FINANCIAL PLANNING COALITION

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:

On behalf of the Financial Planning Coalition[1] ("Coalition"), we are writing to express our opposition to the Department of Labor's ("Department") retirement investment advice rules package identified above.[2]

We oppose both the final rule that immediately reinstates, without any opportunity for public comment, the outdated 1975 regulatory definition of fiduciary investment advice under the Employee Retirement Income Security Act ("ERISA"),[3] commonly referred to as the "five–part test."[4] We also oppose the proposed prohibited transaction exemption ("PTE") that would allow ERISA investment advice fiduciaries to rely on the U.S. Securities and Exchange Commission's ("SEC") Regulation Best Interest ("Reg BI")[5] when providing advice regarding retirement plan and individual retirement account ("IRA") investments.

The immediate reinstatement of the five-part test, coupled with the proposed exemption based on compliance with the SEC's recently adopted and unproven Reg BI, will all but ensure that much of the professional investment advice retirement savers rely on is not required to

[1] The Financial Planning Coalition is comprised of Certified Financial Planner Board of Standards, Inc. ("CFP Board"), the Financial Planning Association® ("FPA®"), and the National Association of Personal Financial Advisors ("NAPFA"). Information about the Coalition is available at http://financialplanningcoalition.com/. CFP Board is a professional body that sets competency and ethical standards for more than 87,000 CFP® professionals throughout the United States. FPA is the principal membership organization for CFP® professionals and those who support the financial planning process in the U.S. with 22,000 members nationwide. NAPFA is the nation's leading organization of fee-only comprehensive financial planning advisors with more than 3,800 members nationwide.
[2] EBSA, 29 CFR 2550, *available at* https://www.federalregister.gov/documents/2020/07/07/2020-14261/improving-investment-advice-for-workers-and-retirees.
[3] 29 U.S.C. Ch. 18 et seq.
[4] Under the five-part test, for advice to constitute "fiduciary investment advice," the person must (1) render advice with respect to the plan [or IRA] as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing, or selling securities or other property, (2) on a regular basis, (3) pursuant to a mutual agreement, arrangement, or understanding with the plan, plan fiduciary or IRA owner, that, (4) the advice will serve as a primary basis for investment decisions with respect to plan or IRA assets, and that (5) the advice will be individualized based on the particular needs of the plan or IRA. *See*, 29 C.F.R. Section 2510.3-21(c).
[5] SEC, "Regulation Best Interest: The Broker-Dealer Standard of Conduct," Release No. 34-86031, 17 C.F.R. Part 240, *available at* https://www.sec.gov/rules/final/2019/34-86031.pdf.

meet a fiduciary standard of conduct as contemplated under ERISA. The reinstated five-part test determines when a person who provides investment advice for a fee will be classified as a "fiduciary" under ERISA and therefore subject to its stringent obligations. We know from practical experience that fiduciary responsibilities can be avoided under the loophole-ridden five-part test, largely because ERISA fiduciary status arises only when a person satisfies all five prongs of the test. At the same time, the Department's decision to base its proposed new PTE on the SEC's ambiguous and untested Reg BI means that, even when financial professionals are considered to be investment advice fiduciaries, they would remain free to engage in a wide variety of business practices that clearly are not in the best interests of retirement investors.

Accordingly, the Coalition respectfully requests that you withdraw this regulatory package in its entirety and initiate a new rulemaking that prioritizes protecting the hard-earned savings of American workers and retirees.

The Coalition brings a unique perspective to this discussion. By virtue of their CFP® certification, stakeholders and members of Coalition organizations have committed to provide financial advice under a fiduciary standard of conduct. The more than 87,000 CFP® professionals hold registrations and/or licenses across business models as investment adviser representatives, registered representatives of broker-dealers and/or insurance agents, and in many instances hold dual or multiple registrations or licenses. Regardless of business or compensation model, CFP® professionals commit to provide financial advice under a fiduciary standard of conduct. In this comment letter, the Coalition offers the Department our experience, gained from guiding our stakeholders and members on compliance with the fiduciary standard.

1. Today's Retirement Marketplace

Commentators have written extensively about the dramatic shift in the retirement landscape during the more than four decades since the Department promulgated the five-part test in 1975 to determine fiduciary responsibility under ERISA. At that time, Congress had not yet modified the Internal Revenue Code ("IRC") to permit employees to contribute a portion of their salary to 401(k) plans; Congress had just authorized IRAs for the first time only one year earlier; and most retirement assets were held in defined-benefit plans in which a professional manager was responsible for investing fund assets.

Fast forward 45 years and the current statistics describe the dramatic shift in the ways today's workers save for retirement. According to the Investment Company Institute ("ICI"), as of March 31, 2020, 401(k) plans held an estimated $5.6 trillion in assets and represented more than 19 percent of the $28.7 trillion in US retirement assets, which includes employer-sponsored retirement plans (both defined benefit ("DB") and defined contribution ("DC") plans with private- and public-sector employers), individual retirement accounts ("IRAs"), and annuities. In 2018, more than 58 million American workers were active 401(k) participants, and there were more than 580,000 401(k) plans[6], offering an average of 27 different investment options each.[7] In addition, an estimated 46.4 million U.S. households (36 percent of all U.S. households) reported owning an IRA as of mid-2019, either in addition to a workplace retirement plan or as their sole

[6] Investment Company Institute, "Frequently Asked Questions About 401(k) Plan Research," https://www.ici.org/401k/faqs/faqs_401k#:~:text=As%20of%20March%2031%2C%202020,and%20public%2Dsector%20employers)%2C.
[7] Investment Company Institute, "401(k) Plans Continue to Offer Millions of Workers a Reliable Way to Save for Retirement," https://www.ici.org/401k/news/19_news_401kday.

retirement account.[8] About 6 in 10 traditional IRA-owning households in mid-2019 indicated their IRAs contained rollovers from employer-sponsored retirement plans. With $9.7 trillion in assets at the end of the second quarter of 2019, IRAs represented 33 percent of total U.S. retirement assets.[9]

As defined contribution retirement accounts have replaced defined benefit pensions as the primary form of workplace retirement plan, workers increasingly are responsible for making the investment decisions that will determine their financial security in retirement. At the same time, retirement savers face an increasingly complex, and often bewildering, set of financial products and services.

Recent research and investor surveys[10] conclude that most retirement savers are not equipped to navigate the complicated retirement investment marketplace on their own and, because of this, many of them turn to financial professionals for expert advice. Yet, when retirement investors seek financial advice, they typically encounter a marketplace where it is difficult to distinguish 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 salespersons.

Moreover, research and investor surveys confirm that, regardless of what type of financial professional they turn to for advice, investors reasonably expect that the advice they receive will be in their best interest. A 2017 survey by Personal Capital[11] found that nearly half of Americans (46%) believe all financial advisors are required by law to always act in the client's best interests, and nearly a third (31%) are unsure about the standard of conduct to which various financial professionals are held. A 2017 Jefferson National survey[12] found that nearly 6 in 10 investors (59%) incorrectly believe that all financial advisers already are required by law to put their clients' best interests first. And finally, an overwhelming 93% of Americans think it is important that all financial advisors who provide retirement advice are legally required to put their clients' best interests first.[13]

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[8] Investment Company Institute, *The Role of IRAs in US Households' Saving for Retirement*, 2019, ICI Research Perspective, December 2019, Vol, 25, No. 10 https://ici.org/pdf/per25-10.pdf.

[9] *Id.*

[10] *See* FINRA Investor Education Foundation, "The State of U.S. Financial Capability: The 2018 National Financial Capability Study," June 2019, *available at* https://www.usfinancialcapability.org/downloads/NFCS_2018_Report_Natl_Findings.pdf; Brian Scholl, Office of the Investor Advocate, & Angela A. Hung, RAND Corp., "The Retail Market for Investment Advice," at p. 59-60 (Oct. 2018), *available at* https://bit.ly/3hGGNj4; Jeremy Burke and Angela A. Hung, "Trust and Financial Advice," RAND Working Paper (Jan. 2015) at p. 14, *available at* http://bit.ly/2j3GHZC; and earlier research, including 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), *available at* https://bit.ly/3hKJ2lw; and Angela A. Hung, et al., RAND Institute for Civil Justice, "Investor and Industry Perspectives on Investment Advisers and Broker-Dealers" (Oct. 2008), *available at* https://bit.ly/307OpVS.

[11] 2017 Personal Capital Financial Trust Report, *available at* http://bit.ly/2rUJOpU.

[12] Jefferson National Press Release dated June 27, 2017, "Third Annual Advisor Authority Study Shows Investors and Advisors Aligned on Importance of Fiduciary Standard--Regardless of DOL Fiduciary Rule," *available at* https://www.prnewswire.com/news-releases/third-annual-advisor-authority-study-shows-investors-and-advisors-aligned-on-importance-of-fiduciary-standardregardless-of-dol-fiduciary-rule-300480214.html.

[13] In Whose Best Interest: A Financial Engines Survey on the Conflict of Interest Rule, *available at* https://financialengines.com/docs/financial-engines-best-interest-report-2-041817.pdf.

2. CFP Board *Code and Standards*: A Business-Model Neutral Fiduciary Standard

CFP Board is a professional body that sets and enforces education, examination, experience and ethics requirements for CFP® professionals. Today, more than 87,000 CFP® professionals agree to abide by high standards for competency and ethics, which CFP Board periodically reviews and updates to maintain the value, integrity and relevance of CFP® certification. As a professional standard-setting organization, CFP Board develops and enforces business conduct standards that are consistent with, and in certain instances may exceed, existing legal and regulatory requirements.

CFP Board's *Code of Ethics and Standards of Conduct*[14] (*"Code and Standards"),* complete with fiduciary obligations, apply across a wide variety of business models: CFP® professionals work at independent broker-dealers, wirehouses, registered investment advisers, insurance companies and banks; they may be engaged in stand-alone business models or may be dual registrants. Wherever CFP® professionals are employed, they are required to provide professional services under the fiduciary standard articulated in CFP Board's *Code and Standards*.

CFP Board first adopted a fiduciary standard for CFP® professionals in 2007 when it required that a CFP® professional commit to a fiduciary standard when providing financial planning or material elements of financial planning. This fiduciary obligation enjoyed strong support among CFP® professionals, as demonstrated in surveys conducted on behalf of CFP Board.

For example, a 2013 Aite survey[15] found that most registered representatives and registered investment advisers agree that a fiduciary standard of conduct is appropriate for financial services providers who deliver personalized investment advice. This finding was echoed by financial professionals working under a multitude of business models and subject to different regulatory frameworks. Those surveyed cited greater alignment between the provider and investor interests as the primary benefit of a uniform fiduciary standard.

In July 2015, Princeton Survey Research Associates International (PSRAI) conducted similar research for the Coalition.[16] That study surveyed 1,852 stakeholders from Coalition organizations, and found that (i) almost 9 out of 10 respondents agreed with the statement that "a Fiduciary Standard of Conduct is appropriate for all financial professionals who deliver personalized investment advice to retail investors" and (ii) two-thirds believed that a change to extend the fiduciary standard of conduct to broker-dealers would have a positive impact on investors.

A. Revised CFP Board *Code and Standards* Expands the Fiduciary Obligation

In December 2015, CFP Board announced the formation of a Commission on Standards to review and recommend to the Board of Directors of CFP Board proposed changes to the Terminology, Code of Ethics and Professional Responsibility, Rules of Conduct, and Financial Planning Practice Standards sections of the CFP Board's then-applicable standards.

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[14] *Available at* https://www.cfp.net/ethics/code-of-ethics-and-standards-of-conduct.
[15] Aite, "Fiduciary Study Findings for CFP® Board" (June 2013), available at http://www.cfp.net/docs/publicpolicy/aitefiduciary-study-june-2013.pdf.
[16] Financial Planning Coalition, *"*Fiduciary Standard Survey,*"* Prepared by Princeton Survey Research Associates International (Revised July 2015), *available at* http://financialplanningcoalition.com/wpcontent/uploads/2015/07/Princeton-ResearchFiduciary-Study-Final.pdf.

Commission members included CFP® professionals and other financial services professionals operating under diverse business models, regulatory experts, an investor advocate, and a public representative.

After a two-year deliberative and inclusive process that sought input from all stakeholders through public forums, comment letters and meetings with interested parties, the Board of Directors of CFP Board in March 2018, approved a new *Code of Ethics and Standards of Conduct,* which articulates the ethical standards for CFP® professionals, and set an effective date for the *Code and Standards* of October 1, 2019.[17] Consistent with CFP Board's mission to work in the public interest, and in furtherance of its strategic plan committed to a fiduciary standard, the newly-revised *Code and Standards* extends the application of the fiduciary duty to all "Financial Advice"[18] provided by a CFP® professional. This is an enhanced duty as compared to CFP Board's previous standards adopted in 2007, which imposed a fiduciary duty on CFP® professionals only when providing "Financial Planning"[19] services.

The expanded fiduciary obligation recognizes two critical realities. First, that one of the most important financial decisions most investors will make is choosing which professional to rely upon for financial advice. Second, that investors increasingly expect personalized investment advice to be delivered under a fiduciary standard of conduct. Under the *Code and Standards*, the public will know that a CFP® professional has committed to CFP Board to act as a fiduciary at all times when providing Financial Advice. As a result, CFP® professionals will owe their clients the same fiduciary duty both when providing Financial Planning services and when providing Financial Advice, thereby eliminating potential client confusion about a CFP® professional's obligations to a client when providing both types of services.

The fiduciary obligation enjoys strong support among CFP® professionals and their membership organizations. More than 96% of CFP® professionals who responded to a survey[20] agreed that a CFP® professional should be required to act in the client's best interest when providing Financial Advice. Likewise, FPA and NAPFA publicly endorsed the expanded fiduciary obligation. FPA applauded CFP Board "for taking the bold and necessary step in expanding the fiduciary standard for CFP® professionals."[21] NAPFA said that the fiduciary obligation in the *Code and Standards* "supports CFP Board's efforts to [broaden] fiduciary requirements for CFP® professionals. Working under fiduciary principles is the most transparent – and we believe the most objective – way to serve the public. Consumers have come to expect advice delivered in their best interest and will now be able to count on a CFP® professional to provide it at all times

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[17] To align with the date set by the SEC for compliance with Reg BI, CFP Board announced on June 16, 2019 that its Board of Directors set a date of June 30, 2020 when CFP® professional's compliance with the new *Code and Standards* would be enforced.

[18] The *Code and Standards* defines "Financial Advice" as (1) "[a] communication that, based on its content, context, and presentation, would reasonably be viewed as a recommendation that the Client take or refrain from taking a particular course of action with respect to: [t]he development or implementation of a financial plan; [t]he value of or the advisability of investing in, purchasing, holding, gifting, or selling Financial Assets; [i]nvestment policies or strategies, portfolio composition, the management of Financial Assets, or other financial matters; or [t]he selection and retention of other persons to provide financial or Professional Services to the Client; or (2) [t]he exercise of discretionary authority over the Financial Assets of a Client."

[19] The *Code and Standards* defines "Financial Planning" as "[A] collaborative process that helps maximize a Client's potential for meeting life goal through Financial Advice that integrates relevant elements of the Client's personal and financial circumstances."

[20] CFP Board, "Commentary on New Code of Ethics and Standards of Conduct," November 27, 2018, at p. 4, *available at* https://www.cfp.net/ethics/compliance-resources/2018/11/commentary-on-new-code-of-ethics-and-standards-of-conduct

[21] *Id.*

when giving financial advice."[22]

<u>3. Evaluating the Department's Retirement Investment Advice Rule Package</u>

Congress enacted ERISA in 1974 to establish special rules to protect Americans' retirement assets in tax-advantaged retirement savings vehicles. In doing so, Congress recognized that it was in the public interest to encourage all Americans to save for a secure and independent retirement. Given the importance of maximizing Americans' retirement assets, Congress intentionally established requirements for financial advice under ERISA that are distinct from and more rigorous than those that apply under insurance and securities laws to nonretirement assets, *including the explicit requirement that advice be in the sole interest of the plan and plan participants*.

The Department's current rule package will allow for conflicted advice by non-fiduciary advisers related to retirement assets in contravention of Congress' express intent. While the Department has the authority to adopt exemptions to ERISA's prohibited transaction rules, it must include protective provisions in any such PTE sufficient to ensure that the interests of plans and plan participants are protected from the harmful impact of permitted conflicts.

The Coalition evaluated the Department's rule package against the framework of CFP Board's *Code and Standards*, which impose a clear and unambiguous fiduciary duty for all financial advice. Our conclusions are that (1) the Department's reinstatement of the five-part test fails to meet its statutory obligation under ERISA, and (2) the proposed PTE based on the SEC's Reg BI is contrary to what is required under the *Code and Standards* and falls far short of what investors saving for a secure and independent retirement deserve and expect.

A. <u>Reinstating the Five-Part Test</u>

We oppose the Department's decision to reinstate the 1975 regulatory definition of fiduciary investment advice. This 45-year-old definition was not developed with the current retail retirement investment advice landscape in mind. The definition's five-part test enables financial professionals to function as investment advice providers in positions of trust and confidence without being held to a fiduciary standard appropriate to that role. It does nothing to prevent financial professionals from marketing themselves to unsuspecting workers and retirees as trusted advisers even when they are regulated exclusively as salespersons.

ERISA broadly defines an investment advice "fiduciary" as 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*." However, when the Department adopted the five-part test in 1975 to implement ERISA, it greatly narrowed, through regulation, the reach of the statutory definition of fiduciary under ERISA. The Department has now reinstated, without any opportunity for public comment, that outdated five-part test for determining who qualifies as an investment advice fiduciary under ERISA. This regulatory definition of fiduciary ignores the fundamental shifts that have occurred in retirement investment marketplace in the intervening 45 years and is wholly inadequate to protect the hard-earned retirement savings of millions of Americans.

The 1975 regulatory definition introduced inappropriate and unjustified requirements that allow advisers' interests to be misaligned with retirement investors' interests. The five-part test

[22] *Id.*

opens significant loopholes that allow for the sale of products that may not be in the best interest of a retirement investor. Importantly, while many financial advisors seek to do what is best for their clients, others may take advantage of "regulatory gaps" to steer their clients into high-cost, substandard investments that pay the advisor well but gradually eat away at retirement investors' nest eggs.

The Coalition is concerned, in particular, about provisions requiring that the advice *(i) be provided on a regular basis and (ii) 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 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 avoid the fiduciary obligation appropriate to their advisory role. Salespersons who provide advice in the context of investment sales have used these loopholes to preserve their ability to provide services to retirement savers 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."

1. "Regular Basis"

One practical effect of reinstating the 1975 five-part test, 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 fiduciary standard under ERISA. Yet, rollovers from workplace retirement plans play a major role in funding IRAs, making the application of the definition to rollover recommendations particularly important. Nearly 6 in 10 (59%) of households that owned traditional IRAs in 2019 indicated that their IRA contained retirement savings rolled over from a workplace retirement plan. Of those, 86% indicated they had rolled over the entire account balance in their most recent rollover, according to ICI.[23] In fact, the Department itself indicated that, "Cerulli has estimated the number of plans rolled into IRAs to be 3,622,198. The Department estimates that 50 percent of these rollovers will be handled by a financial professional."[24]

Despite the substantial retirement assets at stake, the "regular basis" requirement results in applying different standards to identical activities with identical effects.[25] One-time events, such as the sale of annuities or an IRA rollover, may have substantial, adverse impacts on a person's retirement savings. Maintaining the "regular basis" requirement effectively allows such one-time transactions to misallocate ERISA-protected assets. The "regular basis" requirement excludes these transactions from ERISA's scope and allows assets accumulated under ERISA's protection to be dissipated without protection. By effectively exempting most rollover recommendations where the adviser receives sales-based incentives, the Department's reinstatement of the five-part test ensures that retirement savers will be deprived of fiduciary protection when it is needed most – when the risks and conflicts are greatest.

[23] Investment Company Institute, "The Role of IRAs in US Households' Saving for Retirement," ICI Research Perspective, December 2019, Vol. 25, No. 10, *available at* https://ici.org/pdf/per25-10.pdf.
[24] *Supra,* n. 2, at FN 148.
[25] See Benjamin P. Edwards, "The Department of Labor's Test for "Investment Advice" Should Be Changed," July 30, 2020, *available at* https://lawprofessors.typepad.com/business_law/2020/07/the-department-of-labors-test-for-investment-advice-should-be-changed.html.

2. "Mutual Agreement" and "Primary Basis"

Under the five-part test, a person may escape fiduciary status by arguing that there was no "mutual agreement" that their advice would be the "primary basis" for an investment decision.[26] For example, in contested cases, fine-print disclaimers in sales contracts could be offered to rebut the existence of any mutual agreement. And while it is often difficult to parse out the exact source of information behind a retail investor's decision-making as to their retirement assets, persons giving financial advice for a fee should not be able to dispense conflicted advice on the theory that an investor should not rely on that advice as the primary basis for their investment. In fact, as mentioned above, the retirement landscape has changed so much that investors usually are ill-equipped to decipher the intricacies behind retirement investing and largely rely on the informed opinions of financial services professionals as the primary basis to guide them on their retirement savings journeys. In essence, this "mutual agreement" and "primary basis" prong allows salespersons to exploit the wide financial sophistication gap between retail retirement savers and financial services providers.

The Coalition encourages the Department to revise the regulatory definition of fiduciary advice to reflect the realities of today's retirement investment marketplace. Specifically, we urge the Department to remove the second prong of the test that requires that advice must be given "on a regular basis." Additionally, the Department should not abdicate its responsibility to protect retirement assets. Financial professionals should not be permitted to rely upon boilerplate customer agreement disclaimers to escape ERISA's clear fiduciary obligations and thus profit from conflicted advice. Instead, 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 regulatory definition.

B. <u>Prohibited Transaction Exemption</u>

In addition to reopening loopholes in the definition of investment advice fiduciaries, the Department is proposing a broad new exemption to the prohibited transaction provisions under ERISA. The proposed exemption refers to and is based largely on the SEC's recently implemented Regulation Best Interest ("Reg BI"). In proposing this new PTE, the Department has significantly watered down the duty of loyalty that firms and financial professionals would be required to meet when providing investment advice.

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 Reg BI's standards[27] and merely prohibit 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."* The securities law standard is 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 seeks to replace a robust fiduciary standard appropriate to an advisory role with a weaker, non-fiduciary standard. The "without

[26] *Id*.
[27] *Supra*, n. 2, at pp. 40842-40843

regard to" provision must be retained because it is consistent with and reinforces the "undivided loyalty" standard in ERISA. In addition, this provision 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 Department's proposal is modeled on the non-fiduciary and so-called "best interest" standard the SEC chose to adopt in Reg BI.

There are other reasons why Reg BI is not an appropriate basis for the Department's proposed PTE:

- The SEC has stated explicitly that Reg BI is <u>not</u> a fiduciary standard. [28]
- The SEC chose not to define the term "best interest" in the rule.
- Reg BI fails to establish a true best interest obligation as that concept is reasonably understood by investors.
- Reg BI's treatment of conflicts of interest is inadequate to prevent conflicts from tainting the advice that brokers provide to investors.
- The required new "plain English" disclosures for brokers and advisers are inadequate to meaningfully assist investors in making an informed choice between different types of accounts and different financial professionals.[29]
- Since only a few weeks have passed since the June 30, 2020, Reg BI compliance date, it is unclear how the SEC will interpret and enforce Reg BI, how investors will react, or how the marketplace will respond.

For these reasons, the SEC's Reg BI cannot and should not be considered as an appropriate basis for the Department's proposed PTE.

In stark contrast to the Department's proposal and to Reg BI, "best interest" under CFP Board's *Code and Standards* clearly and unambiguously means a fiduciary duty. The fiduciary duty encompasses both a duty of loyalty and a duty of care. The duty of loyalty and duty of care flow directly from both common law fiduciary duty concepts as well as the fiduciary standards applicable to investment advisers under federal law contained in the Investment Advisers Act of 1940.[30] The fiduciary duty is clearly stated and defined, and must be satisfied through the management of conflicts, and not solely or primarily through disclosures, policies or procedures.

Under the *Code and Standards*, the *duty of loyalty* requires, among other things, placing the interests of the client "above" the interests of the CFP® professional and his/her firm. It also requires acting "without regard to" the financial or other interests of the CFP® professional, his/her firm, or any individual or entity other than the client. The "without regard to" requirement is taken directly from Section 913(g) of the Dodd-Frank Act.[31]

The *duty of care* under the *Code and Standards* mandates that a CFP® professional act "with the care, skill, prudence, and diligence that a prudent professional would exercise in light of the client's goals, risk tolerance, objectives, and financial and personal circumstances." This requirement is derived from the common law "prudent man rule," which has evolved into today's

[28] SEC, Regulation Best Interest, at pp. 12, 19, available at https://www.sec.gov/rules/final/2019/34-86031.pdf.
[29] Research conducted by an independent disclosure design expert on behalf of the Financial Planning Coalition, AARP and Consumer Federation of America found that the proposed disclosure, as conceived by the SEC, would fail to serve its intended regulatory function. Comment Letter from AARP, CFA, Financial Planning Coalition, to Jay Clayton, Chairman, Sec. & Exch. Comm'n (September 11, 2018) https://bit.ly/3hPXpF0.
[30] 15 U.S.C. §80b-1 et seq.
[31] Dodd–Frank Wall Street Reform and Consumer Protection Act (Pub.L. 111–203).

"prudent investor rule" and is reflected in fiduciary legal frameworks such as ERISA. Collectively, these principles encourage financial professionals to competently provide services, to be fully knowledgeable about recommended products and services, and to use thorough judgment and due diligence when evaluating investment risks and opportunities based on the client's profile. When financial professionals thoughtfully adhere to both the *duty of loyalty* and the *duty of care*, investors receive protections consistent with the plain meaning of the phrase "best interest."

4. Conclusion: The Department's Proposal Should Reflect the Realities of Today's Retirement Marketplace

Faced with growing responsibility for their own retirement investment decisions and an increasingly complex universe of financial products and services, American investors today naturally turn to financial professionals for assistance. When they seek financial advice, however, they face a marketplace in which it is virtually impossible to distinguish a salesperson from an advisor, or between those advisors who are legally obligated to provide advice truly in the investor's best interest versus those who are not. A clear fiduciary standard, equally applied to all financial professionals who provide retirement investment advice, has become a necessity to protect investors in today's rapidly-evolving marketplace.

The fiduciary duty set forth in CFP Board's *Code and Standards* reflects the simple and unambiguous principle that CFP® professionals operating under all business models must always provide Financial Advice to clients under a fiduciary standard. Accordingly, the Coalition respectfully requests the Department to withdraw in its entirety both the final rule reinstating the 1975 five-part test and the proposed prohibited transaction exemption based on the SEC's Regulation Best Interest. In its place, the Department should initiate rulemaking and propose comprehensive retirement investment regulations that reflect the realities of today's marketplace and protect the hard-earned retirement savings of millions of Americans.

Thank you.

Sincerely,

Kevin R. Keller, CAE	Patrick Mahoney	Geoffrey Brown, CAE
Chief Executive Officer	Interim CEO	Chief Executive Officer
CFP Board	FPA®	NAPFA