when that is not in the retirement saver's best interest. The "large sums of money eligible for rollover represent a significant revenue source for investment advice providers," the Department explains. "A firm that recommends a rollover to a Retirement Investor can generally expect to earn transaction-

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[49] While these recommendations would at least be held to a "best interest" standard under Reg. BI, that standard does not impose explicit documentation requirements comparable to those in the DOL proposal and it permits production-based contests that have in the past been shown to encourage inappropriate rollover recommendations. Neither Reg. BI nor the proposed exemption based on Reg. BI is sufficient to ensure that such recommendations truly reflect the best interests of the retirement saver.

[50] As we have noted elsewhere, the lack of financial sophistication among many employers, particularly but not exclusively among small employers, means that they too are often victims of conflicted, non-fiduciary advice from brokers and insurers, with the result that costs are often quite high and fund quality quite low in small retirement plans.

based compensation such as commissions, or an ongoing advisory fee, from the IRA, but may or may not earn compensation if the assets remain in the Plan." What the Department doesn't mention is that practices that are commonplace at both brokerage and insurance firms, and that would be permitted under its proposed exemption, encourage and reward rollover recommendations without regard to the negative impact on compliance with their "best interest" obligations. That includes financial rewards and other incentives offered as a part of production-based sales contests, which have been shown in the past to encourage inappropriate rollover recommendations.[51]

Having acknowledged the important role that rollover recommendations play in the retirement security of millions of Americans, the Department suggests in the proposing Release that it is meaningfully improving protections for retirement savers by affirming what should have been obvious all along, that "advice to take a distribution of assets from an ERISA-covered Plan is actually advice to sell, withdraw, or transfer investment assets currently held in the Plan." Furthermore, as the Preamble explains, "a distribution recommendation commonly involves either advice to change specific investments in the Plan or to change fees and services directly affecting the return on those investments." But what the Department gives with one hand, by repudiating its 2005 opinion letter that took the position that rollover recommendations did *not* generally constitute advice about plan assets, it takes away with the other, by requiring rollover recommendations to meet all five prongs of the five-part test to be considered fiduciary investment advice.

As a result, many if not most rollover recommendations will still not be considered fiduciary investment advice. Indeed, the only rollovers that would clearly be covered under the Department's interpretation of the "regular basis" test are rollovers to either an existing or newly established investment advisory account, where the adviser provides ongoing services. The Preamble suggests that rollovers to existing or newly established brokerage accounts might also meet the regular basis test. Past experience tells us, however, that many brokers will argue that such accounts do not constitute ongoing advisory relationships, since advice is offered on an "episodic" rather than "ongoing" basis. Indeed, it was primarily on this basis that the SEC chose to apply a non-fiduciary best interest standard to brokers, rather than adopt the uniform fiduciary standard for broker-dealers and investment advisers favored by Congress in the Dodd-Frank Act.

The Preamble discussion of the language requiring a mutual agreement that the advice would serve as a primary basis for the retirement saver's investment decision is similarly ambiguous. It states that, "the determination of whether there is a mutual agreement, arrangement, or understanding that the investment advice will serve as a primary basis for investment decisions is appropriately based on the *reasonable* understanding of each of the parties, if no mutual agreement or arrangement is demonstrated." It goes on to state that, "Written statements disclaiming a mutual understanding or forbidding reliance on the advice as a primary basis for investment decisions are not determinative, although such statements are appropriately considered in determining whether a mutual understanding exists." This fails to provide any meaningful insight into what would constitute a "reasonable" understanding, or how a written statement might be factored into the determination.

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[51] *See, e.g., Enf't Section of the Mass. Sec. Div. v. Scottrade, Inc.*, 327 F. Supp. 3d 345 (D. Mass. 2018), https://bit.ly/305YfHN.

The Department is explicit in stating that "a one-time sales transaction, such as the one-time sale of an insurance product, does not by itself confer fiduciary status under ERISA or the Code, even if accompanied by a recommendation that the product is well-suited to the investor and would be a valuable purchase." The Preamble suggests that such recommendations would only be covered where the insurance agent has or contemplates "an ongoing advice relationship with a customer," such as when the agent provides ongoing services in return for trailing commissions. Under such an approach, however, insurance agents will easily be able to structure their rollover recommendations to avoid triggering the definition of fiduciary investment advice. In addition, the vast majority of recommendations to roll plan assets to other non-securities, such as real estate, or bitcoin, or gold, would also almost certainly not be included in the definition of fiduciary investment advice. But this is precisely where the regulatory protections are weakest, the sales incentives are most toxic, and the protection of a strong fiduciary standard under ERISA is most needed.

Finally, all of this guidance about how the Department might interpret the definition and its application to rollover recommendations is found in the Preamble to the proposed new prohibited transaction exemption. It is not reflected in the text of the final rule reinstating the 1975 regulatory definition of fiduciary investment advice. It therefore does not have the force of law. Inevitably, firms will find ways to use this ambiguity to their advantage, and to the disadvantage of workers and retirees.

By reinstating the 1975 definition of fiduciary investment advice, the Department is depriving retirement savers of fiduciary protections where the need is greatest. If, as the Preamble suggests, the Department recognizes the potential risks associated with rollover recommendations and wishes to provide appropriate protections in light of those risks, it must revise the definition of fiduciary investment advice to ensure that it captures these recommendations.

H. The Department's interpretation regarding investor education creates a new loophole that allows materials that retirement savers perceive as advice to escape regulation as such.

Financial firms have long sought to avoid application of the fiduciary standard by portraying as "investor education" materials that retirement savers reasonably rely on as fiduciary advice. The risk that retirement savers will be misled is most prevalent when firms combine educational materials with product-specific examples, which the retirement saver naturally perceives as a recommendation. The Department's interpretation in the final rule preserves this practice, perpetuating firms' ability to avoid fiduciary obligations when providing what retirement savers reasonably perceive as advice. For example, it does not clearly limit firms' ability to combine plan information with references to the appropriateness of individual investment options or distribution options. It does not clearly restrict firm's ability to address specific investment products or distribution alternatives as part of the "general financial information" provided to plan participants and IRA investors. And it allows models and interactive materials financial firms provide to include specific alternatives, without adequate provisions to prevent retirement savers from relying on them as fiduciary investment advice. As such, nothing in the interpretation prevents firms from steering retirement savers toward the investment options and actions that are most profitable for them while claiming the investor education exemption from the definition of fiduciary investment advice.

I. Reinstatement of the 1975 definition of fiduciary investment advice is neither legally mandated nor appropriate.

The Department justifies its decision to reinstate the 1975 definition of fiduciary investment advice, and to do so without any opportunity for comment or any consideration of whether the definition should be revised, on the grounds that it is simply "conducting the ministerial task of implementing the mandate issued by the Fifth Circuit" when it vacated the Department's 2016 rulemaking. While it is certainly understandable that the Secretary of Labor would view this personal and professional win on behalf of his former clients as dispositive, the Department greatly overstates the extent to which this is a settled matter. On the contrary, viewed in the context of the 2016 rule's litigation, it is far from clear that the 1975 regulatory definition, with its five-part test, is appropriate or that the issue is as settled as the Department seeks to suggest.

1. The Fifth Circuit decision is an outlier.

By any measure, the decision of the Fifth Circuit panel is an outlier. It is inconsistent with other decisions upholding all aspects of the rule, including the rule's revisions to the regulatory definition of fiduciary investment advice. In fact, the two judges on the Fifth Circuit panel who decided the case are the only judges in the nation who took the position that the rule should be struck down. Seven judges collectively upheld the rule in various challenges. In particular, the District Court of the District of Columbia took the exact opposite position in a far more deliberate, dispassionate opinion than that issued by the Fifth Circuit panel. The D.C. court held that the revised definition was not only consistent with the statute, but that it was more consistent with the statute than the five-part test it replaced.

It is only the change in Administration, and the subsequent Department decision to stop defending the case and allow it to be dismissed, that left the Fifth Circuit's outlier decision as the prevailing opinion. The D.C. Circuit case was briefed and scheduled for oral arguments on appeal when the Department changed its position and stopped defending the rule.[52] At that point, in a joint stipulation, the D.C. case was dismissed and thus never fully litigated.[53] If the Department had appealed, as almost certainly would have occurred in a Democratic administration, the D.C. Circuit case would have continued, possibly with a very different outcome. The decision by the Department to stop defending the case also affected the outcome in the Fifth Circuit, where the Court denied motions made by several other parties to intervene to continue defending the rule. In other words, Secretary Scalia's former clients didn't prevail on

[52] Appellant's Unopposed Motion to Continue Oral Argument, *Nat'l Assoc. of Fixed Annuities (NAFA) v. U.S. Dep't of Labor*, Case No. 16-5345, (D.C Cir. Nov. 6, 2017) ("Following a change in Administration, and while these lawsuits were ongoing, DOL changed its positions regarding the Rule and the Rule's applicability date.").

[53] Joint Stipulation of Dismissal, *Nat'l Assoc. of Fixed Annuities (NAFA) v. U.S. Dep't of Labor*, Case No. 16-5345, (D.C Cir. Mar. 23, 2018).

the merits against an adverse party, they were handed a victory by the Trump Administration, which was intent on erasing every vestige of the Obama Administration legacy.

2. The Fifth Circuit decision is intemperate.

The majority opinion in the Fifth Circuit appeal is intemperate, inappropriately "crossing over from legal arguments to fundamental arguments against the rule from a business perspective."[54] Far from acting as a neutral arbiter deciding legal issues, the panel majority allowed their contempt for the Department of Labor and its policy determinations to infect their opinion. For example, the decision uses loaded terms like "burdensome" and "onerous" to describe the requirements placed on market participants. It states that, "Large portions of the financial services and insurance industry have been 'woke' by the Fiduciary Rule and BIC Exemption." It refers to "DOL's semantically created world," states that the Department engaged in a "regulatory abuse of power [to claim] unheralded power to regulate a significant portion of the American economy," and that "the vice in BICE… exploits DOL's narrow exemptive power…" Rather than relying on the record before it, the majority went on its own fact finding mission, concluding that the rule "has already spawned significant market consequences" and that "the technological costs and difficulty of compliance compound the inherent complexity of the new regulations." The use of such contemptuous language signals a position stronger than one solely focused on dispassionate legal analysis regarding the Department's authority to enact the rule as written.

3. The Fifth Circuit decision negates and subverts the plain language of ERISA and clear congressional intent.

In its zeal to vacate the conflict of interest rule and its related exemptions, the panel majority issued a decision that negates and subverts the plain language of ERISA and clear congressional intent underlying ERISA. As the D.C. district court found in its decision upholding the rule, the revised definition of investment advice adopted by the Department is not just consistent with the statutory definition, it is more consistent with the statute than the five-part test it replaced. The decision states, "Indeed, if anything, it is the five-part test – and not the current rule – that is difficult to reconcile with the statutory text. Nothing in the phrase 'renders investment advice' suggests that the statute applies only to advice provided 'on a regular basis.'"[55] In this and other ways, the Fifth Circuit majority's decision deviates from universally accepted understandings regarding ERISA and is inconsistent with the widely accepted case law.

The case law in the Fifth and other circuits is clear. A person is a fiduciary under ERISA if they satisfy the statutory definition in §3(21)(A) of ERISA.[56] Moreover, ERISA applies a

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[54] John Manganaro, *Confusion Abounds After Fifth Circuit Decision Vacates DOL Fiduciary Rule,* planadviser (Mar. 16, 2018), https://bit.ly/3jNaUay.
[55] The court also emphatically rejected both the plaintiff's argument that the Department had overstepped its authority by imposing a fiduciary duty as a condition of the prohibited transaction exemption and that it had overstepped by "creating" a private right of action.
[56] *See, e.g., Donovan v. Mercer*, 747 F.2d 304, 305 (5th Cir. 1984) ("Under the Act, "fiduciary" is defined as follows….Mercer is a fiduciary as a matter of law, as that term is defined in ERISA."); *Kopp v. Klein,* No. 12–10416

functional test to determine who is an ERISA fiduciary, such that the threshold question in determining an individual's fiduciary status is "whether that person was … performing a fiduciary function."[57] Even the industry groups that challenged the 2016 rule have acknowledged these points, as their amicus briefs in other contexts show. The Chamber of Commerce has argued, for example, that, "The appropriate inquiry is not whether the person 'is' a fiduciary but whether, in performing the task in question, the person performed one of the functions to which fiduciary responsibility attaches. The functions to which fiduciary responsibility attaches are enumerated in the statute."[58]

As the case law also makes clear, ERISA's fiduciary duty is intended to apply broadly, consistent with ERISA's remedial purpose to protect retirement savers.[59] Moreover, ERISA reflected the view of Congress that it was not sufficient to rely on the common law of trusts and that neither existing state nor federal law had been effective in preventing abuses.[60] Thus, the

(5th Cir. 2013) ("ERISA defines the scope of the fiduciary role…" *Bank of Louisiana v. Aetna U.S. Healthcare Inc.*, 468 F.3d 237 (5th Cir. 20016) ("A party acts in a fiduciary capacity when he… renders investment advice for a fee to the plan… 29 U.S.C. § 1002(21)(A)"); *Lockheed Corp. v. Spink,* 517 U.S. 882 (1996) (ERISA fiduciary status is "rooted in the text of ERISA's definition of fiduciary"); *Brock v. Self*, 632 F. Supp. 1509, 1521 (W.D. La. 1986) (stating that [A]ny fiduciary duties owed…under ERISA…must be adjudged solely by reference to ERISA."); *See also Blatt v. Marshall & Lassman*, 812 F.2d 810, 812 (2d Cir. 1987) ("The term "fiduciary" is defined in Section 3(21)(A) of ERISA."); *Mutual Life Ins. Co. of N.Y. v. Yampol*, 840 F.2d 421, 425 (7th Cir.1988) ("[I]t is clear that under the ERISA scheme any person who falls within the scope of the Sec. 1002(21)(A) definition is a fiduciary.").

57 *See, e.g., Pegram v. Herdrich*, 530 U.S. 211 (2000) (the threshold question in determining fiduciary status under ERISA is "whether that person was acting as a fiduciary (that is, was performing a fiduciary function…)"); *Lockheed* (when a person "fulfill[s] certain defined functions," that person becomes a fiduciary under § 3(21)(A)); *Lee v. Verizon*, No. 14-10553 (5th Cir) (It is a "function-centric consideration" when "distinguish[ing] between fiduciary and non-fiduciary roles."); *Perez v. Bruister*, Nos. 14–60811 (5th Cir 2016) ("A person assumes fiduciary status …as a "functional fiduciary" under the broad authority, control, or advice provisions of ERISA § 3(21)(A)").

58 *See* Brief Amicus Curiae of the U.S. Chamber of Commerce, *Tatum v. R.J. Reynolds*, CASE NO. 04-1082 (4th Cir.) ("[F]iduciary responsibility attaches to the function -- by whomever performed – rather than to the actor….The appropriate inquiry is not whether the person 'is' a fiduciary but whether, in performing the task in question, the person performed one of the functions to which fiduciary responsibility attaches. The functions to which fiduciary responsibility attaches are enumerated in the statute.").

59 *See Mertens v. Hewitt Assocs*., 508 U.S. 248, 262 (1993) (ERISA does not define "fiduciary" "in terms of formal trusteeship, but in functional terms of control and authority over the plan, . . . thus expanding the universe of persons subject to fiduciary duties . . . ."); *Donovan* ("It is clear that Congress intended the definition of "fiduciary" under ERISA to be broadly construed."); *Bannistor v. Ullman*, 287 F.3d 394 (5th Cir. 2002) ("The term 'fiduciary' is liberally construed in keeping with the remedial purpose of ERISA. *Am. Fed. of Unions Local 102 Health & Welfare Fund v. Equitable Life Assurance Soc'y of the United States, 841 F.2d 658, 662* (5th Cir.1988); *Musmeci v. Schwegmann Giant Super Markets,* 159 F. Supp. 2d 329 (5th Cir. 2003). ("The term 'fiduciary' is *liberally construed* in keeping with the remedial purpose of ERISA. Citing *Am. Fed. of Unions Local 102 Health & Welfare Fund)*; *Brock v. Hendershott*, 840 F.2d 339, 342 (6th Cir. 1988) citing *Donovan*, held "ERISA fiduciary…was intended to be interpreted broadly by Congress."); Sladek v. Bell System Mgmt. Pension Plan, 880 F.2d 972, 976 (7th Cir. 1989) ("As we observed just last year, this Court has consistently given the definition of 'fiduciary' found in Sec. 1002(9) a 'broad reading'"; *Olson v. E.F. Hutton & Co.*, 957 F.2d 622, 625 (8th Cir. 1992) ("[T]he term fiduciary is to be broadly construed.")

60 *Varity Corp. v. Howe,* 516 U.S. 489, 497 (1996) ("ERISA's standards and procedural protections partly reflect a congressional determination that the common law of trusts did not offer completely satisfactory protections."); 120 Cong. Rec. 29928, 29932 (Aug. 22, 1974) (Senator Harrison Williams Jr., introducing ERISA conference report) ("Neither existing State nor Federal law has been effective in preventing or correcting many of…abuses" such as "self-dealing, imprudent investing, and misappropriation of plan funds[.]"); S. Rep. No. 92-1150 (Aug. 18, 1972) (recognizing that federal regulation was needed due to the insufficiencies of the common law of trusts); 120 Cong.

position of the Fifth Circuit panel majority, that only a fiduciary relationship under common law would create a fiduciary relationship under ERISA, is inconsistent with the plain language of ERISA and would effectively undo the clear intent of Congress. In short, by imposing additional requirements to satisfy the statutory definition that have no statutory or judicial basis, the majority effectively rewrote the statute, negating and subverting ERISA's plain language and the congressional intent underlying it.

The panel majority does this in several ways. First it infers that ERISA fiduciary status is constrained by the common law of trusts, despite the fact that the statute says nothing about the common law of trusts. In fact, in passing ERISA, Congress explicitly departed from the common law of trusts to create a broader definition of who is a fiduciary because the common law of trusts was deemed insufficient to protect retirement investors from harm.[61] If Congress had intended that ERISA adopt the common law definition of fiduciary, it would have drafted the statute accordingly, to say for example that, "Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan, consistent with how that term is understood under the common law." But it did not. Instead, it explicitly defined the circumstances where a person is a fiduciary under ERISA. Indeed, Secretary Scalia's own father recognized that ERISA has an "artificial" definition of fiduciary that goes beyond the common law.[62]

Similarly, the Fifth Circuit panel majority infers that ERISA fiduciary status turns on whether there is a relationship of "trust and confidence," despite the fact that the statute says nothing about a relationship of trust and confidence being necessary to establish ERISA fiduciary status. It is telling that neither the majority panel nor the plaintiffs in the Fifth Circuit case ever cited any legal authority that holds that the 1975 rule is rooted in the common law of trusts or that ERISA *requires* a relationship of trust and confidence to find fiduciary status.[63] Ironically, even if this interpretation were correct, the outdated 1975 regulatory definition reaffirmed by the court has precisely the opposite effect. By requiring advice to be provided on a "regular basis" and subject to a "mutual agreement or understanding" that the advice will form a "primary basis" for the retirement saver's investment decision, the definition undermines investor's legitimate expectations of trust and confidence in their dealings with financial professionals who clearly serve in an advisory capacity and market themselves as trusted advisers.

As a result of these and other creative inferences, the panel majority has effectively rewritten ERISA, imposing additional requirements to find fiduciary status that are unambiguously absent from the statutory text and that were clearly not intended by Congress.[64] A clear congressional desire to expand the scope of fiduciary standards of conduct should not be so undermined.[65]

Rec. 3977, 3983 (1974) (Rep. Perkins) (broader definition of fiduciary was necessary to the proper protection of employee benefit plans).

[61] *Id.*

[62] *Mertens*, 508 U.S. 248, 255, n.5 (1993).

[63] *See Mutual Life Ins. Co. of N.Y* ("[T]here is no need to supplement the Sec. 1002(21)(A) definition by grafting onto it any additional qualifications one must satisfy before being deemed a 'fiduciary' with respect to a plan for purposes of ERISA.")

[64] *Id.*

[65] *Brock*, citing *Eaton v. D'Amato*, 581 F. Supp. 743, 746 (D.D.C.1980).

The panel majority is also patently wrong when it asserts that the five-part test in the 1975 definition reflects the common law of trusts. The common law of trusts does not require an ongoing relationship or reliance on the advice when determining fiduciary status. On the contrary, fiduciary relationships, including attorney-client and doctor-patient relationships, are routinely established at common law by one-time transactions. For example, if a person goes to a lawyer for a one-time transaction, such as to get a will executed, the lawyer still owes the client a fiduciary duty. If someone goes to a doctor for a one-time transaction, such as emergency surgery, the doctor still owes the client a fiduciary duty. Moreover, these relationships do not require the advice to be relied upon for it to be deemed fiduciary. If a difficult client doesn't follow his lawyer's advice, that doesn't absolve the lawyer from complying with her fiduciary duty in providing that advice.

The panel majority is equally wrong when it asserts that ERISA incorporates the definition of fiduciary investment advice under the Investment Advisers Act and that the five-part test in the regulatory definition is consistent with that intent. It is true that there are significant similarities between the ERISA and Advisers Act definitions, but there are also important differences. For example, in perhaps the most significant difference, even though investment advisers typically provide ongoing services, the definition does not specify that the advice has to be provided on a regular basis to be considered fiduciary investment advice under the Advisers Act. On the contrary, the SEC has consistently held that an investment adviser's fiduciary obligations follow the contours of the relationship, and investment advisers who provide one-time advice subject to an hourly fee are held to a fiduciary standard consistent with that role. In addition, the Advisers Act includes a broker-dealer exclusion, whereas ERISA does not. The logical conclusion is that, in departing from the Advisers Act model in this way, Congress intended to capture certain broker-dealer relationships that were not covered by the Advisers Act. The five-part test does not achieve this goal. As such, the five-part test is not only inconsistent with the statutory language in ERISA, it is also inconsistent with the Advisers Act definition of fiduciary investment advice the panel majority argues it is intended to emulate.

Much of the panel majority's criticism of the rule reflects the judges' view that brokers and insurers should not be held to a fiduciary standard. But the panel majority misses the fact that the Department wasn't broadly applying a fiduciary standard to brokerage and insurance industries in areas outside its jurisdiction, it was exercising its authority to revise the regulatory definition of what constitutes "render[ing] investment advice" under ERISA.[66] Under *Chevron*, a court must consider whether Congress has "unambiguously foreclosed the agency's statutory interpretation."[67] Nothing in the statute forecloses another definition of investment advice. And, in fact, the definition adopted by the Department in the 2016 rule more closely tracks the statutory language than does the five-part test in the 1975 regulatory definition. Accordingly, nothing in the Fifth Circuit decision forecloses the Department's ability to adopt a revised definition now.

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[66] *See American Federation of Union Local 102 v. Equitable Life Assurance Society*,m841 F.2d 658, 664 (5th Cir. 1988) (making clear that the 1975 rule "clarifie[d] the term 'investment advice.'"); *Thomas Head Greisen Employees Trust v. Buster D*, 24 F. 3d 1114 (9th Cir. 1994). ("The Department of Labor issued regulations that further define "rendering investment advice" within the meaning of ERISA.").

[67] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 468 U.S. 837 (1984).

4. The 1975 regulatory definition of fiduciary investment advice, which the Fifth Circuit panel majority endorsed, is harder to reconcile with ERISA's statutory language and purposes than the revised definition in the 2016 rule.

The practical effect of the 1975 regulatory definition of fiduciary investment advice is that it enabled broker-dealers and insurers to function as retirement investment advisers without being subject to the fiduciary duties appropriate to their advisory role. In other words, instead of requiring all those who were functioning as trusted advisers to give retirement investment advice that is both prudent and loyal, the antiquated regulatory definition with its artificial five-part test made it all too easy for financial firms and investment professionals to evade their fiduciary obligations. As discussed above, whole categories of advice, including rollover recommendations, were automatically carved out of the definition by virtue of the fact that the advice was not provided on "a regular basis." In other instances, firms that marketed their services as one-on-one, personalized advice designed to promote the customer's best interest turned around and used boilerplate language to disclaim away their fiduciary obligations based on the mutual agreement and primary basis prongs of the definition.

Those technical impediments were not found in ERISA, have worked to frustrate its statutory goals, and defeat retirement savers' legitimate expectations. As the D.C. District Court ruled, "Indeed, if anything, it is the five-part test – and not the current [2016] rule – that is difficult to reconcile with the statutory text." The 2016 revised definition of investment advice comports with the statutory language in ERISA in a way that the 1975 definition does not. It does not include any of the technical impediments that have no basis in ERISA's statutory text and that have facilitated evasion by market participants, frustrating ERISA's broad remedial purpose.

J. The Department should withdraw the final rule reinstating the 1975 regulatory definition of fiduciary investment advice and propose a pro-investor revised definition.

Contrary to its assertions in the final rule reinstating the 1975 regulatory definition of investment advice, the Department is under no "mandate" arising out of the Fifth Circuit decision to reinstate the definition. Instead, reinstating the 1975 definition is just one of the options available to the Department, and it is the worst of the available options. Because the Fifth Circuit decision is both an outlier and was incorrectly decided, the Department should instead adopt a revised definition of investment advice that more closely tracks the statutory language in ERISA. The goal should be to capture the full range of services retirement savers reasonably rely on as trusted retirement investment advice in order to ensure that retirement savers receive critical protections against the harmful impact of conflicts of interest when they turn to financial professionals for trusted advice about their retirement savings.

By reinstating the 1975 regulatory definition, the Department is not only leaving retirement savers bereft of fiduciary protections when they need those protections most, it is enabling deception bordering on the fraudulent on the part of financial firms. If, as they argued in court, financial firms truly are "mere salespeople engaged in arm's length commercial transactions," then they should not be permitted to market themselves as trusted advisers. If, on the other hand, they are truly functioning as the trusted advisers they market themselves to be, then clearly the fiduciary standard should apply, including in instances that will not be captured under the reinstated 1975 regulatory definition.

The Department has the authority to solve that problem and a moral, if not a legal, obligation to do so. It is a gross abuse of its authority that it has chosen instead to reinstate the 1975 definition, without even considering whether revisions are needed to bring that antiquated definition up-to-date with current market realities and without any opportunity for interested parties to weigh in. It is an abuse of process that we urge the Department to correct by withdrawing the final rule and issuing a new proposal consistent with the statutory language, clear congressional intent, and the best interests of millions of American workers and retirees.

III. The SEC's deeply flawed, non-fiduciary Regulation Best Interest is not an appropriate model for a prohibited transaction exemption under ERISA.

When Congress enacted ERISA, it incorporated the highest fiduciary standard – one that requires fiduciaries to act with undivided loyalty and solely in the interest of the plan and plan participants. This is appropriate in light of the critically important role that tax advantaged retirement accounts play in ensuring the financial well-being of workers and retirees, the well-documented toxic impact that conflicts of interest can and do have on the advice retirement savers receive, and the inability of most retirement savers to fend for themselves and protect themselves from such conflicts. While the Department has the authority to adopt exemptions to ERISA's prohibited transaction rules, it must include protective provisions in any such prohibited transaction exemption (PTE) sufficient to ensure that the interests of plans and plan participants are protected from the harmful impact of permitted conflicts.[68] By basing its proposed new class exemption on the SEC's deeply flawed Reg. BI, the Department has failed to meet its obligations to ensure that plans and plan participants are protected.

There are several reasons why Reg. BI is not an appropriate basis for the proposed PTE, starting with the fact that it is explicitly not a fiduciary standard. Nor does it include a true best interest obligation, as that term is reasonably understood by investors. Its provisions to restrict conflicts of interest are completely inadequate to prevent those conflicts from tainting the advice that brokers provide. And the required new "plain English" disclosures for brokers and advisers are anything but, leaving investors without the ability to make an informed choice between different types of accounts and different financial professionals. As such, it cannot serve as an adequate basis for a prohibited transaction exemption under ERISA.

We therefore urge you to withdraw the proposed exemption in its entirety and to start from scratch on a new regulatory approach that is focused on protecting the interests of retirement savers, not preserving the excess profits of powerful financial interests.

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[68] *See* 29 U.S. Code § 1108(a). Exemptions from prohibited transactions; 26 U.S. Code § 4975(c)(2).

A. Reg. BI is not a fiduciary standard.

When it adopted Reg. BI, the SEC ignored the will of Congress,[69] the recommendation of its own staff,[70] the views of a majority of commenters who had weighed in on the issue,[71] and the recommendation of its Investor Advisory Committee,[72] all of which supported adoption of a uniform fiduciary standard for broker-dealers and investment advisers when providing personalized investment advice to retail investors. Listening only to brokerage firms and their lobbyists, the SEC chose instead to adopt a new non-fiduciary "best interest" standard for broker-dealers, emphasizing as it did so that the new standard was "separate and distinct from the fiduciary duty that has developed under the Advisers Act."[73] In crafting that standard, the Commission was careful to include all the provisions from Section 913(g) of the Dodd-Frank Act intended to limit a broker's fiduciary obligations, without imposing the fiduciary duty itself and without incorporating an obligation to act "without regard to" conflicts of interest that might otherwise taint the broker's recommendations.[74] That language, in particular, is needed to bridge the gap between the high fiduciary standard imposed by ERISA and the weaker "best interest" standard imposed under the FINRA suitability standard and the Advisers Act fiduciary duty as interpreted and enforced by the SEC.

The SEC's convoluted, irrational explanation for why it chose not to include the "without regard to" language in its formulation of the best interest standard makes clear that its only reason was that members of the brokerage community objected. According to the proposing Release, commenters from the broker-dealer community had raised the concern that the "without regard to" language could be read as prohibiting all conflicts of interest, including those arising from the receipt of commissions.[75] The SEC obviously recognized that those concerns were entirely unfounded. The Release pointed, for example, to provisions in 913(g) that explicitly allow for the receipt of commissions, principal trades, and sales from a limited menu of proprietary products as "mak[ing] clear that the overall intent of Section 913 was that a 'without regard to' standard did not prohibit, mandate or promote particular types of products or business models, and preserved investor choice among such services and products and how to pay for these services and products (e.g., by preserving commission-based accounts, episodic advice, principal trading and the ability to offer only proprietary products to customers)."[76]

The SEC nonetheless chose to ignore the will of Congress and adopt a weaker standard in order to accommodate those unfounded industry concerns. It explained its decision this way, "In

[69] As reflected in Section 913(g) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which authorized the SEC to adopt a uniform fiduciary standard for broker-dealers and investment advisers that is no weaker than the existing Advisers Act fiduciary standard.

[70] As reflected in the staff study mandated under Section 913 of the Dodd-Frank Act, which recommended that the SEC engage in rulemaking to adopt a uniform fiduciary standard and outlined a number of specific recommendations regarding how to approach the rulemaking.

[71] As the SEC acknowledges in the proposing Release for Reg. BI, "Most commenters expressed support for a uniform fiduciary standard of conduct. " Reg. BI Proposing Release at 25.

[72] Recommendation of the SEC Investor Advisory Committee, Broker-Dealer Fiduciary Duty (Nov. 22, 2013), https://bit.ly/2EjP5Ps.

[73] Regulation Best Interest, 83 Fed. Reg. 21,574, 21,585 (proposed May 9, 2018).

[74] *Id*. at 21,586.

[75] *Id*. n. 975.

[76] *Id.* at 21,586.

lieu of adopting wording that embodies apparent tensions, we are proposing to resolve those tensions through another formulation that appropriately reflects what we believe is the underlying intent of Section 913."[77] Far from reflecting the underlying intent of Section 913, however, the new standard reflected instead the existing suitability standard under FINRA rules, a standard Congress explicitly sought to replace with a uniform fiduciary standard. The language the SEC adopted for its formulation of the best interest standard – "without placing the[ir] financial or other interest . . . ahead of the interest of the retail customer" – is modeled directly on FINRA's guidance regarding its suitability standard.[78]

This was no accident. Almost as soon as the Administration changed, financial firms and their lobbyists dropped their prior support for rulemaking under 913(g) of the Dodd-Frank Act. Instead, they began peppering the SEC with letters encouraging the agency to adopt a suitability-plus-disclosure approach to broker-dealer regulation, while characterizing it as a best interest standard tailored to the broker-dealer business model.[79] And that is precisely what the Commission chose to do.[80] While the SEC has subsequently tried to paper over its decision not to adopt a fiduciary standard for broker-dealers,[81] Chairman Clayton's vague assertions that Reg. BI is based on "fiduciary principles" cannot overcome the SEC's concrete actions in rejecting adoption of a fiduciary standard.

The Department cannot reasonably base a PTE under ERISA on a non-fiduciary, suitability-based standard that has historically been shown to be inadequate to protect investors from the harmful impact of conflicts of interest.[82]

B. Reg. BI does not require brokers to do what is best for their customers.

Further evidence that the SEC intended its new best interest standard to codify, rather than enhance, obligations imposed under the FINRA suitability standard can be found in the Commission's refusal to define or clarify what it means by "best interest." Investor advocates,

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[77] *Id.*

[78] *See* FINRA Regulatory Notice 11-02; FINRA Rule 2111 (Suitability) FAQ ("In interpreting FINRA's suitability rule, numerous cases explicitly state that 'a broker's recommendations must be consistent with his customers' best interests.' The suitability requirement that a broker make only those recommendations that are consistent with the customer's best interests *prohibits a broker from placing his or her interests ahead of the customer's interests.*")(emphasis added).

[79] For a further discussion of this issue, *see* Barbara Roper and Micah Hauptman, CFA, Letter to SEC regarding Standard of Conduct for Investment Advisers and Broker-Dealers (Sept. 14, 2017), https://bit.ly/30T6nuC at 75-76. *See also* Roper and Hauptman, Letter to SEC Chairman Jay Clayton (Mar. 15, 2018), https://bit.ly/2P1ZGkh.

[80] *See, e.g.*, Regulation Best Interest, 83 Fed. Reg. 21,574, 21,576 n.7, which explicitly acknowledges that the requirement to make recommendations that are "consistent with his customers' best interests," is among several provisions in the rule that "reflect obligations that already exist under the FINRA suitability rule or have been articulated in related FINRA interpretations and case law." The enhancements to suitability that the SEC claims in Reg. BI are enhancements to the statutory standard, which is satisfied through disclosure, not to the suitability standard under FINRA rules.

[81] *See, e.g.*, Transcript of Miami Investor Roundtable, at 13 https://bit.ly/2BBvjx3 (Chairman Clayton: "We then raise the standard of care that broker-dealers owe their clients to embody what I would call a true fiduciary concept, that a broker can't put their interests ahead of the client's.").

[82] *See, e.g.*, Sept. 2017 Letter from Roper and Hauptman regarding Standard of Conduct for Investment Advisers and Broker-dealers.

including the SEC's Investor Advisory Committee (IAC), urged the Commission to adopt a principles-based definition of best interest. The IAC noted that clarification was needed because the same best interest terminology "has been used to describe standards as different as the existing suitability requirement under FINRA rules and the now defunct Department of Labor conflict of interest rule."[83] Without further clarification, neither investors nor brokers will know where the SEC's new standard is intended to fall within that spectrum, the group argued. To provide that much needed clarity, it urged the Commission to adopt a principles-based definition requiring brokers and investment advisers alike to "recommend the investments, investment strategies, accounts, or services, from among those they have reasonably available to recommend, that they reasonably believe represent the best available options for the investor."[84]

The SEC refused to provide this clarification. In justifying that decision, the SEC drew a false equivalency between adopting a principles-based definition of the term best interest and adopting a "more prescriptive" approach.[85] No one has suggested or could reasonably expect the SEC to delineate all the conduct that would, or would not, satisfy a best interest standard. But that does not mean the agency should not more clearly identify the principles it will apply when determining whether a broker has met that standard. In addition to the IAC, numerous organizations including our own have called on the SEC to at least make clear how the new standard differs from the existing FINRA suitability standard. For example, six investor advocacy organizations made this point in a letter to SEC Chairman Clayton shortly before the rule was finalized. In it, the groups urged the agency to both define the term best interest and "support its best interest definition with concrete examples of practices that are required under Reg BI that are not required under FINRA suitability as well as practices that are prohibited under Reg BI that are not prohibited under FINRA suitability."[86]

But, despite a statement in the final rule Release suggesting that the SEC would provide additional "interpretations and guidance" regarding the meaning of best interest, it has yet to offer a single concrete example of conduct that would have been permitted under FINRA suitability that would be prohibited under Reg. BI or that would be required under Reg. BI but not FINRA suitability. For example, while the SEC has claimed that its new best interest standard is intended to require a greater focus on costs than is required under suitability, the examples it has provided fall well within the range of conduct FINRA has taken enforcement actions against under its suitability standard. Meanwhile, although the Commission has failed to provide clarity about what the new standard *does* require, it goes to some lengths to make clear what it does not require. Specifically, it makes clear that broker-dealers are permitted to recommend investments that cost the investor more and pay higher compensation to the broker as long as they "consider" the costs and provide some rationale for the recommendation. Here again, the requirement to "consider" costs mirrors FINRA guidance regarding its suitability

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[83] Recommendation of the SEC Investor Advisory Committee, Regarding Proposed Regulation Best Interest, Form CRS, and Investment Advisers Act Fiduciary Guidance (Nov. 7, 2018), https://bit.ly/3f7Ph1d.
[84] *Id.* (The IAC specified that the "determination regarding the best reasonably available options should be based on a careful review of the investor's needs and goals, as well as the full range of the reasonably available products', strategies', accounts', or services' features, including, but by no means limited to, costs.")
[85] Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 Fed. Reg. 33,318, 33,321 (July 12, 2019).
[86] Comment Letter from Heather Slavkin Corzo, AFL-CIO, et al, to Jay Clayton, Chairman, Sec. & Exch. Comm'n, April 26, 2019, at 3, https://bit.ly/2Ddu6gX.

standard,[87] and here again the Commission has ignored requests to clarify whether or how the standard differs from obligations that already exist under FINRA suitability.

Meanwhile, statements by the SEC that the best interest standard in Reg. BI is similar to the best interest standard under the Advisers Act reinforce rather than allay concerns that the standard is too weak to protect investors. While claiming that the Advisers Act fiduciary duty requires investment advisers to place their clients' interests first at all times, the SEC has all too often allowed that Advisers Act obligation to be satisfied through disclosure alone. And firms have shown that they can and will use that gap in the standard to profit unfairly at their customers' expense. The result is that advisers have been held to a best interest standard in name only, and the Commission's Reg. BI regulatory package perpetuates that weak and ineffective standard for brokers and advisers alike.

The SEC's refusal to clarify the meaning of best interest is particularly problematic in the context of an industry campaign designed to undermine the agency's ability to enforce principles-based standards. Trade associations representing firms dually registered as broker-dealers and investment advisers, many of whom were caught up in the SEC's share class selection disclosure initiative, recently filed a rulemaking petition with the agency in which they accuse the SEC of "regulation through enforcement" and argue that it has no authority to take enforcement actions against conduct that is not specifically spelled out in explicit rules.[88] Since these same groups opposed any clarification of Reg. BI's best interest standard, it seems clear that a primary goal of their campaign is to ensure that the SEC does not use its enforcement authority under Reg. BI to give real meaning to its best interest standard.

By refusing to clarify the meaning of best interest, the agency is effectively leaving it to broker-dealer firms – the regulated industry – to develop their own self-serving interpretations. Firms that have relentlessly lobbied for the weakest possible standard and the least accountability are unlikely to suddenly do an about-face and implement the standard in a way that would deliver strong protections to their customers. As a result, there is no reason to expect that the standard will cause a meaningful improvement in broker-dealer conduct. Certainly, we've seen no evidence of significant changes in broker-dealer practices since Reg. BI was implemented.

The Department cannot reasonably base a PTE on such a vague and undefined standard. At the very least, the Department has an obligation to wait until further evidence is in regarding the impact of Reg. BI, if any, on broker-dealer conduct. Until it has that evidence, it cannot reasonably reach a finding that a PTE modeled on Reg. BI will be sufficiently protective of plans and plan participants.

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[87] FINRA Rule 2111 (Suitability) FAQ ("Some of the cases in which FINRA and the SEC have found that brokers placed their interests ahead of their customers' interests involved cost-related issues. The cost associated with a recommendation, however, ordinarily is only one of many important factors to consider when determining whether the subject security or investment strategy involving a security or securities is suitable.").

[88] Letter from Barbara Roper, CFA, to SEC, regarding File No. 4-761, Rulemaking Petition to End the Commission's "Backdoor" Regulation of 12b-1 Fees (Jun. 15, 2010), https://bit.ly/3g6Jjip.

C. Reg. BI does not adequately protect investors from the harmful impact of conflicts of interest.

The conflict provisions in Reg. BI are completely inadequate to protect investors from investment advice tainted by conflicts of interest. Under Reg. BI, conflicts of interest that operate at the firm level are addressed exclusively through disclosure. For conflicts that operate at the level of the individual registered representative, firms have an undefined obligation under Reg. BI to "mitigate" as well as disclose the conflict. The SEC has failed to clarify what standard it will use to determine whether mitigation is sufficient, leaving it to firms to determine for themselves what steps are required. We've seen no evidence since the rule was implemented that it is forcing significant changes in harmful industry practices. As such, it cannot serve as an appropriate substitute for ERISA's duty to act with undivided loyalty.

Brokerage firms' profits depend on their success in selling the products and services that generate the most income for them. As a result, they have a strong incentive to steer investors toward the products, accounts, and services that are most profitable for the firm, rather than those that are best for the customer. Reg. BI does nothing to limit such conflicts. It does not even prohibit firms from artificially creating incentives to encourage the sale of those more profitable products and services. Instead it relies exclusively on disclosure to address firm-level conflicts, even though the ineffectiveness of disclosure in protecting investors from the harmful impact of conflicted advice is well documented.

When it comes to conflicts that operate at the level of the individual registered representative, the SEC leaves it to firms to decide how best to mitigate conflicts present in their business model. That includes both external conflicts, such as the fact that some products pay more to the seller than others, as well as the incentives the firms themselves create to encourage their reps to recommend particular products and services that are profitable for the firm. CFA and others encouraged the SEC to specify in the rule text that policies and procedures to mitigate conflicts have to be sufficiently rigorous to prevent the conflict in question from inappropriately influencing the recommendation, but the Commission refused to do so.[89] Not only did the Commission refuse to add this clarification to the rule text, it has also failed to provide clear guidance in the final rule Release regarding the standard it will use to determine whether policies and procedures to mitigate conflicts are adequate. The SEC's refusal to take even the minimal step of prohibiting firms from artificially creating incentives that encourage and reward harmful advice suggests the standard will not be high.

The limited guidance the SEC has provided suggests that firms will be given significant discretion to determine what conflicts to mitigate and how, with little concern that the SEC will second-guess those choices. The Release states, for example, "[W]e believe that broker-dealers are most capable of identifying and addressing the conflicts that may affect the obligations of their associated persons with respect to the recommendations they make, and therefore are in the best position, to affirmatively reduce the potential effect of these conflicts of interest such that

[89] The SEC did add language to this effect with regard to policies and procedures to address conflicts related to limited menus. If anything, however, the Commission's decision to include the requirement in one small area, but not with regard to mitigation policies and procedures more generally, suggests it intended to set a weaker standard for conflict mitigation generally.

they do not taint the recommendation."[90] The SEC's approach ignores that fact that, for decades, all too many brokers dispensing investment advice to retail customers have intentionally taken advantage of their customers' trust by recommending the high-paying investments that are most profitable for them, but that saddle customers with high costs, substandard performance, and unnecessary risks, effectively enriching themselves at their customers' expense. The practice is deeply ingrained and hugely profitable. It is, therefore, completely unrealistic to expect that brokers subject to Reg. BI will use their broad discretion in a way that effectively neutralizes conflicts and maximizes investor protection. We have seen no evidence since Reg. BI was implemented that it has caused most firms to fundamentally rethink their approach to incentives.

Firms that believe Reg. BI requires few changes to long-standing incentive practices can find support in the rule Release. In one place, for example, the SEC states: "While many broker-dealers have programs currently in place to manage conflicts of interest, each broker-dealer will need to carefully consider whether its existing framework complies with this provision."[91] Elsewhere it notes that, "In certain instances, we believe that compliance with existing supervisory requirements and disclosure may be sufficient."[92] As a result, it is not clear whether, how, or to what extent, firms will be required to change their practices to comply with the new requirement. This is of particular concern in light of the attitude prevalent in large swaths of the industry that anything that isn't explicitly prohibited in rules is permitted.[93] Here again, investor advocates called for greater clarity from the Commission, which the Commission refused to provide.[94]

Perhaps the best example of the gap between the SEC's claims about Reg. BI's strong investor protections and the disappointing reality lies in the provisions governing sales contests. The rule's "ban" on such practices applies only to sales contests, sales quotas, bonuses, and non-cash compensation that are based on the sale of specific securities or specific types of securities within a limited period of time. Non-product-specific and non-time-limited contests, quotas, bonuses, and non-cash compensation continue to be permitted. Far from providing strong new protections for investors, as the SEC itself concedes in a footnote, this provision (like other key provisions in the rule) parallels existing requirements under FINRA rules.[95] To the extent that the rule expands somewhat on those existing restrictions, it is likely to force firms to tweak, rather than abandon, practices that reward advice that is profitable for the firm, rather than advice in the best interests of investors. Meanwhile, the Commission makes clear that non-product-specific,

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[90] Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 Fed. Reg. 33,318, 33,390 (July 12, 2019); *See also* at 33,391 ("we are providing broker-dealers with flexibility to develop and tailor reasonably designed policies and procedures that include conflict mitigation measures, based on each firm's circumstances.").
[91] *Id*. at 33,391.
[92] *Id.* at 33,392.
[93] Roper Letter re Rulemaking Petition.
[94] *See, e.g.,* Comment Letter from Heather Slavkin Corzo, AFL-CIO, et al, to Jay Clayton, Chairman, Sec. & Exch. Comm'n, April 26, 2019, at 6, https://bit.ly/2Ddu6gX ("the Commission must provide greater clarity regarding how the obligation to eliminate or mitigate conflicts would apply to different types of conflicts.").
[95] Regulation Best Interest at 33,395 n.785. ("FINRA rules also establish restrictions on the use of non-cash compensation in connection with the sale and distribution of certain types of products. *See* FINRA Rules 2310, 2320, 3221, and 5110.").

production-based sales contests, of the type that have been associated with inappropriate rollover recommendations, are permitted under the rule.[96]

In light of Reg. BI's vague and ineffective provisions to prevent conflicts of interest from tainting recommendations, the Department cannot reasonably base a PTE on this wholly inadequate standard. To do so would be a gross watering down of ERISA's high fiduciary standard, particularly its duty to act with undivided loyalty, with predictably harmful consequences for the quality of advice retirement investors receive.

D. Required disclosures do not enable investors to make an informed choice among financial firms and financial professionals.

Instead of adopting a strong, uniform fiduciary standard for broker-dealers and investment advisers, the SEC chose to preserve both weaknesses and differences in the regulatory standards that apply to these two types of investment professionals. The SEC instead chose to rely on disclosure, placing the burden on investors to differentiate between firms based on the services they provide, the extent and nature of conflicts of interest associated with those services, and their legal obligations to the customer. It adopted this approach despite extensive evidence that even good disclosures do not enable most retail investors to make these distinctions. And the disclosures that the SEC has mandated are not good disclosures. As a result, investors face huge barriers in selecting the financial professionals who best meet their needs.

As far back as 2005, the SEC began studying whether it would be possible to develop disclosures that enable investors to distinguish between broker-dealers and investment advisers.[97] Repeated efforts have met with failure, showing that disclosures don't even work to help investors distinguish between the two types of financial professional, let alone understand key differences in the services they offer, their conflicts of interest, their legal obligations, or why it matters. Ignoring this evidence, the SEC chose to adopt a regulatory approach that preserves important differences in the standards that apply to broker-dealers and investment advisers and that relies on disclosures, in the form of a new Customer Relationship Summary (Form CRS), to help investors to determine which type of financial professional or account is best for them.

Predictably, both testing conducted on behalf of the SEC and independent testing clearly demonstrated that the disclosures did not fulfill their intended purpose. When RAND researchers conducted qualitative interviews with survey participants, for example, they found a widespread lack of comprehension, differing interpretations, and misunderstandings of the proposed Form

[96] *Id*. at 33,396. ("While conflicts of interest are also associated with sales contests, sales quotas, bonuses and non-cash compensation that apply to, among other things, total products sold, or asset accumulation and growth, we agree with commenters these conflicts present less risk that the incentive would compromise compliance with the Care Obligation and Conflict of Interest Obligation such that a recommendation could be made that is in a retail customer's best interest and that does not place the place the interest of the broker-dealer or associated person ahead of the interest of the retail customer.").
[97] *See, e.g.*, Siegel & Gale, LLC and Gelb Consulting Group, Inc., Results of Investor Focus Group Interviews About Proposed Brokerage Account Disclosures, Report to the Securities and Exchange Commission (Mar. 10, 2005), https://bit.ly/3hKJ2lw; *see also* Angela A. Hung, et al., RAND Institute for Civil Justice, Investor and Industry Perspectives on Investment Advisers and Broker-Dealers, (2008), https://bit.ly/2LSDOsr.

CRS.[98] Independent research conducted by a disclosure design expert on behalf of CFA, AARP, and the Financial Planning Coalition confirmed that the proposed disclosure, as conceived by the SEC, would fail to serve its intended regulatory function.[99] Indeed, qualitative interviews conducted by the firm clearly showed that the disclosures were more likely to mislead than inform investors.

Instead of taking time to address these serious deficiencies in its proposed approach, the SEC, in its rush to finalize the rule, made matters worse by ceding to firms the responsibility for figuring out how to describe their services, fees, and conflicts of interest within the tight space limitations imposed by the rule.[100] Meanwhile, its prescribed language regarding legal obligations served to mask, rather than clarify, important differences in the standards that apply to broker-dealers and investment advisers. Our informal review of the Form CRS from a number of major firms, including firms with a history of better than average disclosures, reveals that the forms are even worse than we anticipated. Even the best of these tend to be dense and unreadable, while the worst read like marketing brochures designed to sell, rather than clarify, the services the firm offers.

The Department cannot reasonably base a PTE on the SEC's failed regulatory approach, which not only does not provide investors with adequate protections against harmful conflicts, but also does not enable them to make an informed choice among different types of firms.

E. Other regulatory standards cited by the Department are similarly inadequate to form the basis for a PTE.

The Department suggests in the Preamble of its proposed new PTE, that it would base its interpretation of its best interest standard, not only on Reg. BI, but also on the Advisers Act fiduciary standard and the NAIC's model "best interest" standard for annuities sales. Neither of these standards provides an appropriate substitute for the high fiduciary standard Congress chose to apply when it enacted ERISA.

In describing the fiduciary duty that investment advisers owe their clients, the SEC has consistently affirmed that investment advisers have a duty to serve the best interests of the client at all times and not subordinate its clients' interests to its own. Similarly, it has asserted that investment advisers must "seek to avoid conflicts of interest with its clients, and, at a minimum, make full and fair disclosure of all material conflicts of interest that could affect the advisory relationship." But none of these statements accurately describes the Advisers Act fiduciary standard, *as it is interpreted and enforced by the SEC.*[101] In reality, disclosure is the norm, rather

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[98] Angela A. Hung et al., RAND Corp., Investor Testing of Form CRS Relationship Summary (Nov. 2018), https://bit.ly/3hI7gg4.

[99] *See, e.g.*, Comment Letter from AARP, CFA, Financial Planning Coalition, to Jay Clayton, Chairman, Sec. & Exch. Comm'n (September 11, 2018) https://bit.ly/3hPXpF0.

[100] Form CRS Relationship Summary; Amendments to Form ADV, 84 Fed. Reg. 33,493, 33,502 (July 12, 2019).

[101] Barbara Roper and Micah Hauptman, Letter to SEC, regarding File Number S7-07-18, Regulation Best Interest, File No. S7-08-18, Form CRS Relationship Summary, File Number S7-09-18, Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers (Aug. 7, 2018), at 28-33, https://bit.ly/39xpwpR. *See also*, SEC Investor Advisory Committee 2018 Recommendation at 6 ("While it has become routine to describe the

than the exception, for dealing with conflicts of interest, and the Commission does not restrict advisers' ability to engage in even the most harmful conflicts. This has become a more pressing problem with the growing dominance of dual registrant firms (firms registered as both broker-dealers and investment advisers) that bring conflicts into advisory accounts not traditionally associated with such accounts. Worse, the Commission has even permitted advisers to engage in conduct that is clearly harmful to their clients, such as recommending more costly and worse performing proprietary funds when the firm has better options available, as long as the practice is disclosed somewhere deep inside an ADV form few investors will even read, and fewer still will understand.[102]

In suggesting that it would interpret the best interest standard in its proposed exemption consistent with the SEC's interpretation of the Advisers Act, therefore, the Department is suggesting that the best interest standard will be satisfied through disclosure alone and will provide no meaningful protections against the harmful impact of conflicts of interest. That is not adequate to support a finding that the PTE is sufficiently protective of plans and plan participants.

The Department also suggests that it would interpret its best interest standard consistent with the standard in NAIC's model rule for annuities sales. Like the proposed PTE, the NAIC is purportedly modeled on Reg. BI. But, where the SEC has refused to define its best interest standard, NAIC did define the term and explicitly defined it as a suitability standard. An insurance agent meets her best interest obligations under the standard by recommending a product that meets the consumer's needs.[103] The model rule also excludes all forms of cash and non-cash compensation from the definition of material conflict of interest. And, like the SEC's Reg. BI, its restrictions on sales contests and quotas are too narrowly defined, requiring firms to tweak but not eliminate incentives that reward harmful conduct.[104] A best interest standard that is consistent with the NAIC's model rule is no best interest standard at all.

A PTE based on the NAIC model rule would allow insurance agents to recommend the products that pay them most and are most profitable for the firm subject to extensive conflicts that are not adequately addressed in the rule. That will not promote best interest

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Advisers Act as requiring investment advisers to act in their clients' best interests at all times and prohibiting them from [subordinating] their clients' interests to their own, there is concern that the Commission is not well enough armed to enforce these obligations because the fiduciary duty under the Advisers Act is implied rather than explicit and arises out of the anti-fraud provisions of the Act. Because disclosure is generally considered adequate to satisfy a fraud standard, there may be gaps between what investors reasonably expect from someone who is pledged to act in their 'best interests' and what the law, as enforced by the SEC, actually requires. In reality, investment advisers, like broker-dealers, may engage in practices that put their own interests ahead of their clients' interests – for example by recommending higher cost proprietary funds when the firm has better options available – but they typically run afoul of the Commission only if they fail to disclose those practices on their ADV forms. For these reasons, a majority of the Committee believes that enhancing the fiduciary standard under the Advisers Act, and making the best interest obligation implied under that standard explicit, is a critical investor protection initiative for the Commission to pursue.")

[102] Securities and Exchange Commission, Press Release, J.P. Morgan to Pay $267 Million for Disclosure Failures (Dec. 18, 2018), https://bit.ly/39C8lDu; *See also,* Barbara Roper, CFA, *SEC's Best Interest Standard in Name Only Is No Model for DOL*, Huffington Post (Jan. 13, 2016), https://bit.ly/3hHQIVv.

[103] Birny Birnbaum, Center for Economic Justice, and Barbara Roper, CFA, Letter to Life Insurance and Annuities (A) Committee, National Association of Insurance Commissioners (Dec. 4, 2019), https://bit.ly/3jHeX8l.

[104] *Id.*

recommendations and is therefore not adequate to support a finding that the proposed PTE is sufficiently protective of plans and plan participants.

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A PTE based on any of these three standards would do more harm than good, by allowing financial professionals to claim to be acting in their customers' best interest 1) when that is not an accurate representation of the standard they are held to and 2) when their incentives encourage harmful advice. Retirement savers would be misled into expecting protections the PTE does not provide, making them more rather than less vulnerable to advice that is tainted by conflicts of interest. The inevitable result is that financial firms would remain free to siphon billions of dollars a year out of the retirement accounts of vulnerable workers and retirees, putting these retirement savers' ability to afford a dignified and independent retirement at risk.

IV. The proposed exemption would put workers and retirees at risk by exposing them to retirement investment advice that is tainted by toxic conflicts of interest.

Even as it reopens loopholes in the definition of fiduciary investment advice, the Department is proposing to create a broad new prohibited transaction exemption that weakens the fiduciary standard when it does apply. The proposed new PTE suffers from serious deficiencies, many but not all of which are related to the fact that it is modeled on the SEC's Reg. BI. The Department has watered down the impartial conduct standards on which the PTE is based, rendering them ineffective in ensuring that retirement savers receive best interest advice. The discussion in the Preamble regarding policies and procedures to ensure compliance makes clear that what sounds like it could be a rigorous standard is all but meaningless as interpreted by the Department. The disclosure provisions are at best useless and, at worst, harmful, misleading investors into believing they are receiving protections the rule does not provide. The required retrospective compliance review, which could in theory provide an effective mechanism to ensure compliance, is rendered ineffective by other deficiencies in the exemption's protective conditions. Worst of all, the lack of any enforcement mechanism for IRA investors would leave millions of Americans who invest for retirement through IRAs defenseless against the harmful, conflicted advice unleashed by the Department in this rulemaking.

A. The watered down impartial conduct standards are not adequate to protect retirement savers from the harmful impacts of conflicted advice.

Financial institutions and investment professionals who wish to rely on this broad new PTE are required to comply with impartial conduct standards derived, in part, from the 2016 best interest contract exemption. This includes a best interest obligation that incorporates both a duty of loyalty and a duty of care. While the Department makes clear that its best interest standard wouldn't require the financial professional to identify the single "best" investment for the retirement saver "out of all the investments in the national or international marketplace," it fails to make clear precisely what the financial professional would be required to do to satisfy this standard, other than engage in a prudent process. It does not explain, for example, how its best interest standard differs from the suitability standard that has traditionally applied to brokers' and insurers' investment recommendations. Moreover, in proposing this new PTE, the Department has quietly, but significantly, watered down the duty of loyalty firms and financial professionals would be required to meet.

Specifically, the Department proposes to eliminate from the best interest standard the requirement to act "without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party." That language is crucial in aligning the best interest standard with the obligation to act with undivided loyalty in section 404 of ERISA. In its place the Department proposes to adopt language borrowed from securities law, prohibiting the financial professional from placing "the financial or other interest of the Investment Professional, Financial Institution or any affiliate, related entity or other party ahead of the interests of the Retirement Investor, or subordinate the Retirement Investor's interests to their own." But the latter standard is far weaker, both in theory and in practice, than the sole interest standard Congress adopted as appropriate for tax-advantaged retirement accounts.

In essence, with this one change, the Department is replacing the strong fiduciary standard appropriate to an advisory role with a weak, non-fiduciary standard, even though the PTE only applies when the financial professional is functioning as a fiduciary adviser. The "without regard to" language that the Department has chosen to eliminate is not only consistent with the "undivided loyalty" standard in ERISA, it also reflects the fiduciary standard that Congress deemed appropriate for broker-dealers and investment advisers when providing personalized investment advice to retail investors, as articulated in Section 913(g) of the Dodd-Frank Act. In contrast, the alternative language proposed by the Department is modeled on the FINRA suitability standard and the non-fiduciary best interest standard the SEC chose to adopt in Reg. BI in place of a fiduciary standard.

It is also a departure from the SEC's long-standing, though now abandoned, characterization of the Advisers Act as requiring the investment adviser to place the client's interests first at all times. As a group of the nation's leading securities law professors wrote when the SEC's Advisers Act fiduciary guidance was adopted abandoning that long-standing interpretation, "To state only that you cannot subordinate the client's interests to your own represents a very weak substitute that may allow the investment adviser to still give considerable weight to its own interests."[105] But that is precisely the standard the Department now proposes to adopt, falsely claiming that it is consistent with ERISA's duty of undivided loyalty.

This theoretical prohibition on placing the financial firm's and financial professional's interests ahead of the customer's interests has, in practice, been applied in only the narrowest of circumstances under securities laws. Both FINRA and the SEC have applied this concept to the recommendations by brokers and advisers of a higher cost share class that also pays them more when a lower cost option is available. However, when brokers and advisers recommend different investments, investment types, or investment strategies that are highly profitable for them, but of questionable value for the investor, that conduct has gone unchallenged as long as it stops short

[105] John C. Coffee, Jr., et al, *Statement of Concerned Securities Law Professors Regarding Investment Advisers and Fiduciary Obligations*, The CLS Blue Sky Blog (Jun. 25, 2019), https://bit.ly/2X7stIK.

of outright fraud. There is every reason to believe that will also be the case under the Department's proposed PTE.

If the Department is sincere about wanting its duty of loyalty to be interpreted as consistent with ERISA's obligation to act with undivided loyalty, it would need to interpret that language very differently than it has been interpreted by FINRA and the SEC. If that were its intent, it could, for example, prohibit firms from creating incentives that would reasonably be expected to encourage advice based on the interests of the firm or the financial professional, rather than on the best interests of the retirement saver. Instead, it does the opposite, specifying in the Preamble that it will interpret the best interest standard, including the duty of loyalty, "consistent with the standard set forth in the SEC's Regulation Best Interest and the SEC's interpretation regarding the conduct standard for registered investment advisers."

This context is important when considering the statement in the Preamble that, "[I]n choosing between two investments equally available to the investor, it would not be permissible for the Investment Professional to advise investing in the one that is worse for the Retirement Investor because it is better for the Investment Professional's or the Financial Institution's bottom line." As noted above, the SEC has only interpreted that obligation to recommend the investment that is best for the investor as applying in the narrowest of circumstances, for example, when choosing between different share classes of the same fund. It has not applied that same logic more broadly to the range of recommendations brokers and advisers make regarding investments and investment strategies. If the Department interprets it in the same way, it will do little to constrain firms' ability to place their interests ahead of the interests of their customers. Among other problems, under this interpretation, the Department would appear to have to show that the compensation was the reason for the bad advice. Determining whether a violation had occurred would be all but impossible in the absence of a requirement to document the basis on which the financial professional determined a particular investment or course of action was in the best interests of the investor and difficult even when documentation is provided.

Under the proposed PTE, documentation of the basis for the best interest determination would only have to be provided in the context of rollover recommendations. While we welcome the requirement to document the basis for determining a rollover recommendation is in the customer's best interests, it stops well short of what is needed to protect retirement savers from recommendations that are designed to benefit the financial firm and financial professional rather than the retirement saver. First, for the reasons discussed above, many rollovers will not be subject to the requirement, because they will not be considered fiduciary investment advice under the five-part test. As a result, where the conflicts are greatest and the sales rules are weakest, there will be no obligation to justify the rollover as consistent with the best interest standard.

Second, the factors identified by the Department as having to be included in that consideration are not sufficiently rigorous. In particular, firms are likely to justify rollovers that expose the retirement saver to increased costs based on "the different levels of services and investments available under the Plan and the IRA." To be meaningful, the documentation would need to include a clear examination of the long-term impact of any increased costs and why the added benefits justify those added costs. The fact that the retirement saver might have access to a broader range of investments or services in the IRA should not be sufficient to justify the rollover if the retirement saver has no need for those added services or the broader investment selection. The Department's failure to clearly articulate a principles-based definition of best interest exacerbates the problem. In the absence of a strong, clear definition of best interest, requiring firms and financial professionals to recommend the investments, accounts, and investment strategies they reasonably believe to be the best available option for the retirement saver, financial professionals will be able to concoct flimsy justifications that the Department is unlikely to challenge because they, superficially at least, take these factors into account.

Inadequate as it is, the requirement to document the basis for the rollover recommendation is one of the few provisions of the proposed PTE with any potential to enhance protections for retirement savers. As such, this documentation requirement should be extended to all recommendations made in reliance on the PTE. The same reasons the Department cites for imposing the documentation requirement on rollover recommendations – to ensure financial professionals "take the time to form a prudent recommendation, and that a record is available for later review" – apply to retirement investment advice more broadly. The Department's failure to adopt this requirement for all fiduciary retirement investment advice reinforces concerns that this, like the SEC's Reg. BI, will be a best interest standard in name only, promising retirement savers protections it fails to deliver.

One particularly egregious example of how the Department's interpretation is not consistent with retirement savers' best interest is its blanket statement that there is no duty to monitor under the proposed PTE's best interest standard. But, because of loopholes in the definition of fiduciary investment advice, this best interest obligation would *only* apply in instances where advice is provided on a regular basis. Under the proposed approach, therefore, financial professionals could provide ongoing retirement investment advice to retirement savers without any obligation to monitor the customer's account to determine whether the advice remains appropriate or needs to be updated. At the very least, the Department should adopt the position that the SEC takes with regard to investment advisers' monitoring obligations, that the duty follows the contours of the relationship. For advice that is provided on a regular basis, there should be some duty to monitor consistent with the nature of that relationship.

The Department appears to be intent on interpreting the proposed "best interest" standard in a way that doesn't require financial professionals to recommend the investments that are best for the customer and doesn't require financial firms to eliminate, or even refrain from creating, harmful incentives that can and will result in advice that is not in customer's best interest. By adopting the weakest possible interpretation of the best interest standard, the Department makes clear that its duty of care is more procedural than substantive and its statements about ensuring financial professionals act with "undivided loyalty" are nothing more than empty rhetoric. This suggests that, far from looking to improve protections for retirement savers, the Department is focused on preserving the excess profits of the powerful financial firms who formerly hired Secretary Scalia to defeat a stronger standard. Other shortcomings in the proposed exemption reinforce this concern.

B. The Department's weak interpretation of the impartial conduct standards renders the obligation to adopt policies and procedures reasonably designed to ensure compliance all but meaningless in protecting retirement savers.

Paired with a strong best interest standard, the proposed requirement that firms "establish, maintain and enforce written policies and procedures prudently designed to ensure that the Financial Institution and its Investment Professionals comply with the Impartial Conduct Standards" could offer meaningful protections to retirement savers. In the absence of a strong best interest standard, however, the provision offers the promise of investor protection, but not the reality. The fundamental disconnect between what the Department says the policies and procedures requirement is intended to achieve, and what it indicates it would actually accept as demonstrating compliance, makes clear that, here again, there is no substance behind the best interest rhetoric.

The Department states, for example, that policies and procedures should be prudently designed to ensure that a financial firm's "incentive practices, when viewed as a whole, are prudently designed to avoid misalignment of the interests of the Financial Institution and Investment Professionals and the interests of Retirement Investors. In accordance with this standard, a reasonable person reviewing the Financial Institution's incentive practices, policies, and procedures would conclude that the policies do not give Investment Professionals an incentive to violate the Impartial Conduct Standards, but rather are reasonably designed to promote compliance with the standards." It goes on to clarify that, to comply with this standard, "Financial Institutions' policies and procedures would be required to be prudently designed to protect Retirement Investors from recommendations to make excessive trades, or to buy investment products, annuities, or riders that are not in the investor's best interest or that allocate excessive amounts to illiquid or risky investments."

While that all sounds great in theory, the reality is quite different. Like Reg. BI, the proposed PTE does nothing to limit the incentives that financial firms may have to encourage advice that is profitable for the firm but not in its customers' best interest. It suggests that they "should consider minimizing" incentives that operate at the firm level, such as establishing an enhanced review process for investment products that may be recommended to retirement savers, but nothing more. It says nothing, for example, about how to minimize the conflicts associated with receipt of revenue sharing payments or other similar conflicts.

At the same time, the proposed PTE relies on these conflicted firms to address through a combination of mitigation and supervision the conflicts of interest of the investment professionals that work for them. But, like Reg. BI, it doesn't even prohibit firms from artificially creating incentives that are designed to encourage conduct that is not in customers' best interest. And, while the Department claims that policies and procedures must be prudently designed to protect retirement savers from the harmful impact of those conflicts, the Department simultaneously makes clear that it has no intention of limiting incentive practices that a reasonable person would clearly view as creating a strong incentive to recommend investments that are not in the retirement savers' best interest.

The following are just a few examples of common industry practices that clearly create incentives to prioritize firm profits, and financial professional benefits, over investor protection, all of which appear to be permissible under the proposed PTE:

- Getting paid significantly more to sell one product over another clearly creates an incentive to recommend the higher paying product, regardless of whether it is the best option for the investor.

- Receiving revenue sharing payments clearly creates an incentive for firms to push the products that make those payments, regardless of whether they are the best available option for the investor. Paying financial professionals more to sell those products exacerbates the conflict.

- Conditioning health care coverage for the financial professional's family on the professional's success in meeting production-based quotas clearly creates an incentive to recommend sales, including rollovers, regardless of whether that is what's best for the retirement saver.

- Sales quotas and sales contests that would be permissible under the rule – including non-time limited, product-specific quotas and non-product-specific, production-based contests – clearly create an incentive to recommend products to fill the quota and earn contest prizes rather than those that are best for the investor.

When the Department makes clear, as it does in this Preamble, that all such practices are permitted under the PTE, it makes a mockery of its statement that incentives practices have to be designed to promote compliance with the best interest standard. The industry has made clear that it will interpret anything other than an outright ban as constituting regulatory permission to engage in the harmful conduct. For example, as noted above, two major industry groups recently accused the SEC of engaging in a back-door campaign to ban 12b-1 fees in response to its initiative to enforce well-established obligations for investment advisers to act in their clients' best interests and provide full and fair disclosure of material facts. The clear goal of this industry campaign is to prevent the SEC from enforcing principles-based standards, which includes both Reg. BI and the Advisers Act standard. The same is likely to apply to the Department's proposed PTE based on those standards.

Instead of cracking down on harmful incentives, the Department suggests that firms that retain significant conflicts of interest can address them through more rigorous supervision. That falsely assumes that the firms have an incentive to constrain the conduct that their incentives practices encourage. For example, the Preamble states that financial institutions that allow "significant variation in compensation across different investment products would need to implement more stringent supervisory oversight." When the firm's bottom line also benefits from recommending the higher compensating investment products, however, they are all too likely to turn a blind eye when their financial professionals push those products on unsuspecting retirement savers without regard to the customer's best interests. A "reasonable person" is therefore likely to conclude that a financial institution that retains significant differential compensation does that intentionally, to encourage the sale of higher compensating products, and isn't going to prevent abuses of the best interest standard through increased oversight. This disconnect is even more obvious with regard to the harmful incentives firms themselves create.

As noted above, a fundamental problem with this approach is that it is modeled on the SEC's non-fiduciary Reg. BI, which was intentionally designed to avoid disruption of broker-dealers' highly conflicted business model. As such, the SEC suggests actions firms might take to address conflicts, but leaves firms free to decide for themselves just how much conflict mitigation is needed. And, as discussed above, it suggests that existing practices to comply with FINRA rules may fully satisfy the obligation in some cases. Even for the harmful incentives firms themselves artificially create – sales contests, quotas and certain types of bonuses – the SEC rule bans only a tiny sliver of potential conflicts, leaving firms extensive freedom to create incentives that reward the conduct that is profitable for them, rather than that which is best for the customer.

As noted above, for example, the production-based sales contests that are explicitly permitted create a strong incentive to recommend rollovers as a way to gather assets, even when the retirement saver would be better off keeping their money in their workplace retirement plan. If the Department were as concerned as it claims about inappropriate rollover recommendations, it would add such contests to the list of banned practices. Instead, the Department once again relies on the firms creating the conflicts to "carefully consider" performance and personnel actions and practices that could encourage violation of the impartial conduct standards, without any acknowledgement that the firms themselves may have strong incentives to violate those standards.

The provision regarding advice on proprietary products and limited menu of products is similarly inadequate. The Department even quotes self-serving industry talking points about the supposed benefits of product limitations in "allowing broker-dealers and associated persons to develop increased familiarity with the products they recommend." To protect retirement savers from the potentially harmful impact of such practices, the Department relies on disclosure of the conflict – a notoriously ineffective means of protecting investors from the harmful impact of such conflicts – and a vague requirement to "adopt policies and procedures that are prudently designed to prevent any conflicts of interest from causing a misalignment of the interests of the Financial Institution and Investment Professional with the interests of the Retirement Investor." But this is meaningless in this context, as it is more generally, since the Department clearly intends to allow the fundamental conflict to go unaddressed.

That leaves as the only potentially meaningful protection with regard to proprietary products the prohibition on using the limited menu to justify making a recommendation that does not meet the impartial conduct standards. For that provision to serve its intended purpose, however, the impartial conduct standards, and the Department's interpretation of those standards, would need to be strengthened. At the very least, the Department should require financial firms to document the basis on which they concluded that their product menus were reasonably designed to enable them to comply with the impartial conduct standards when serving retirement savers, and it should require financial professionals to document the basis on which they concluded the recommended investment was in the best interests of the retirement saver.

The Department proposes to incorporate the SEC's wholly insufficient approach to addressing conflicts into its new PTE, despite a complete lack of evidence that it is effective in protecting investors. By rushing to adopt an experimental and highly controversial regulatory approach, the Department risks leaving workers and retirees at risk of harm from conflicted retirement investment advice. It cannot reasonably conclude that a PTE based on this approach is sufficiently protective of plans, plan participants and IRA investors.

C. The required disclosures are at best useless, at worst harmful and misleading.

The proposed PTE requires disclosures that range from being ineffective in protecting investors to being outright harmful. The worst of these is the requirement that financial institutions provide a written disclosure prior to engaging in a transaction pursuant to the exemption acknowledging that the financial institution and its investment professionals are fiduciaries under ERISA and/or the tax code, as applicable. But the Department is explicit in stating that there is no private right of action under the PTE, so the disclosure doesn't provide any added accountability. And, since compliance with the PTE is satisfied through adherence to a non-fiduciary best interest standard, the disclosure could actually mislead retirement savers into expecting protections it does not deliver.

In addition, financial institutions would be required to provide a "written description of the services to be provided and material conflicts of interest arising out of the services and any recommended investment transactions." The disclosure is required to be "in plain English, taking into consideration Retirement Investors' level of financial experience." The Department suggests, however, that its proposed disclosure requirement can be satisfied "through any disclosure, or combination of disclosures, required to be provided by other regulators so long as the disclosure required by Section II(b) is included." While we have long supported requiring all financial professionals to provide plain English disclosures along these lines, there is little reason to believe the resulting disclosures will be comprehensible to the average retirement saver, let alone provide the plain English descriptions that appropriately reflect the level of expertise of the typical retirement saver.

As the Department makes clear in the Preamble, the disclosure requirement could be met by providing a copy of Form CRS or, for investment advisers, a copy of their ADV Form. But our initial review of the new Form CRS suggests that these are far from the plain English disclosures the SEC intended. And ADV forms for dual registrant firms can be over 100 pages in length, with the relevant information buried deep within the document. New disclosures required by NAIC are, if anything, even worse. The NAIC rejected out of hand all concrete suggestions from consumer advocates designed to make the disclosures comprehensible to the typical investor and, like the SEC, refused to test their proposed disclosures for effectiveness.[106]

If the Department is sincere in wanting retirement savers to get plain English disclosures, it will need to make clear that documents such as these would not satisfy disclosure obligations

[106] Comments of the Center for Economic Justice to the NAIC Life Insurance and Annuities (A) Committee, regarding Recommendations for Disclosures/Templates for Proposed Revisions to Annuity Suitability Model Regulation, (Dec. 30, 2019).

under the PTE. It would also need to make clear that the disclosures would have to be delivered through the retirement savers' preferred means of receiving disclosures if there is to be any chance that retirement savers will actually receive and read them. Without those changes, and without conducting testing to determine the effectiveness of disclosures in conveying the desired information in a way that equips retirement savers to act on those disclosures, the Department cannot reasonably conclude that the disclosure requirements in its proposed PTE are sufficiently protective of plans, plan participants, and IRA investors.

D. The otherwise beneficial retrospective compliance review is rendered ineffective by other deficiencies in the exemption's protective conditions.

The proposed PTE includes a requirement for firms to monitor their investment professionals to identify conduct that does not adhere to the impartial conduct standards or the financial institution's policies and procedures. It requires firms to conduct a retrospective review of compliance at least annually and document the results of the compliance review in a written report to the CEO "or equivalent." That individual would then be required to certify annually that the firm has policies and procedures in place that are "prudently designed to achieve compliance with the conditions of this exemption" and that the firm has a process in place to test the effectiveness of its policies and procedures periodically and to modify its policies and procedures as needed. Combined with a strong, clear best interest standard, including limits on the most harmful conflicts, such an approach could be reasonably effective in protecting working families from harmful retirement investment advice.

Unfortunately, weaknesses in the impartial conduct standards, as revised and interpreted by the Department, render this otherwise beneficial compliance mechanism largely ineffective. First, the Department, following the lead of the SEC, leaves it to firms to decide what constitutes best interest advice and how conflicts of interest have to be mitigated to meet the standard. But the firms are often the direct beneficiaries of advice that is not in the retirement saver's best interest. For example, it may benefit the firm's bottom line when their investment professionals make inappropriate rollover recommendations or recommend the purchase of a mutual fund that makes higher revenue sharing payments to the firm instead of a better performing, lower cost option that doesn't make those payments. And they themselves often create the incentives that encourage advice that puts firm profits over customers' best interests. They are unlikely to be reliable arbiters of whether their policies and procedures are adequate to protect investors from the harmful conduct they themselves encourage.

To have a credible chance of detecting compliance failures, a firm would have to require its investment professionals to document the basis on which they determined that a particular recommendation was in the retirement saver's best interests. But the Department imposes no such documentation requirement except in the context of rollover recommendations, and firms that don't want to be held accountable are unlikely to adopt such a requirement voluntarily. Absent a clear requirement to recommend the investments, investment strategies, services, and accounts the investment professional reasonably believes represent the best option for the retirement saver from among those they have reasonably available to recommend, and without any obligation to document the basis for that determination, the compliance review is likely to become little more than a paperwork exercise.

For these reasons, the Department cannot reasonably assume that the PTE will be sufficiently protective of plans, plan participants, and IRA investors.

E. The lack of an enforcement mechanism for IRA investors will leave millions of retirement savers defenseless against harmful, conflicted retirement investment advice.

Because the Department lacks enforcement authority with regard to IRA accounts, and the IRS lacks expertise or resources to enforce the standard, the impartial conduct standards will be unenforceable for IRA investors absent some meaningful enforcement mechanism. Nothing could more clearly illustrate the extent to which this rule is designed to protect financial firms from accountability rather than retirement savers from financial harm than the thoroughness with which the Department has stripped the rule of any such enforcement mechanisms. Gone is the contract requirement and the warranties that made that standard enforceable through state contract law for IRA investors, and nothing has been added to take their place. As the Preamble clearly states, "the Department does not intend the exemption to expand Retirement Investors' ability, such as by requiring contracts and/or warranty provisions, to enforce their rights in court or create any new legal claims above and beyond those expressly authorized in ERISA. Neither does the Department believe the exemption would create any such expansion."

The only remaining enforcement mechanism is the requirement for firms to self-report that they've engaged in a prohibited transaction, by virtue of violating the terms of the exemption, and pay the excise tax. We are unaware of any evidence that this has ever been used effectively to protect IRA investors. The practical effect is that the PTE offers no remedy when IRA investors are harmed by the conflicted advice unleashed by this exemption. As such, it provides no incentive for compliance by financial firms or investment professionals who profit from harmful advice.

The Department cites the Fifth Circuit decision as limiting its ability to include certain contract requirements in the new exemptions. As discussed above, however, the Fifth Circuit decision was an outlier. Other courts reached the opposite conclusion. For example, the D.C. court upheld the Department's authority to require firms to include specific terms in their contracts if they want to qualify for the exemption.[107] It explained that the problem with the plaintiff's argument challenging the legitimacy of the contract requirement "is that the BIC Exemption does not create a private cause of action; it merely dictates terms that otherwise-conflicted financial institutions must include in written contracts with IRA and other non-title I owners in order to qualify for the exemption."[108] If the Department nonetheless believes the contract requirement is impermissible, then it needs to identify a different enforcement mechanism to substitute for that requirement.

In the absence of an enforcement mechanism beyond the existing excise tax, firms can and will act on their conflicts of interest in ways that cause financial harm to retirement savers. They will recommend higher cost investments that pay them more, saddling retirement savers with inappropriate risks or poorly performing investments that erode the value of their retirement

[107] *Nat'l Assoc. of Fixed Annuities (NAFA) v. U.S. Dep't of Perez*, 217 F. Supp. 3d 1 (D.D.C. 2016).
[108] *Id.*

nest egg. For proof, one need only look at the widespread violations of the best interest standard by dually registered securities firms that, counting on the SEC to turn a blind eye, for years routinely recommended the mutual fund share classes that were most profitable for them, rather than those that were best for their clients.[109] Even when presented with an opportunity to self-report in return for lighter sanctions when the SEC did finally crack down, dozens of firms resisted. No one can reasonably expect these firms to self-report violations of PTE conditions to the IRS or believe that this would provide effective protection to retirement savers.

These kinds of abuses are particularly likely to occur among financial firms and investment professionals not subject to regulation under Reg. BI, which can at least be enforced through FINRA arbitration. For other types of retirement investment advice, the retirement saver who suffers financial harm as a result of violations of the standard would have no ability to recover their losses. As a result, IRA investors will be particularly vulnerable to conflicted advice regarding insurance investments, where the conflicts are great, sales practice rules are weak, and enforcement is spotty. While much of the advice retirement savers receive regarding insurance investments will be carved out of the fiduciary standard entirely by way of the five-part test, where advice about insurance is offered to IRA investors in the context of an ongoing advisory relationship, the PTE offers no protections to the workers and retirees who are harmed as a result of relying on advice tainted by conflicts of interest. For non-annuity life insurance investments, even the weak protections afforded by the NAIC model suitability rule will also not apply. In short, the proposed exemption is once again weakest where the need for enhanced protections is greatest.

For these reasons, the Department cannot reasonably conclude that the PTE is sufficiently protective of IRA investors. If it is not willing to create a mechanism that renders the impartial conduct standards enforceable for IRA investors, the only reasonable alternative is to prohibit firms from relying on the exemption when providing retirement investment advice to IRA investors. To do otherwise would leave the millions of Americans who save for retirement through IRAs vulnerable to predatory firms operating secure in the knowledge that they cannot be held accountable for their abusive actions.

V. The Department is engaged in a rushed process based on an economic analysis that demonstrates the proposal's significant shortcomings.

The Department appears to be intent on rushing this proposed exemption through without adequate time for comment despite, or perhaps because of, an economic analysis that demonstrates the proposed exemption's failure to meaningfully enhance investor protections.

A. The economic analysis reinforces the conclusion that the rule, if adopted, would provide few if any protections beyond existing laws.

The Department claims that its proposed exemption is designed to improve investment advice for workers and retirees. In reality, however, it is nothing more than a substituted

[109] *See, e.g.,* SEC Division of Enforcement Co-Director Stephanie Avakian, What You Don't Know Can Hurt You, Nov. 5, 2019 https://bit.ly/3hLsCcE.

compliance regime misleadingly presented as providing new protections. The economic analysis makes that clear. It states, for example:

- "[T]he proposed exemption was developed in consideration of other regulatory conduct standards. The Department envisions that Financial Institutions and Investment Professionals that have already developed, or are in the process of developing, compliance structures for other regulators' standards will be able to experience regulatory efficiencies through reliance on the new exemption."

- "Because BDs with retail businesses are subject to the SEC's Regulation Best Interest, they already comply with, or are preparing to comply with, standards functionally identical to those set forth in the proposed exemption."

- "These [SEC registered] IAs are fiduciaries, and they already operate under conditions functionally identical to those required by the proposed exemption. Accordingly, the proposed exemption would pose no more than a nominal burden for these entities."

In other words, despite the fact that Congress intentionally set a heightened fiduciary standard to govern retirement investment advice, the Department clearly acknowledges that it is simply incorporating other lower standards – including non-fiduciary standards – into the regulatory regime for retirement investment advice.

The lack of any enhanced protections beyond those provided by other regulations is further reflected in the Department's estimate of compliance costs associated with the new PTE. The Preamble states: "Because this proposed exemption is intended to align significantly with other regulators' rules and standards of conduct, the Department expects the compliance costs associated with this proposal to be modest. The Department estimates that the proposed exemption would impose costs of more than $44 million in the first year and $42 million in each subsequent year. Over 10 years, the costs associated with the proposal would be approximately $294 million, annualized to $42 million per year (using a 7 percent discount rate)." That is barely a rounding error for a large financial firm's profit statement, and an infinitesimal cost for a regulation affecting millions of retirement savers and trillions of dollars in retirement investments. Cost estimates for other aspects of the proposal are even more modest – $1 million in the first year and $0.3 million in each subsequent year for the disclosure requirement, for example, and $1.7 million in the first year for developing policies and procedures to ensure compliance with the impartial conduct standards.

With regard to the disclosure requirement, the Preamble states: "For many entities, including IAs, this condition would impose only modest additional costs, if any at all. Most IAs already disclose their status as a fiduciary and describe the types of services they offer in Form ADV. BDs with retail investors are also required, as of June 30, 2020, to provide disclosures about services provided and conflicts of interest on Form CRS and pursuant to the disclosure obligation in Regulation Best Interest. Even among entities that currently do not provide such disclosures, such as insurers and some BDs, the Department believes that developing disclosures required in this proposed exemption would not substantially increase costs because the required disclosures are clearly specified and limited in scope." But the Department offers no evidence that these existing disclosures are effective in protecting investors or even enable them to make an informed choice among different types of financial professionals.

Similarly, in explaining the modest costs associated with its policies and procedures requirement, the Department estimates that it would take a legal professional, at an hourly labor wage of $138.41, just 22.5 minutes at each small retail broker-dealer, 45 minutes at each large retail broker-dealer, 15 minutes at a small investment adviser, and 30 minutes at a large investment adviser. For insurers the anticipated "burden" is greater – an estimated five hours a year for small insurers and ten hours a year at large insurers. These estimates clearly demonstrate that the policies and procedures adopted by firms will simply mirror existing practices, not enhance protections from conflicted advice for retirement savers. And the hourly wage the Department uses in its estimate suggests it believes the review can be done, not by senior compliance counsel, but by a very junior attorney. Here again, as the Preamble makes clear, the cost estimates reflect the Department's expectation that investment advisers and broker-dealers "may need to review their policies and procedures" and possibly even amend them; but it won't require meaningful changes to bring their policies into compliance. "These additional steps would impose additional, but not substantial, costs at the Financial Institution level," according to the Preamble.

The economic analysis similarly makes clear that the annual retrospective compliance review is designed to duplicate rather than enhance existing regulatory requirements. If the $1.7 million annual cost estimate wasn't enough to make that clear, the Preamble explains that its requirement simply duplicates existing obligations under FINRA rules.[110] And here again, the Department uses an hourly wage in its estimate that suggests the compliance reviews can largely be conducted by entry-level legal staff, rather than senior compliance professionals. The hourly estimates – five hours for small firms and ten hours for large firms to write the report and 15 to 30 minutes for firms to certify it – illustrates as clearly as anything could what an empty, superficial process the Department expects this to be. Here again, the Department expects the compliance costs to be higher for insurers, but still "modest." Given how foreign the notion of a best interest standard is to many insurers, and how pervasive conflicts are in their business model, this is a stunning admission on the Department's part that any sham of a compliance review is likely to satisfy the new standard.

As for the obligation to document the basis for rollover decisions, the Department estimates that can be done, on average, in just 10 minutes. While that might be an ambitious but reasonable estimate for firms that use compliance software to automate that analysis, the Department does not appear to include the cost of compliance software in its cost estimate. That suggests that it is prepared to accept any analysis, no matter how hasty or superficial, to justify advice about the single most important decision many Americans will ever make. So much for the Department's claim that this requirement is designed to "ensure that Investment Professionals take the time to form a prudent recommendation."

[110] "FINRA requires BDs to establish and maintain a supervisory system reasonably designed to facilitate compliance with applicable securities laws and regulations, to test the supervisory system, and to amend the system based on the testing. Furthermore, the BD's chief executive officer (or equivalent officer) must annually certify that it has processes in place to establish, maintain, test, and modify written compliance policies and written supervisory procedures reasonably designed to achieve compliance with FINRA rules."

In short, the Department's assumption that its proposed rule won't impose any meaningful costs confirms our assessment that it won't provide any meaningful protections to retirement savers. This is no accident. Instead, it is clear throughout the Preamble that the Department's intent is to water down ERISA's high fiduciary standard in order to harmonize with standards that were designed to govern non-fiduciary financial firms that market themselves as trusted advisers but prefer to be regulated as mere salespeople, no different than a car dealer. The proposal gives them the best interest standard in name only for which they have long lobbied.

B. The Department has denied stakeholders an opportunity for meaningful comment.

Shortly after the Department released its proposal, we joined with 20 other organizations in writing to the Department to request an extension of the comment period from 30 days to 90 days.[111] As we argued in that letter, a 30-day comment period is an unreasonably short amount of time to provide thoughtful and comprehensive comments on this complex and highly technical proposal affecting millions of American retirement savers and trillions of dollars in retirement assets. It would be inadequate at the best of times, but is particularly inadequate in the midst of a pandemic that has greatly disrupted people's work and daily lives.

The fact that we've been able to submit a comment letter within that time frame does not negate our argument. First, the proposal is based in large part on an untested and highly controversial regulatory approach that was implemented just days before the Department issued its proposal. The Department cannot possibly know whether Reg. BI will adequately protect investors from conflicted advice without far more experience under the rule. That fundamental deficiency in the process cannot be addressed solely through an extension of the comment process, but other deficiencies resulting from the rushed comment process could. Specifically, the rushed comment process did not allow sufficient time for us to conduct additional research that could have informed the regulatory analysis.

A 90-day comment period would significantly expand our ability to conduct such research. The following are a few key examples of the type of input we and others could have provided given a sufficient opportunity:

- The Department bases its proposed exemption on requirements in Reg. BI to limit the harmful impact of conflicts of interest. With a 90-day comment period, we could have conducted a review of the changes brokerage firms have adopted to implement Reg. BI in order to assess whether they meaningfully reduce incentives to act in ways that are not in investors' best interests. While that is not the same thing as evaluating the impact of the new regulations on conduct, it would at least offer a basis for assessing the likelihood that conduct will change.

[111] AFL-CIO, et al, Letter to Department of Labor Office of Exemptions Determinations, regarding ZRIN 1210-ZA29 [Application No. D-12011] Improving Investment Advice for Workers & Retirees (Jul. 8, 2020), https://bit.ly/3jMTzP0.

- The Department requires firms to prudently design their policies and procedures governing incentives practices such that "a reasonable person reviewing the Financial Institution's incentive practices, policies, and procedures would conclude that the policies do not give Investment Professionals an incentive to violate the Impartial Conduct Standards, but rather are reasonably designed to promote compliance with the standards." With a 90-day comment period, we could have surveyed retirement investors to determine how they view incentive practices permitted under the rule and whether they view them as consistent with a requirement to act in investors' best interests. If the Department took the time to study the issue, we strongly suspect it would learn that reasonable people believe common industry incentive practices permitted under this rule will encourage violations of the best interest standard.

- The Department proposes to require financial institutions and investment professionals to disclose that they are acting in a fiduciary capacity under ERISA or the Code. With sufficient time to comment, we could have conducted additional research to determine how retirement savers perceive such disclosures, including whether they are likely to be confused or even misled by such disclosures into expecting protections the rule does not provide. For example, we could have tested investor comprehension and perceptions of and reactions to a scenario in which a financial professional discloses they are operating in their brokerage capacity and subject to Reg. BI's non-fiduciary standard while at the same time they are operating as a fiduciary under the Code.

- The Department proposes to allow firms and investment professionals to meet many of their disclosure obligations by providing Form CRS, an ADV form, or other similar documents. But it hasn't tested those disclosures for effectiveness. With more time to comment, we could have conducted additional research to assess retirement savers' ability to understand critical information based on those disclosures. If the Department took the time to study the issue, we believe the Department would learn what others who have studied the issue in the past have learned – that the disclosures firms provide are often incomprehensible to the typical investor.

Without exploring these issues, the Department cannot determine whether its proposal is likely to be effective or whether it will leave retirement savers worse off than they would be if it took no action at all. The Department's failure to explore these issues before issuing this proposal, and its refusal to provide adequate time for others to provide input on these topics as part of the comment record, strongly suggests that it is willfully ignoring evidence that doesn't support its pre-conceptions about the most appropriate regulatory approach.

Given the significance, complexity, and near-term uncertainty regarding critical components of the proposal, as well as the unprecedented circumstances in which we are living, a 30-day comment period is simply not a reasonable amount of time to facilitate comprehensive and meaningful feedback from all interested parties. The Department's insistence on moving forward on such an artificially rushed schedule suggests that the Department simply isn't interested in hearing, let alone carefully weighing, the views of those outside the financial services industry with an interest in the issue. As such, it confirms the view that the proposal is designed, not to protect retirement savers' nest eggs, but to protect financial firms' profits. The fact that the very same financial interests whose preferences are so clearly reflected in this regulatory package formerly turned to Secretary Scalia to lead their challenge of regulations they viewed as too rigorous casts a pall of bias and illegitimacy over this rulemaking which is reinforced by the Department's insistence on moving forward under a recklessly rushed process.

VI. Conclusion

This regulatory package is, in effect, a transfer of billions of dollars of wealth each year from the retirement accounts of financially vulnerable workers and retirees to the wealthiest, most powerful financial firms. The beneficiaries are not the workers and retirees the Department purports to aid, but rather Secretary Scalia's former and likely future clients from the financial services industry. This is not an unintended consequence of the Department's chosen regulatory approach, it is the inevitable and predictable outcome of conscious decisions the Department has made to minimize any impact on these financial firms, even at the expense of sacrificing protection for retirement savers. While claiming to improve investment advice for workers and retirees, the proposed PTE and reinstated definition will instead simultaneously unleash a flood of advice tainted by toxic conflicts of interest on unsuspecting workers and retirees and strip those retirement savers of any ability to seek recourse for the financial harm they will inevitably suffer. It is a gross betrayal of the Department's mission and should be withdrawn in its entirety.

Respectfully submitted,

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