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August 6, 2020

Via: https://www.regulations.gov and e-mail

The Honorable Jeanne Klinefelter Wilson
Acting Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Application No. D-12011
ZRIN 1210-ZA29
Improving Investment Advice for Workers & Retirees
Docket ID #: EBSA-2020-0003

Dear Acting Assistant Secretary Wilson:

On behalf of our 38 million members and all retirement savers, AARP writes today to comment on the Department of Labor's (Department or DOL) Proposal on fiduciary investment advice for workers and retirees. AARP shares the goal of increasing access to fiduciary investment advice for individual account plan participants. To that end, we have consistently asserted that such advice must be subject to the Employee Retirement Income Security Act's (ERISA) fiduciary rules, based on sound investment principles and protected from conflicts of interest. We welcome the chance to be a part of this process and intend to continue to play an active role in educating and engaging all Americans to help them make informed investment decisions and improve their financial security.

AARP submits that the Proposal, as currently written, would authorize a harmful level of conflicted advice by fiduciaries who are providing advice to individuals with ERISA retirement accounts and their plans as well as IRA holders. Moreover, the Proposal sanctions compensation models not currently allowed and expands the types of investments covered. Perhaps, most importantly, contrary to ERISA's mandate, AARP submits that the Proposal provides inadequate restrictions on the provision of conflicted fiduciary investment advice and does not provide the necessary substantive protections for participants and beneficiaries.

AARP urges the Department to substantially modify or rescind its Proposal, and to revise it in order to expand the protections for participants and beneficiaries and other Retirement Investors in accordance with ERISA's statutory language and the purpose and intent of Congress.

I. In Order To Effectively Accumulate And Manage Retirement Assets, Individuals Need Nonconflicted Fiduciary Investment Advice.

A priority for AARP is to assist Americans in accumulating and effectively managing adequate retirement assets to supplement Social Security. The shift from defined benefit plans to defined contribution plans has transferred significant responsibility to individuals for investment decisions that directly impact the adequacy of the assets available to fund their future retirement needs.[1] Unfortunately, the state of America's retirement landscape is cause for great concern. According to calculations by the Center for Retirement Research at Boston College, only about half of households, in mid-career, have retirement savings. For many people, the account balance in their 401(k) plan or Individual Retirement Account (IRA) represents the bulk of their personal savings.[2] The rest have little to no sources of retirement income other than Social Security[3] and the "retirement income deficit" for American households continues to grow. Recent analysis by the Employee Benefit Research Institute (EBRI) showed that 47 percent of workers in 2017 reported that the total value of their household's savings and investments, not just for retirement, was less than $25,000 and 24 percent had less than $1,000.[4] Moreover, the average longevity for persons who retire at age 65 has increased until the mid-80's.[5] Finally, many Americans lack strong financial literacy skills,[6] and results from financial

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[1] *See* Section IV.A.2., *infra*.
[2] U.S. Gov't Accountability Office, GAO 15-419, *Retirement Security: Most Households Approaching Retirement Have Low Savings* 8 (May 2015), http://www.gao.gov/assets/680/670153.pdf (to the extent that households have savings, they are not significant outside of retirement accounts).
[3] Federal Reserve Bulletin (Sept. 2017), https://www.federalreserve.gov/publications/files/scf17.pdf.
[4] Lisa Greenwald et al., *The 2017 Retirement Confidence Survey: Many Workers Lack Retirement Confidence and Feel Stressed About Retirement Preparations* (Mar. 21, 2017), https://www.ebri.org/pdf/briefspdf/EBRI_IB_431_RCS.21Mar17.pdf. This figure refers to the total value of their household's savings and investments, excluding the value of their primary home.
[5] According to the Centers for Disease Control, a man reaching age 65 today can expect to live, on average, until age 83, and, a woman until age 85.6. Elizabeth Arias, Ph.D., and Jiaquan Xu, M.D., National Vital Statistics Reports, Vol. 68, No. 7, *United States Life Tables*, 2017, Table A (June 24, 2019), https://www.cdc.gov/nchs/data/nvsr/nvsr68/nvsr68_07-508.pdf.
[6] Annamaria Lusardi et al., *Financial Literacy and Financial Sophistication in the Older Population: Evidence from the 2008 HRS* (Sept. 2009), http://www.mrrc.isr.umich.edu/publications/papers/pdf/wp216.pdf ("In view of the fact that individuals are increasingly required to take on responsibility for their own retirement security, this lack of [financial] knowledge has serious implications."); *see also*

education efforts have been mixed, at best.[7] Given these trends, it is critical to do all we can to help Americans keep and grow as much of their hard-earned savings as possible and to ensure that they make well-informed investment decisions for their financial situation.[8]

AARP has historically supported the development of rules and regulations that protect plan participants and IRA holders when they make investment decisions concerning their retirement monies. Such protections include – but are not limited to – adequate protections from conflicted advice. We believe that without such protections, it is difficult for individuals to effectively save and plan for a secure and adequate retirement.

II. Class Exemptions Must Be Narrowly Construed In Order To Maintain ERISA's Purpose Of Protecting The Retirement Assets Of Participants And Beneficiaries.

Under ERISA § 408(a),[9] the Secretary is authorized to "grant a conditional or unconditional exemption of any fiduciary or transaction, or class of fiduciaries or transactions, from all or part of the restrictions imposed by §§ 406 and 407(a)." Congress

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FINRA Inv'r Educ. Found., *The State of U.S. Financial Capability: The 2018 National Financial Capability Study* 33 (June 2019), https//www.usfinancialcapability.org/downloads/NFCS_2018_Report_ Natl_Findings.pdf (noting a downward trend in financial literacy since 2009); Annamaria Lusardi & Peter Tufano, *Debt Literacy*, *Financial Experiences, and Overindebtedness*, 14 J. OF PENSION ECON. AND FIN. 332 (Oct. 2015) (only one-third of respondents correctly answered debt literacy questions concerning compounding of interest); Annamaria Lusardi & Olivia S. Mitchell, *Financial Literacy and Planning: Implications for Retirement Wellbeing,* Nat'l Bureau of Econ. Research Working Paper 17,078, at 6 (May 2011), http://www.nber.org/papers/ w17078.pdf (one-third of survey respondents did not understand compound interest, one-quarter did not understand inflation implications and half did not know about risk diversification).

[7] Susannah Snider, *Do Financial Literacy Courses Work?,* U.S. NEWS (Aug. 28, 2018), https://money. usnews.com/money/personal-finance/family-finance/articles/2018-08-28/do-financial-literacy-courses-work**;** Justine S. Hastings, Brigitte C. Madrian, and William L. Skimmyhorn, *Financial Literacy, Financial Education And Economic Outcomes*, ANNUAL REV. ECONOMICS at 1; 5: 347–373 (May 2013), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3753821/#R80.

[8] *See, e.g.*, Jay Goodliffe et al., *The Cost of Retiring Poor: Cost to Taxpayers of Utahns Retiring Poor* (Jan. 2015), http://www.aarp.org/content/dam/aarp/ppi/2016-03/cost-to-taxpayers-of-utahns-retiring-poor.pdf (increases in retirement savings will prevent substantial increases in costs associated with existing public programs); Aleta Sprague, *The California Secure Choice Retirement Savings Program* 5 (Apr. 26, 2013), http://www.retirementmadesimpler.org/Library/CAretirementFinal4.26.13.pdf (noting that retirees without adequate retirement savings will rely on the federal and state social safety net).

[9] 29 U.S.C. § 1108(a).

intended that the exemptions it established from ERISA's prohibited transaction rules were to be construed narrowly.[10]

The Secretary's authority to issue such exemptions is limited by statute to those exemptions which are: "(1) administratively feasible, (2) in the interests of the plan and of its participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries of such plan."[11] Further, the Department is only authorized to grant an exemption after first "considering all the facts and representations submitted by an applicant in support of an exemption application, all the comments received in response to a notice of proposed exemption, and the record of any hearing held in connection with the proposed exemption."[12] Accordingly, because ERISA provides not only disclosure rights, but more importantly, substantive rights and protections, the exemption must address the conflicts presented by the prohibited transaction and provide stringent conditions including genuine enforcement mechanisms before any exemption from the prohibited transaction rules is granted.

III. Compliance With Other Federal And State Regulatory Schemes Is Not Adequately Protective Of Participants And Beneficiaries In ERISA Plans Or IRAs.

Before ERISA was enacted, Congress passed the Welfare and Pension Plan Disclosure Act of 1958 (WPPDA) "purportedly to protect the interest of welfare and pension plan participants and beneficiaries through disclosure of information with respect to such plans."[13] This statute required plan administrators to file annual reports with the Secretary of Labor and furnish them on request to participants, so that "the knowledge thus disseminated would enable participants to police their plans."[14]

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[10] See S. Rep. No. 93-127, 93d Cong., 1st Sess. (1973), *as reprinted in* 1974 U.S.C.C.A.N. 4838, 4853 ("[E]xemptions should be confined to their narrow purpose.") (discussing an earlier version of the bill); *see also McDannold v. Star Bank, N.A*., 261 F.3d 478, 481 (6th Cir. 2001) ("Under ERISA, Congress sought to protect plan assets by placing narrow restrictions on the types and terms of stock purchase transactions in which plans may engage. *See* 29 U.S.C. §§ 1106-1108 (prohibiting certain transactions with benefit plans and outlining stringent exemptions)."); *Reich v. Hall Holding Co*., 990 F. Supp. 955 (N.D. Ohio 1998) ("In order to allow appropriate transactions between a plan and its sponsor, however, Congress enacted ERISA § 408, which carves out narrow exemptions from the prohibited transactions listed in § 406. Congress' goal of preventing insider abuse should not be undermined by the unnecessary expansion of the scope of these narrowly carved exemptions."), *aff'd sub nom., Chao v. Hall Holding Co*., 285 F.3d 415 (6th Cir. 2002).

[11] 29 U.S.C. § 1108(a).

[12] 29 C.F.R. § 2570.48(a).

[13] H.R. Rep. No. 93-533, reprinted at 1974 U.S.C.C.A.N. 4639, 4642.

[14] *Id*.

But Congress concluded that this scheme was "weak," both because of "limited disclosure requirements" and, more importantly, because it was "wholly lacking in substantive fiduciary standards."[15] Although Congress relied on trust law as the foundation of ERISA,[16] it realized that trust law was inadequate to completely protect participants.[17] ERISA's fiduciary requirements imposed duties of prudence, loyalty, and care with respect to the management of trust funds upon plan fiduciaries.[18] Congress also prohibited certain transactions between the plan and parties in interest,[19] because Congress found that these transactions were likely to cause injury.[20] Section 406(b) of ERISA categorically bars transactions involving fiduciary conflict or self-dealing transactions and expands upon the common law's arm's-length standard of conduct.[21]

At the time of ERISA's enactment, Congress was also aware of other federal and state regulatory schemes. Nothing in the text, history, or structure of ERISA demonstrates any congressional purpose or design to thwart compliance with ERISA's fiduciary duty requirements merely because a fiduciary complies with federal securities laws or other federal or state regulatory schemes.[22]

The purpose of each statute clearly demonstrates the reason compliance with one statute is not equal to compliance with the other. The securities laws were never meant to protect retirement plans, and have never served that role. Instead, their purpose is to regulate the offer, purchase and sale of securities; protect all, not just retirement account, investors; maintain fair, orderly, and efficient markets; and facilitate capital formation.[23] In contrast, "[o]ne of ERISA's principal goals is to afford appropriate protection to employees and

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[15] *Id.*
[16] *See, e.g., Tibble v. Edison Int'l*, 575 U.S. 523, 135 S. Ct. 1823, 1828 (2015) ("Under trust law, a trustee has a continuing duty to monitor trust investments and remove imprudent ones."); *Central States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 569-71 (1985) (fiduciary powers must be exercised in accordance with trust law standards).
[17] *See 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 protection."); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 264 (1993) (Congress made "an express statutory departure" from the common law of trusts in its definition of fiduciary).
[18] ERISA § 404, 29 U.S.C. § 1104.
[19] ERISA § 406(a), 29 U.S.C. § 1106.
[20] *Comm'r v. Keystone Consol. Indus*., 508 U.S. 152, 160 (1993). *See also Marshall v. Kelly*, 465 F, Supp. 341, 354 (W.D.Okla.978) ("Congress was concerned in ERISA to prevent transactions which offered a high potential for loss of plan assets *or for insider abuse"*) (emphasis added).
[21] *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc*., 530 U.S. 238, 252 (2000).
[22] *Cf. POM Wonderful LLC v. Coca-Cola Co*., 134 S. Ct. 2228, 2238 (2014) ("When two statutes complement each other, it would show disregard for the congressional design to hold that Congress nonetheless intended one federal statute to preclude the operation of the other.").
[23] 15 U.S.C. §§ 77b, 78b.

their beneficiaries with respect to the administration of employee welfare benefit plans."[24] Congress "establish[ed] standards of conduct, responsibility, and obligations for fiduciaries."[25] In this manner, fiduciaries are held accountable for their decisions, thereby fostering ERISA's primary goal of protecting employees' benefits. Under ERISA, the duties owed by fiduciaries to plan participants and beneficiaries are "the highest known to the law."[26] ERISA was enacted after these other statutory schemes; ERISA's primacy over regulation of retirement plans should be even more obvious. If Congress had intended that compliance with these other regulatory schemes satisfied ERISA's strict fiduciary standards, surely it would have said so.[27] Congress did not.

Moreover, Congress enacted ERISA's preemption provision that maintained state laws regulating insurance, banking, or securities,[28] and specifically stated that existing federal laws would be complementary.[29] This statutory provision demonstrates that Congress was capable of distinguishing between different types of statutes. ERISA, unlike any of the securities or insurance laws, statutorily requires anyone with significant control over a retirement plan to meet ERISA's fiduciary duties of loyalty and prudence[30] and not engage in self-dealing or conflicts of interest.[31] ERISA's standards are far higher than those of the securities or insurance laws because ERISA's role is to protect an individual's retirement benefits.[32]

Finally, unlike these other federal or state regulatory schemes, the American taxpayer subsidizes the retirement system protected under ERISA through tax deferral. Indeed, the tax expenditure for retirement plans is estimated at $1.5 trillion for the years 2019-2023, which is among the top three tax expenditures.[33] Given the substantial subsidies and the overall importance of retirement security to all Americans, it is clear why Congress provided more protection for retirement assets.

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[24] *Merrimon v. Unum Life Ins. Co. of Am.*, 758 F.3d 46, 50 (1st Cir. 2014).
[25] ERISA § 2(b), 29 U.S.C. § 1001(b).
[26] *Donovan v. Bierwirth*, 680 F.2d 263, 271, 272 n.8 (2d Cir. 1982).
[27] *See Russello v. United States*, 464 U.S. 16, 25 (1983) ("Language in one statute usually sheds little light upon the meaning of different language in another statute, even when the two are enacted at or about the same time."). Indeed, if Congress was satisfied with these regulatory schemes in protecting retirement plans, it would not have enacted ERISA. ERISA § 2(b), 29 U.S.C. § 1001(b).
[28] *See* ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A).
[29] *See* ERISA § 514(d), 29 U.S.C. § 1144(d).
[30] *See* 29 U.S.C. § 1104.
[31] *See* 29 U.S.C. § 1106.
[32] *See Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S.359, 375 (1980).
[33] Joint Committee on Taxation, *Estimates of Federal Tax Expenditures For Fiscal Years 2019-2023* (JCX-55-19, Dec.18, 2019), https://www.jct.gov/publications.html?func=startdown&id=5238.

This proposed exemption is largely based on, and defers to, the Securities and Exchange Commission's (SEC's) recently implemented Regulation Best Interest (Reg. BI). Reg. BI was drafted based on securities laws, and unlike ERISA, uses a "best interest" and not a fiduciary standard. The SEC explicitly acknowledged in adopting Reg. BI that it is not a fiduciary standard.[34] Under Reg. BI's non-fiduciary "best interest" standard, financial providers do not have the same fiduciary obligation to act in the sole interest of beneficiaries.[35] Moreover, the Department has extended the SEC best interest standard to all types of investment advisers and products, including insurance products not subject to SEC regulation.

The purpose of ERISA was to provide **more** protection for participants than state and federal law did at the time of ERISA's enactment.[36] Accordingly, compliance with the regulations of the SEC, state insurance, or related agencies or organizations is not protective of participants and beneficiaries in ERISA plans or IRAs and should not give ERISA fiduciaries a pass on their ERISA fiduciary duties.[37]

IV. Reinstating The 1975 Regulation Leaves Participants, Beneficiaries And Their Plans Unprotected, Without Grappling With The Real Changes That Have Occurred In The Retirement System.

A. AARP believes that the DOL's 1975 regulation is inconsistent with ERISA's statutory text and legislative history, and no longer is appropriate for the current retirement system.

1. The DOL 1975 regulation is inconsistent with ERISA's statutory text and legislative history.

Section 3(21) of ERISA provides that anyone who provides investment advice for a fee or other compensation, direct or indirect, shall be considered a fiduciary under the Act. A fiduciary, under ERISA, is required to act prudently, solely in the interests of participants and beneficiaries, and generally without conflicts of interest. Fiduciary status and its corollary standards and prohibitions are at the core of ERISA's protections.[38] Congress

[34] 84 Fed. Reg. 33318, 33462-33467 (July 12, 2019).
[35] *Compare* Regulation B-I *with* ERISA's sole interest standard at 29 U.S.C.§ 1104(a)(1).
[36] 29 U.S.C. § 1001.
[37] If this was true, then such compliance could eliminate all ERISA liability related to any ERISA fiduciary's investment decision.
[38] See Sections 3(21), 404 & 406, 29 U.S.C. §§ 1002(21), 1104 & 1106.

intended ERISA to provide more protections for fiduciary transactions than common law did.[39]

The Department's 1975 interpretation of fiduciary does not derive from ERISA's statutory language;[40] that text categorically designates any person who provides investment advice for a fee a fiduciary.[41] There is no limitation in the statutory text requiring that advice must be provided "on a regular basis" or that there must be a mutual agreement or understanding. Not only does the Department's initial interpretation add limitations where the statute has none, but its interpretation falls short of ERISA's main purpose of protecting participants and beneficiaries, primarily because the current interpretation would not apply to many modern advice transactions.[42] Reinstating the 1975 interpretation of fiduciary is inconsistent with ERISA's statutory text and legislative history.

2. There has been a well-documented shift from defined benefit to individual account retirement savings vehicles, which also transfers investment risk to individuals.

Since ERISA's enactment and the Department's issuance of regulations in 1975 defining fiduciary investment advice, retirement plans and investments have so significantly changed that there is no longer any justification, if there ever was one, for the current regulation's narrowing of the scope of the statutory definition of fiduciary investment advice.

Since 1975, there has been a dramatic decline in defined benefits plans – where advice was generally provided to more sophisticated employer fiduciaries – and a tremendous growth in participant directed defined contribution plans, where advice and investment offerings often are provided to less sophisticated and busy individuals. At the time of the initial regulation, IRAs had just been created, and today's most popular retirement vehicle – the 401(k) plan – was not created until years later. Today, most Americans with retirement savings are in 401(k) or other individual account type plans, and are therefore solely responsible for investing and managing the plan assets in their individual accounts.[43]

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[39] See Section III, *supra*.
[40] Section 3(21), 29 U.S.C. § 1002(21a).
[41] At least one court agrees with this analysis. "Indeed, if anything, it is the five-part test . . . 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." *Nat'l Ass'n for Fixed Annuities v. Perez*, 217 F. Supp. 3d 1, 23 (D.D.C. 2016).
[42] Section 2, 29 U.S.C. § 1001.
[43] *LaRue v. DeWolff, Boberg & Assoc.*, 552 U.S. 248, 255 n.5. (2008).

With this increase in defined contribution plans, more plan participants bear the risk associated with the performance of the funds in which fiduciaries invest their money.[44] Employees' defined contribution accounts often constitute the entirety of their retirement investment and are often modest in size, magnifying the personal consequences of poor returns or losses. The quality of performance hugely affects the benefits that participants receive upon retirement.[45] They entrust their money to plan fiduciaries based on the assumption that fiduciaries are administering the plans prudently and solely in the participants' best interest.[46] Fiduciary duties apply to the selection and monitoring of investment options, including those options that are proprietary mutual funds. Not surprisingly, excessive fees or lower returns in investment options negatively affect 401(k) account balances. Small changes to 401(k) plan fees substantially affect the amount of benefits that plan participants accrue for retirement and whether they will have adequate assets in retirement. This move toward defined contribution plans makes ERISA's substantive fiduciary protections even more critical because of the increased risk to plan participants.

In addition, as account holders change jobs or approach retirement age, we have seen a significant movement of assets from employer-sponsored plans to IRAs. Indeed, the amount of assets in IRAs now exceeds that of defined contribution plans, and recent data shows a steady increase of those assets, with most of the money coming from rollover distributions from 401(k) plans.[47] This growth of IRA assets from pension plans also demands a regulatory response. As participants retire or terminate employment and are encouraged to move their 401(k) assets into IRAs, they are moving from a heavily regulated system with fiduciary protection to one without similar protections. This same money, with similar tax subsidies and a similar national interest to ensure retirement security, should enjoy similar regulatory protections. Given the importance of individual account plans – and individual decisions – to overall retirement security, it is clear why retirement savers expect a fiduciary or other financial advisor to act in their sole interest.

Of particular concern to AARP is the potential negative impact of conflicts on the retirement security of our members and other older Americans. The Government Accountability Office (GAO) estimated that $20,000 in a 401(k) account that had a one

[44] *See* Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 YALE L.J. 451, 453 (2004) ("The defined benefit configuration principally assigns risk to the employer because the employer guarantees the employee a specified benefit, while the more privatized defined contribution approach apportions risk to the employee[.]").
[45] *Tibble v. Edison Int'l*, 575 U.S. 523, 135 S. Ct. 1823, 1826 (2015).
[46] ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1).
[47] Investment Company Institute, Retirement Assets Total $28.7 Trillion in First Quarter 2020 (June 17, 2020), https://www.ici.org/research/stats/retirement/ret_20_q1.

percentage point higher fee for 20 years would result in an over 17% reduction – over $10,000 – in the account balance.[48] We estimate that over a 30-year period, the account would be about 25 percent less. Even a difference of only half a percentage point – 50 basis points – would reduce the value of the account by 13 percent over 30 years.[49] A recent paper analyzed the claims for and against imposing fiduciary duty, and found that imposing fiduciary duty on broker-dealers shifts the set of products they sell to consumers, away from variable annuities and towards fixed indexed annuities. Even within variable annuities, imposition of fiduciary duty induces a shift towards lower-fee, higher-return annuities with a wider array of investment options. Indeed, they found that imposing a fiduciary duty upon broker-dealers raises risk-adjusted returns by 25 basis points.[50] The paper found that increases in the stringency of fiduciary duty improves advice.[51] In short, conflicted advice resulting in higher fees and expenses can have a huge impact on retirement income security levels.

In an earlier AARP survey aimed at fee disclosure, respondents answered questions concerning what factors they thought were important when making decisions about investments in their 401(k) plans.[52] Respondents cited the risk of the investments (94%); the reputation of the financial services company that managed the investments (93%); the past performance of investments (92%); diversification of investments (92%); and the amount of fees (85%) as important considerations when making investment decisions in their 401(k) plans.[53] Significantly, the types of information that respondents thought would be very helpful in making decisions concerned the amount of fees deducted, information about past performance and performance and fee benchmarks.[54] Individuals

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[48] U.S. Gov't Accountability Office, GAO-07-21, *Private Pensions: Changes Needed to Provide 401(k) Plan Participants and the Department of Labor Better Information on Fees* 7 (2006).
[49] Another way to look at this is participants would have to work from one to three years to make up the loss in their accounts.
[50] Similarly, paying 25 basis points more over 30 years leaves the investor with an account balance that is about 7 percent lower**.**
[51] Vivek Bhattacharya, Gaston Illanes and Manisha Padi, *Fiduciary Duty And The Market For Financial Advice* (NBER Working Paper No. 25861 Issued in May 2019, Revised in May 2020). *Accord,* Mark L. Egan, Shan Ge, Johnny Tang, *Conflicting Interests and the Effect of Fiduciary Duty -- Evidence from Variable Annuities* (NBER Working Paper No. 25577 Issued in July 2020) (finding variable annuity sales are roughly six times more sensitive to brokers' financial interests than investors' resulting in brokers earning higher commissions for selling inferior annuities, in terms of higher expenses and more ex-post complaints).
[52] Collette Thayer, *Comparison of 401(k) Participants' Understanding of Model Fee Disclosure Forms Developed by the Department of Labor and AARP* (Sept. 2008), http://www.aarp.org/research/surveys/ stats/surveys/public/articles/fee_disc losure.html.
[53] *Id*. at 6-7.
[54] *Id*. at 7-8.

may be unwilling to use and/or trust investment advice that does not take into account the information they believe is important to make decisions concerning investment options.

AARP does not believe that holding retirement plan advisers to a lesser standard, based in large part on disclosures alone, will address the problems of knowledge differential, advice need, and the national interest of ensuring adequate retirement income. Given the confusion and lack of understanding in the financial marketplace, it is clear to AARP that disclosure alone is not enough – a fiduciary interest standard is needed.[55] AARP believes that if an investment professional recommends to a plan fiduciary or participant the purchase of a certain investment (e.g., XYZ Stock), and the adviser receives payment, directly or indirectly, for providing that advice or investment (e.g., a fee or commission), the investment professional should be a fiduciary subject to ERISA's fiduciary responsibility provisions.

3. In 1975, because some now common investment vehicles did not exist, additional protections are required for Retirement Investors.

Since 1975, the variety and complexity of investments have dramatically changed. For example, in 1975, Wall Street had not yet created collateralized debt obligations or contemplated the creation and tremendous growth of target date funds. This constantly evolving investment marketplace – along with the evolution of the retirement landscape – demonstrates a need for a rule that better protects the interests of plans, as well as the participants and beneficiaries who shoulder greater responsibility for the investment of their individual plan accounts or IRAs. Maintaining the status quo is not an option.

However, undergirding this current Proposal is the erroneous assumption that more choice in investments is good for Retirement Investors.[56] A growing body of research indicates that people find it easier to make decision and make better decisions when faced with a smaller menu of options than with many possible choices.[57] Indeed, Congress

[55] We note that in the 2016 package of Rules and Exemptions concerning investment advice the Department cited numerous studies to conclude that where investment advice was concerned disclosures alone were inadequate to protect participants and beneficiaries. Here, the Department seems to have implicitly rejected those findings, without discussion.
[56] Indeed, the Exemption expands the types of products to which the Exemption applies. We question how this expansion is protective of participants and beneficiaries.
[57] Barry Schwartz, *The Paradox of Choice: Why More is Less* (2009); Sheena Iyengar & Emir Kamenica, "Choice proliferation, simplicity seeking, and asset allocation," *Journal of Public Economics, 94* (2010); S. Iyengar, G. Huberman, and W. Jiang, How Much Choice is Too Much? Contributions to 401(K) Retirement Plans. In: Mitchell O., Utkus S, editors. *Pension Design and Structure: New Lessons from*

relied on this research when it enacted the auto-enrollment and auto-default provisions.[58] Consequently, pushing Retirement Investors to receive fiduciary investment advice merely to obtain more investment choices is faulty policy and contravenes congressional intent.

4. Tax incentives encourage the formation and continuation of retirement plans in contrast to other savings vehicles.

Significant tax incentives encourage the offering of and participation in retirement plans in order to achieve the important national goal of improved income security in retirement. These tax incentives have been successful in encouraging the growth of the private retirement system, which now comprises nearly $30 trillion in assets. AARP has consistently asserted that retirement plan money – which receives substantial tax incentives and must meet a long list of tax qualification requirements – deserves a higher level of protection than other types of investments or purchases.

ERISA plays a crucial role in ensuring the protection of retirement funds subsidized by taxpayers so that participants have sufficient assets for a secure and adequate retirement. Safeguarding these monies was among the main reasons for ERISA's enactment, and the fiduciary and conflict of interest rules are the main substantive enforcement tools under ERISA. Specifically, ERISA requires fiduciaries to act solely in the interest of participants and adhere to its prohibited transaction rules and general fiduciary responsibility provisions, which are designed to ameliorate conflicts of interest. Because the Department must conform its regulatory activities to the statutory framework contained in ERISA and promote ERISA's purposes, investment professionals to ERISA-protected plans are not necessarily governed by the same rules adopted by the SEC under the securities laws. Indeed, the ERISA rules, while complementary, can and should be stronger. To that end, AARP believes that advice provided to retirement plan investors must be subject to ERISA's fiduciary rules, based on sound investment principles and protected from conflicts of interest. Various scandals – from Enron to the manipulation of LIBOR interest rates and foreign currency markets to AIG's stock manipulation and Lehman Brothers' accounting fraud – underscore the imperative that such advice is independent and free from conflicts of interest, and that the standards governing industry practices involving the provision of fiduciary investment advice are fair, clear and easy to understand.

Behavioral Finance (2004); Sheena Iyengar and Mark Lepper, "When choice is demotivating: Can one desire too much of a good thing?", *Journal of Personality and Social Psychology* (2000).
[58] IRC §401(k)(13); ERISA § 404(c)(5).

AARP's comments should be read to be applicable to fiduciaries of plans who have the authority to make investment decisions on behalf of the plan as well investment advisors to participants and beneficiaries and IRA owners. This is especially important for small employers and their fiduciaries who may not have the resources to obtain independent advice on plan investment matters. The effect of imprudent or biased advice to a plan fiduciary with investment discretion over plan assets will trickle down and negatively impact the retirement security of the plan's participants and beneficiaries.

B. Fiduciary investment advice "on a regular basis" should include advice to take assets out of a plan and where to invest it.

The 1975 regulation permitted advisers to play a significant role in connection with a one–time transaction and avoid any potential liability for the provision of conflicted advice. AARP believes that the requirement, under the 1975 regulation, that advice must be provided "on a regular basis," enables an adviser to make an important investment recommendation to a plan, participant or investor and avoid any fiduciary responsibility for his or her actions, notwithstanding the potential impact of such advice on the plan. For example, advice to take a retirement distribution or to rollover retirement assets upon termination of employment or retirement may be a one-time transaction for the individual, but may be the largest, most significant – and potentially irreversible – decision that will be made in their lifetime. It makes little sense that advice provided on such a monumental decision is effectively exempt under current law. One-time recommendations – no matter how consequential or how much money is at stake – are carved out and are not considered to be made by a fiduciary adviser.

We appreciate that DOL has stated that recommendations to roll over plan assets "could" be the start of a regular relationship.[59] However, AARP believes that the DOL's interpretation does not go far enough. AARP believes that the recommendation to roll over plan assets and the subsequent recommendation as to where to invest these assets (assuming they are made by the same adviser) meets the "on a regular basis" prong of the 5-part test. These are two separate adviser recommendations and two separate decisions for the participant to make and clearly meet a "regular basis" threshold.

[59] Similarly, AARP believes that trailing commissions or other fees should bring investment professionals including insurance agents into a fiduciary relationship.

C. To determine whether there is a mutual agreement between a Financial Institution and an investment professional and a participant or plan, the reasonable understanding of the Retirement Investor should be presumed to be correct, unless the adviser can prove otherwise.

Under the 1975 regulation, investment professionals who play a significant role in the development of the investment portfolio of the plan or IRA can disavow fiduciary status and avoid liability for imprudent or conflicted advice. It is extremely difficult, under this regulation, for largely unsophisticated investors to prove both parties accepted the same mutual agreement. Without clear proof, the investor has no claim against even the most fraudulent of advisers. Because the parties may have a different understanding of the transaction due to unequal bargaining power, AARP believes that the Department should interpret this regulation so that the Retirement Investor's position as to whether there is an understanding for the advice to provide a primary basis for the investment decision is provided a presumption of correctness, only overcome with significant evidence. Of course, a written contract would avoid this issue and AARP has suggested below that the DOL require one in order for the adviser to provide advice and manage plan assets. This is especially true given the large amount of assets involved.[60] Indeed, for most individuals, their retirement account is – outside their home – their largest asset.[61]

In summary, AARP submits that reinstating the 1975 regulation is inconsistent with ERISA's statutory text and legislative history, and is significantly outdated given changes in the retirement system. In essence, the DOL has provided for a lower bar for investment professionals' conduct, which is inconsistent with the high fiduciary standard set out in ERISA. The Department should further clarify its interpretation of "on a regular basis," recognizing that advice to roll plan assets from one plan to another is the beginning of a relationship and the advice (assuming it's the same adviser) as to where to invest plan assets is a second, separate step, thus meeting the "on a regular basis" prong of the 5-part test. Finally, the DOL should explicitly state that the reasonable understanding of a

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[60] Fidelity Investments Press Release, *Fidelity Q1 2020 Retirement Analysis* (Apr. 24, 2020) https://www.marketwatch.com/press-release/fidelity-q1-2020-retirement-analysis-retirement-savers-stayed-the-course-despite-economic-crisis-2020-04-24?tesla=y (average 401(k) balance was $91,400, down 19% from the record high of $112,300 in Q4 2019 while the average IRA balance was $98,900, down from $115,400 in Q4 2019); for those between 60-69, the average 401(k) balance was $195,500 and the median 401(k) balance was $62,000. Roger Wohlner, *The Average 401(k) Balance By Age*, The Street (Apr. 6, 2020), https://www.thestreet.com/retirement/401k/average-401k-balance.

[61] U.S. Census Bureau, *Wealth and Asset Ownership for Households, by Type of Asset and Selected Characteristics: 2016*, Table 2 (last revised: Sept.19, 2019) (indicating that home ownership and retirement accounts comprise individuals' largest personal assets), https://www.census.gov/data/tables /2016/demo/wealth/wealth-asset-ownership.html.

participant, beneficiary, or plan is presumed to be the mutual understanding of the parties, unless proven otherwise.

III. The Class Exemption Should Be Separated Into Four Separate Class Exemptions Because There Are Unique Issues As To Different Entities And Actions, Requiring Different Conditions To Protect Participants and Beneficiaries.

The Proposal combines, seemingly indiscriminately, different entities into the definition of Retirement Investor. Participants and beneficiaries, IRA holders, large plans and small plans have different issues attendant to the receipt of fiduciary investment advice. For example, the issues of fiduciary investment advice attendant to individuals' investments in their plan are different from individual IRA holders who may be concerned about outliving their assets and are unique as compared to fiduciary investment advice tendered to a plan where the plan fiduciary may be liable for the selection and monitoring of investments.

AARP believes that the individual retirement investor may not have the requisite academic expertise, financial literacy, or time to independently evaluate the recommendations made by an investment professional, the merits of the transaction, and the potential conflicts of interest.[62] Indeed, in some instances, the individual investor is not seeking advice or investments, but is solicited by the adviser, so has not conducted any research, or considered other investment options. Most investment professionals hold themselves out as trusted advisers, and investors in the market currently expect and believe that all investment professionals are already acting in their sole interest.[63] The disclosures required by this Proposal may not be effective in alerting Retirement Investors that the advice provided in connection with the transaction is not intended to be subject to ERISA's fiduciary protections nor do they provide any explanation of the potential implications of conflicted advice for their investments.

Similarly, small business owners, preoccupied with running a business, may not have the time, resources, expertise, and financial leverage to independently evaluate the merits of any fiduciary investment advice recommendation, the potential conflicts of interest, and the lack of ERISA's fiduciary protections. As the Department knows, small employers often are sold certain investment platforms with representations that the platform will satisfy the employer's fiduciary obligations. Many small employers rely to a much

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[62] *See* text accompanying nn. 7-8, *supra* and n. 88*, infra*.
[63] AARP, *Fiduciary Duty and Investment Advice: Attitudes of 401(k) and 403(b) Participants*, http://www.aarp.org/research/topics/economics/info-2014/fiduciary-duty-andinvestment-advice---attitudes-of-401-k--and-4.html (September 2013).

greater extent on plans sold by financial service firms and others. No one disputes that the small plan retail market is quantitatively different from the large plan market.[64]

In contrast, large plans are more likely to have dedicated staff, and in-house or outside expertise necessary to prudently evaluate all transactions and contracts. Larger employers have the knowledge and resources to actively design their plans and provide a layer of fiduciary protection for their employees.

Because of the clearly diverse issues for each type of Retirement Investor, the proposed conditions also should be different. The disclosures and the written policies and procedures should be expressly tailored for each group. To address this problem, AARP suggests that this Class Exemption should be separated into three independent Prohibited Transaction Class Exemption: one for individuals; one for small plans under 100 participants; and one for large plans. Of course, the Principal Covered Transactions portion of this Proposal obviously should be separate.

We note that there is no definition of affiliate or related entity in the Proposal itself. This is problematic because an obvious conflict can present itself when investment professionals sell or recommend proprietary products, or products issued by an affiliate or related entity. For example, these types of conflicts can be found in a broker-dealer's private wealth management business or in an investment advisory firm as firms seek to leverage their brokerage or other platforms to cross-sell products and services.

IV. The Exclusions Are Too Broad And Not Protective Of Participants And Beneficiaries.

The Proposal excludes robo-advice, but not robo-advice where there is personal interaction with an investment professional. The Proposal should require the investment professional to explain the rationale for deviating from the computer-generated advice.

An investment professional and/or Financial Institution would be excluded from relying on the Class Exemption for a period of 10 years for certain crimes relating to the provision of fiduciary investment advice or other egregious conduct. However, the Proposal does not define such conduct nor provide a method for this determination inasmuch as there is no substantive requirement for such a provision in the policies and procedures. Moreover, there is no requirement for reporting such conduct. The

[64] By small plans, AARP is using the Department's own definition of plans with less than 100 participants because it is consistent with the filing requirements under the Form 5500 and other existing rules and practices.

Department should clarify these requirements, as well as make clear that the burden of proof for a petition for a waiver from this exclusion is high.

Similarly, an investment professional and/or Financial Institution would be excluded from relying on the Class Exemption for a period of 10 years for a systemic pattern or practice of violating the Class Exemption. First, there is no substantive directive from the Department as to the method the Financial Institution should use to monitor, report, and repair systemic problems. Second, because there is limited disclosure to Retirement Investors concerning these overall policies and procedures and compliance with them, the ability of investors to exercise oversight of their plans is limited.[65] Quite simply, self-regulation will not unmask these problems and therefore is not protective of participants and beneficiaries.[66]

V. The Proposed Conditions For Relief Are Inadequate To Protect Participants And Beneficiaries From Conflicted Fiduciary Investment Advice.

A. The proposed impartial conduct standards are significantly inferior to ERISA's fiduciary standards.

The proposed Impartial Conduct Standards are significantly inferior to the protections that ERISA's fiduciary standards offer to Retirement Investors. Instead, the Impartial Conduct Standards undermines ERISA's prudence standard by limiting the bases upon which the prudence of the advice is measured and by weakening the duty of loyalty by not placing the interests of the Retirement Investors above the Financial Institution or investment professional. The Financial Institution or investment professional cannot place their interests "*ahead of the interests* of the retirement investor, or *subordinate* the retirement investor's interests to their own."[67] Moreover, in tests of a CRS Model Form, individuals had trouble grasping the concepts of "best interest standard" and "conflicts of interest" and were confused how these would impact their relationship with broker-dealers and investment advisers.[68] It is hard to fathom how impartial conduct standards

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[65] Quite simply, no one can police a pension plan as well as its participants. See text accompanying nn.82-83, *infra*.
[66] The stories of the impact of self-regulation are legion, and they may be found in old newspaper headlines - Enron, WorldCom, Bear Stearns, Countrywide Financial Corp., Lehman Brothers, Michael Milken, and Bernie Madoff.
[67] 85 Fed. Reg. 40834, 40,842 (July 7, 2020).
[68] S*ee* Kleimann Communication Group, Inc., *Report on Development and Testing of Model Client Relationship Summary* 10-11 (Dec. 5, 2018) (discussing the difficulties testers had in understanding the best interest standard and conflicts of interest), https://www.aarp.org/content/dam/aarp/politics/advocacy/2018/12/crs-report.pdf.

can be protective of Retirement Investors when they do not understand what the concepts mean and the implications for their assets.

Relegating the interests of the Retirement Investor to be, at best, on par with the Financial Institution and investment professional is antithetical to ERISA's statutory language and legislative history. ERISA should be interpreted to give meaning to its purpose of protecting participants and beneficiaries by providing stronger protections than the securities or insurance laws.

B. The Proposal requires reasonable compensation, but does not go far enough to ensure that the Retirement Investors are protected.

AARP understands the Department's position that the lowest fees are not necessarily required.[69] However, we submit that the investment professional should disclose in writing to the Retirement Investor the reasons the investment professional is not recommending an investment with lower fees and the reasons the recommendation is more beneficial for the Retirement Investor. For example, if a product which an investment professional recommends is more complex (e.g., a variable annuity), and also has high fees, the investment professional, at a minimum, should be required to explain to the Retirement Investor the rationale for this recommendation as compared with a comparable financial product with a lower fee. The investment professional should be required to demonstrate that the compensation arising from such an investment is reasonable and in the client's best interest.

AARP is troubled that the Proposal explicitly permits 12b-1 fees, revenue sharing, and sales loads when the market itself is moving away from these types of fees and expenses. Indeed, numerous court decisions indicate that a plan's payment of such fees may be a violation of the duty of prudence. The Department should revisit its decision to permit investment professionals to take these monies from the pockets of Retirement Investors.[70]

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[69] We note, however, that this position seems somewhat inconsistent with the Department's recent proposed regulation on environmental, social and governance (ESG) investing where it states that pecuniary factors must precedence when fiduciaries make investments. *Financial Factors in Selecting Plan Investments*, 85 Fed. Reg. 39113, 39114 (June 30, 2020), https://www.federalregister.gov/d/2020-13705/p-13. Moreover, the Proposal does not address the findings in the 2016 Proposal of the magnitude of investor losses due to conflicted investment advice.

[70] *Braden v. Wal-Mart Stores, Inc*., 588 F.3d 585 (8th Cir. 2009) (holding that plaintiffs sufficiently alleged defendants breached their fiduciary duties of prudence and loyalty where they alleged that defendants chose funds that charged excessive fees due to revenue-sharing arrangements with the plan trustee, which benefited the trustee at the expense of the plan); *Lowen v. Tower Asset Mgmt*., 829 F.2d 1209 (2d Cir. 1987) (affirming grant of partial summary judgment in suit by plan trustees against investment manager for imprudent investments and self-dealing); *Cassell v. Vanderbilt Univ*., 285 F.

C. Best execution is the appropriate standard for investment transactions but should include the price of the transaction along with the applicable costs.

The Proposal should clarify that the "best execution" standard for executing portfolio transactions includes not only the price of the transaction itself but, if applicable, fees and expenses including commissions that provide the most favorable total cost or proceeds reasonably obtainable under the circumstances.

D. The Proposal should prohibit the Financial Institution and the investment professional from making both material misleading statements and material omissions.

AARP agrees that one of the conditions for the exemption must be that the Financial Institution or investment professional may not make any material misleading or inaccurate statement about fees and expenses, rates of return, material conflicts of interest, and other conditions and information that could affect the decision of the Retirement Investor.

However, material misleading statements should explicitly include material omissions. Various cases have shown that frequently it is what is not said or the misleading manner in which advice is presented that is more important than what is specifically stated.[71] The Financial Institution or investment professional should also be required to provide information that the Retirement Investors should know – even if they do not request it. This is especially true where the Financial Institution or investment professional actually knows of the Retirement Investor's need for the information or the existence of undisclosed facts that might affect the Retirement Investor's decision.[72]

Supp. 3d 1056 (M.D. Tenn. 2018) (refusing to dismiss the class claims challenging excessive administrative fees, service providers, and high-fee investment options); *Charters v. John Hancock Life Ins. Co*., 583 F. Supp. 2d 189 (D. Mass. 2008) (granting plan trustee partial summary judgment on its claim against insurance company for breach of fiduciary duty where insurance company qualified as fiduciary under ERISA based on its discretionary authority to set administrative maintenance charges and its right to substitute investment options available to plan; holding that fact questions existed as to whether insurance company had charged excessive fees and had properly offset administrative fees charged to plan); *Haddock v. Nationwide Fin. Servs., Inc*., 419 F. Supp. 2d 156 (D. Conn. 2006) (denying summary judgment to service provider in action by trustee alleging breach of fiduciary duty in connection with revenue-sharing payments received from mutual funds).

[71] *E.g., CIGNA Corp. v. Amara*, 563 U.S. 421 (2011); *Varity Corp. v. Howe*, 516 U.S. 489 (1996).

[72] *Griggs v. E.I. DuPont de Nemours & Co*., 237 F.3d 371 (4th Cir. 2001) (holding that employer breached its fiduciary duty by failing to alert a participant in a timely manner to the tax consequences of a

VI. Not Only Are Disclosures A Poor Substitute for Substantive Protections Against Conflicted Fiduciary Investment Advice, But The Proposal's Required Disclosures Are Inadequate.

While mere disclosures are a poor substitute for substantive protections against bad fiduciary investment advice,[73] even within that paradigm, the required disclosures are inadequate. For example, under the Proposal, another regulator's disclosures may satisfy the disclosure even though the purposes of those disclosures are not to protect retirement plans and their participants and beneficiaries.

A. The required disclosures are not comprehensive enough to be protective of participants and beneficiaries.

AARP submits that the disclosures are insufficiently detailed to be protective of participants and beneficiaries. We suggest the following additional disclosures:

- A written acknowledgement that the Financial Institution and its professionals are fiduciaries; no disclaimer of fiduciary status should be permitted.

- A written acknowledgement that the Financial Institution and its professionals have conflicts of interest, what those conflicts of interest are, the scope of those conflicts, the reasons they are material, and investment alternatives that do not

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rollover of his pension plan benefits); *Jordan v. Federal Express Corp*., 116 F.3d 1005 (3d Cir. 1997) (holding that when fiduciary knows silence would be harmful, there is an affirmative duty to inform participant of material information that participant must know for his or her own protection); *Anweiler v. American Elec. Power Serv. Corp.*, 3 F.3d 986 , 991 (7th Cir. 1993) (stating that "[f]iduciaries must also communicate material facts affecting the interests of the beneficiaries. . . . This duty exists when a beneficiary asks fiduciaries for information, and even when he or she does not."); *Monper v. Boeing Co*., 104 F. Supp. 3d 1170, 1181 (W.D. Wash. 2016) (recognizing that "an ERISA fiduciary may be held liable not only for disseminating materially misleading information, but also for failing to affirmatively provide material benefits information, whether on its own accord or when prompted by a participant's inquiry, in the event of a nonfiduciary's misrepresentation").

[73] In its 2016 Proposal, citing numerous studies, the Department rejected a disclosure-alone standard as being ineffective to mitigate adviser conflicts and yielding little or no investor gains. DOL, *Regulating Advice Markets - Regulatory Impact Analysis* 268-71(Apr. 2016), https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/historical-information-on-regulations/1210-AB32-2-archive/ria.pdf. This Proposal does not discuss those findings. *Cf.* Vivek Bhattacharya, Gaston Illanes and Manisha Padi, *Fiduciary Duty And The Market For Financial Advice* (NBER Working Paper No. 25861 Issued in May 2019, Revised in May 2020) (a fiduciary standard results in lower fees and better returns where variable annuities are used as investment).

raise these conflicts. The written acknowledgement should also include a statement that, in spite of these conflicts, the Financial Institution and its professionals are providing conflicted advice to the Retirement Investor. Timely disclosure of the conflicts of the Financial Institution and investment professional should be provided every single time advice is provided to the Retirement Investor. The Proposal should require that this disclosure be bolded and highlighted.

- A written description of services.

- A written explanation of the fees and compensation arrangement.

- If the investment professional is not recommending the investment with lowest fees, a written explanation for not recommending an investment with lower fees and the reasons the recommendation is more beneficial for the Retirement Investor.

- A quarterly report on the account and investment performance to the Retirement Investor.

- A copy of the written policies and procedures adopted by the Financial Institution and its investment professionals.

- A copy of the self-review of the Financial Institution's provision of conflicted fiduciary investment advice.

For individual Retirement Investors, we urge that investment professionals should provide an estimate of the retirement savings needs for each participant. Many surveys have demonstrated that this one calculation does much to propel individuals to save for retirement. AARP believes that the investment professional should be required to take into consideration diversification, suitability of investments, the participant's risk tolerance, and costs, and make every effort to obtain the necessary information. In an effort to ensure that participants receive this important information, AARP submits that the regulation should require the investment professional to be certified by an accredited organization or state agency in financial planning issues. If the investment professional uses a computer model recommendation and deviates from it, the adviser should provide to the participant a written explanation of the reasons for the deviation and the different investments and investment allocation(s). The explanation should also describe why suggested investments with higher fees were chosen as opposed to other investment choices with lower fees.

All of the disclosures should be written in a manner to be understood by the average Retirement Investor. In addition, the disclosures should be accurate, not misleading, and not omit any material conditions or information including information that the Financial Institution or investment professional knows or should know that the Retirement Investors needs to determine whether to maintain the advice relationship and/or investment(s).

The Department should also provide a model form for these and all required disclosures in the Proposal. We suggest that the statement about potential conflicts be prominent and in at least a 14-point font to be distinguishable from the rest of the text included in the disclosure. The font of the entire statement itself should be no less than 12-point.

B. The Retirement Investors should be provided the disclosures sufficiently in advance of the transaction, so they have time to read and consider them.

As shown in an AARP survey concerning fee disclosure,[74] the manner in which investment information is presented is of paramount importance in determining whether participants are able to use and understand the information. Without good form design, it is apparent that information can be easily obfuscated and of little significance to participants.

The regulation is silent on the timing of the disclosures except to require that the disclosures must be provided "prior" to engaging in the transaction. That means that under the Proposal, the disclosures could be provided 10 minutes before the transaction is completed and be in compliance with the Exemption. Requiring the disclosures to be provided "prior" to the transaction, without specifying a time period, is akin to not providing adequate disclosures at all. Lack of time undercuts any benefit that the disclosure may have because the Investor will not have the opportunity to read and consider the information contained in the disclosure.[75] AARP submits that the Financial

[74] AARP, *Comparison of 401(k) Participants' Understanding of Model Fee Disclosure Forms Developed by Department of Labor and AARP* (Sept. 2008), https://www.aarp.org/money/investing/info-09-2008/fee_disclosure.html; *see also* Kleimann Communication Group, Inc., *Report on Development and Testing of Model Client Relationship Summary* 5 (Dec. 5, 2018) (design is important for comprehension), https://www.aarp.org/content/dam/aarp/politics/advocacy/2018/12/crs-report.pdf.
[75] As the Department well knows, after-the-fact enforcement leads to no enforcement. If the adviser were to violate the regulation's requirements and the participant loses money due to the adviser's advice, under the Proposal, the participant is left without a remedy under ERISA. Moreover, fiduciary advisors may not be responsible for losses resulting from investment choices made by participants, see ERISA § 404(c)(1)(B), because even if an investment advisor gives bad advice breaching its fiduciary duty, technically the participant is making the "decision" to rely on the advice.

Institution and/or investment professional should provide the disclosures to the Retirement Investor fourteen days before the close of the recommended transaction.[76]

The disclosures must be provided in the format (that is, paper or electronic) that the Investor requests and written in a manner to be understood by the average "Retirement Investor."[77]

VII. Rollover Recommendations Should Be Considered Fiduciary Investment Advice, But The Proposal's Disclosures Are Not Protective of Participants and Beneficiaries.

A. Recommendations regarding the rollover or distribution of assets from a plan or IRA are properly designated as fiduciary investment advice.

AARP applauds the Department's inclusion of advice related to a recommendation to take a distribution of benefits or as to the investment of securities or other property to be rolled over or otherwise distributed from the plan or IRA, as well as a recommendation as to the management of securities or other property to be rolled over or otherwise distributed from the plan or IRA.[78] AARP believes that the added benefits of broadening the scope of activities under the definition of fiduciary investment advice to include recommendations regarding the rollover or distribution of assets from a plan or IRA are necessary and substantial.[79]

AARP notes that, for many people, the account balance in their retirement plan or IRA represents the bulk of their personal savings. As a result, AARP believes that the distribution stage and process are a critical part of the cycle of participant events. Decisions made with respect to the timing and manner of plan distributions will often determine the value and effectiveness of a working lifetime of retirement savings. In effect, the plan participant is at a critical stage when determining the timing and manner

[76] This would be similar to the SEC's free look period.
[77] 29 U.S.C. § 1025 (a)(2)(iii).
[78] The Department was given the authority to interpret the prohibited transaction provisions for purposes of both the Code and ERISA. Executive Order: Reorganization Plan No. 4 of 1978, 43 FR 47713 (Oct. 17, 1978). The Department's application of the prohibited transaction rules to IRAs is not novel. Department guidance has previously stated that cross-collateralization and indemnification provisions in brokerage and other account agreements related to IRAs result in non-exempt prohibited transactions.
[79] Virtually all defined contribution plans permit a lump sum distribution while almost half of defined benefit plans do. Philip Armour, Michael D. Hurd, and Susann Rohwedder, *Trends in Pension Cash-out of Older Workers at Job Separation and the Effects on Long-term Outcomes* 13 (DOL-OPS-14-D-0018 Sept. 2015), https://www.dol.gov/sites/dolgov/files/EBSA/researchers/analysis/retirement/trends-in-pension-cash-out-at-job-separation-and-the-effects-on-long-term-outcomes.pdf.

in which to take a distribution from his or her retirement plan or IRA. Decisions made at that time are often effectively irreversible, both from a legal and practical sense, including tax consequences and transaction costs. AARP believes that these distribution decisions will have a major impact not only on the assets accumulated over a lifetime of retirement savings, but on individuals' overall retirement security. Accordingly, it is essential that the adviser providing guidance at this critical juncture to a participant be subject to ERISA's fiduciary duties.

This expansion of fiduciary investment advice should result in greater protections for plan participants who may not appreciate that encouragement to take distributions or invest rolled-over assets may be driven by factors (e.g., fees or commissions) other than the sole interests of the participant. A recommendation for the participant to take a distribution should constitute the provision of fiduciary investment advice – whether or not accompanied by a recommendation as to where the distribution should be invested.[80] AARP has consistently argued that the distribution recommendation is essentially a recommendation that the participant sell the underlying assets in his or her individual account or IRA.

Moreover, AARP recommends that the Department confirm in the final regulation that a recommendation to a participant by an adviser to take a loan from a plan should also be considered the provision of fiduciary investment advice. In essence, the participant is foregoing other investment opportunities in exchange for a fixed income investment. Over the long term, AARP believes that a low interest participant loan can have a negative impact on the accumulation of retirement assets.

Similarly, AARP urges that the Department confirm in the final rule that the scope of activities under the definition of fiduciary investment advice includes a recommendation to a participant to keep his or her assets in the plan, as well as advice to maintain current plan investments.

Finally, AARP also urges the Department to clarify the remedies available to a participant under ERISA who receives fiduciary investment advice related to a recommendation to take a distribution or roll over assets from an account in an ERISA-covered plan. If a participant in an ERISA-covered plan receives fiduciary investment advice from an employer-selected adviser, the Department should clearly provide that whenever the participant is the recipient of the advice, s/he is the covered retirement

[80] As stated above, if the recommendation to take a distribution is accompanied by a recommendation as to where to invest the distribution that would constitute "on a regular basis" and therefore the investment professional would be a fiduciary under the Prohibited Transaction Class Exemption. *See* Section IV.B., *supra*.

investor and the participant retains all of their ERISA rights and remedies. AARP believes that ERISA's remedies apply to the recommendations made with respect to assets held in an ERISA plan, notwithstanding the subsequent distribution or roll over of such assets. AARP encourages the Department's clarification of its views on this important issue in the preamble to the final Proposal.

B. The required disclosures to the Retirement Investor concerning the rollover recommendation are not protective.

Although the Proposal requires Financial Institutions to document the specific reasons for any rollover recommendation and show that the rollover is in the best interest of the Retirement Investor,[81] it does not require that the documentation be provided to the Retirement Investor – the entity that needs it the most. Moreover, the Proposal does not include any substantive directives as to what must be included in the documentation. Any disclosures should be sufficiently detailed and written in a clear, concise manner calculated to be understood by the Retirement Investor. AARP submits that this documentation for the rollover recommendation should include, at a bare minimum:

- The process for ensuring that the general disclosures described in Section VI.A., *supra*, are met.

- The investment professional's assumptions and estimates of expenses, asset values, risk and returns, and the bases for these assumptions and estimates.

- The alternatives to the rollover recommendation.

- The amount, if anything, the employer pays toward the individual's account and the impact on the fees that the Retirement Investor will pay if the Investor takes a distribution (i.e., will the Retirement Investor pay fees and expenses that the employer pays and how much).

- Any incentives and/or fees the Financial Institution and/or the investment professional receives if they keep the account when employees leave their employer (i.e., maintaining the rollover account) or if they obtain additional fees for investments of the participants outside of the plan.

[81] A rollover recommendation would include changes of account type, such as from commissions to level fee arrangements.

- Fees and historic rates of return comparing the rollover recommendation and its proposed investment with the alternative(s), including leaving the assets in the current plan, in a chart, over a 1, 5, and 10-year period.[82]
- The levels of service and investments to be provided to the Retirement Investor and the reasons that they are beneficial to the Investor.

- Information on potential tax consequences, and that the participant should consult with a tax professional to ensure there are no unexpected tax consequences that are harmful to the participant prior to entering the transaction.[83] (If the investment professional does not ensure that the rollover is done correctly and triggers an unexpected tax consequence, especially given the complexity of the rollover rules, the participant may have no remedy.)

- A copy of the self-review of the Financial Institution's provision of conflicted fiduciary investment advice.

VIII. The Proposal Does Not Provide Adequate Protections To Retirement Investors Where Proprietary Products And Limited Menus Of Investment Products Are Recommended Or Sold.

When a Financial Institution or investment professional sells or recommends proprietary products or products issued by an affiliate or third party, conflicts of interest are obvious, including potential misalignment of interests between the Financial Institution, the investment professional, and Retirement Investors. These types of conflicts also can arise as firms seek to leverage their brokerage or other platforms to cross-sell products and services. While there are firms that have open product architecture platforms, which allow for the sale of third-party products as well as proprietary products, investment professionals may be paid higher commissions, or other rewards, for selling proprietary products - often at the expense of customers. Proprietary funds are frequently used in target date and lifestyle funds, which can result in stacking fees upon fees. In addition, conflicts may arise when firms involved in both the design and distribution of products

[82] For example, if the alternative is to keep the plan assets in the employer plan versus rolling over the assets, the chart would show all of the fees minus amount the employer pays. The chart should be an apple to apples comparison, i.e., same period of time and to the extent possible, comparison of asset classes. If asset classes are different in the rollover, the documentation should include the reasons for this change.
[83] For example, individual Retirement Investors may not realize that a variable annuity that is part of the Investor's retirement plan is subject to all of the rules for tax qualified plans such as penalties for early withdrawals before age 59-1/2 and required minimum distributions.

do not operate with an appropriate level of independence from other business lines within a firm. At a minimum, plan fiduciaries or trustees who permit proprietary investments to be part of a plan's platform architecture may find themselves at greater risk for litigation, and this Proposal leaves the plan fiduciaries and trustees who select and monitor investments with full responsibility.

The sale or recommendation of proprietary products and limited menus requires complete and accurate disclosure of the conflict of interest and the implication for the Retirement Investor to understand and address, as needed, the misalignment of interests. In these instances, it is even more important that the policies and procedures and the disclosures provide the necessary analysis and documentation behind recommendations or products requiring third-party payments. This analysis and documentation should demonstrate not only the conflict the investment professional faces in choosing and recommending proprietary products that may not be in a client's sole interest, but that such recommendations also provide greater revenue for the Financial Institution or investment professional, and how that conflict is alleviated.

IX. The Covered Principal Transaction Portion Of This Proposal Should Be A Separate Exemption with Necessarily Different Conditions.

AARP submits that the Covered Principal Transaction portion of the Class Exemption should be a separate exemption. The issues surrounding the Covered Principal Transaction exemption are much more akin to the issues in the Department's Statutory Exemption for Cross-Trading of Securities.[84] Both of these issues concern transactions involving the purchase or sale of certain investment products between the plan, participants, or other parties-in-interest and the Financial Institutions and investment professionals when they are acting on or from their own account(s). Comparing the conditions that have been established in the Cross-Trading of Securities with the conditions in this Proposal illustrates that the conditions for Covered Principal Transactions fall short of being protective of participants and beneficiaries.

We suggest that, similar to the Statutory Cross-Trading Exemption, a size limitation is appropriate for the use of this Proposal. Large plans have the resources and sophistication to protect their interests. Accordingly, we suggest the Department set a comparable dollar limitation for this exemption.

The Proposal is silent on the methodology for determining the price of the investments which are a part of the transaction. We suggest using the standard in the Cross-Trading

[84] 73 Fed. Reg. 58450 (Oct. 7, 2008).

Exemption that the transaction must be affected at the "independent current market price" of the investment product. The Proposal also should include validation of the source used to establish the price itself and fairness of this price.

AARP also believes that any fees or expenses related to this transaction should be minimal, or discounted, from the usual fees inasmuch as the investment is already in the portfolio of the Financial Institution or investment professional.

In addition to the substantive directive to include credit quality and liquidity in the required written policies and procedures, other substantive directives should be required. We suggest the following additions to the policies and procedures:

- The process for ensuring that the general disclosures described in Section VI.A., *supra*, are met.

- Not only should the written policies and procedures require prudence, but these policies must be fair and equitable to all Investors.

- A description of the procedures for ensuring compliance with the minimum asset size requirement.

- A process for obtaining the consent of Retirement Investors, in advance, for these types of transactions as well as notifying the Investors how to retract their consent.

- A written acknowledgement that the use of the Principal Transaction Exemption is necessary because of conflicts of interest and how the Financial Institution and investment professional will mitigate the conflicts. Merely capping compensation incentives, without more, is inadequate to protect Retirement Investors. The Proposal should require that this disclosure be bolded and highlighted in the disclosure.

- A statement of policy which describes the criteria that will be applied by the Financial Institution and investment professional in determining that use of the Principal Covered Transaction Exemption will be beneficial to both parties to the transaction.

- A description of the methodology for determining the investment decision itself versus the use of the principal transaction exemption inasmuch as these are two distinct decisions.

- A description of the process and procedure for ensuring that: one party does not receive a favorable price at the expense of another; investment professionals do not cause a Retirement Investor to sell or purchase assets in order to facilitate a trade, rather than to advance the Investor's own investment strategies; and there is not a delay in the consummation of buy or sell transactions and thus a risk of losing the benefit of the market price at the time the buy/sell decision was made by the Investor.

- A description of the process and procedure that the Financial Institution will use to prevent abuse including portfolio dumping (where less favored clients act as a dumping ground for undesirable positions held by the Financial Institution, investment professional and/or more favored clients). This is especially important for smaller plans and individuals that are, compared to larger plans, less able to monitor and detect potential abuse.

- Written records showing the basis for each transaction and how it complies with the written policies and procedures.

- A description of the Financial Institution and investment professional's pricing and methodology.

- The policies and procedures should be clear, concise, and written in a manner calculated to be understood by the Retirement Investor consenting to these types of transactions.

- The information contained in the policies and procedures must be sufficiently detailed to facilitate a periodic review by the CEO, the compliance officer, and the DoL

- The requirement of an independent compliance officer, whose compensation should not be materially affected by any trading resulting from the transactions under review.

- Identification, in the annual report, of the compliance officer responsible for review, and the compliance officer's qualifications for the position.

- A statement which describes the scope of the review conducted by the compliance officer, specifically noting whether such review is limited to compliance with the policies and procedures, or whether such review extends to any determinations regarding the overall level of compliance with the other requirements of the Prohibited Transaction Class Exemption.

- An annual report to Retirement Investors concerning the compliance of the Financial Institution and investment professional with their policies and procedures.

In the absence of any evidence or instance demonstrating that tax-exempt investments (including tax-exempt municipal bonds and certain annuities) should be purchased for a retirement account, AARP submits that tax-exempt investments should not be included in the definition of a Covered Principal Transaction.

In order to sufficiently protect participants and beneficiaries, any new and additional investments should not be included in the Class Exemption through individual exemptions, but instead through amendment to the Class Exemption; this is another reason to issue a separate Class Exemption for Covered Principal Transactions.

X. The Proposal's Self-Regulatory Scheme Is Inherently Not Protective Of Retirement Investors.

In this Proposal, the DoL appears to withdraw from its enforcement powers and permit the regulated community to self-regulate, simply by designing policies and procedures with little guidance from DOL. This is inconsistent with the purpose of the Class Exemption and the requirement to protect Retirement Investors from conflicted fiduciary investment advice.

The DOL states that the Financial Institution must create prudent policies and procedures without providing any substantive directives as to what must be included in these policies and procedures. More is required than a mere description. We suggest that the Proposal require, at a minimum, the following provisions in the written policies and procedures:

- The process for ensuring that the general disclosures described in Section VI.A., *supra*, are met.

- The information contained in the policies and procedures must be sufficiently detailed to facilitate a periodic review by the CEO, the compliance officer, and the DOL

- A statement of policy which describes the criteria that will be applied by the Financial Institution in determining that the Financial Institution or investment professional did not place their interests "*ahead of the interests* of the retirement investor, or *subordinate* the retirement investor's interests to their own."

- A description of how the Financial Institution and its investment professional will mitigate any actual or potential conflicts of interest and responsibilities to the Retirement Investor involved in the transaction or relationship involving fiduciary investment advice. Merely capping compensation incentives, without more, is inadequate to protect Retirement Investors.

- The requirement that the Financial Institution and investment professionals maintain written records showing the basis for each recommendation and how it complies with the written policies and procedures.

- The requirement of an independent compliance officer, whose compensation should not be materially affected by any trading resulting from the transactions under review.

- Identification, in the annual report, of the compliance officer responsible for review, and the compliance officer's qualifications for the position.

- A statement which describes the scope of the review conducted by the compliance officer, specifically noting whether such review is limited to compliance with the policies and procedures, or whether such review extends to any determinations regarding the overall level of compliance with the other requirements of the Prohibited Transaction Class Exemption.

- To the extent the self-review uncovers any violations of the policies and procedures, an unwinding of the transaction(s).

- A copy of the self-review will be distributed to all Retirement Investors receiving conflicted fiduciary investment advice.

Effective enforcement is particularly important to ensure that any Investor losses are kept to a minimum. The DOL has explicitly stated that Retirement Investors have no private right of action to enforce the Exemption's standards, making it difficult for a Retirement Investor to obtain enforcement of any obligation against a Financial Institution or investment professional not meeting all of the exemption requirements. Given the limited remedies for non-exempt prohibited transactions – none of which will make the participant whole – it is all the more important that the exemption be protective of participants and beneficiaries.

As DOL knows, adequate resources are needed to police the retirement system.[85] Given the millions of plans already in the DOL's purview and the size and scope of its current examinations and enforcement program,[86] we expect that the EBSA's sampling, as described in the Proposal, will be limited, with few (if any) DOL enforcement actions against financial firms and investment professionals that engage in non-exempt Prohibited Transactions. By relying on a self-regulatory model, the Proposal is simply inadequate to protect Investors from conflicted fiduciary investment advice; moreover, it provides no remedies for Investors who are the victims of fiduciary breaches by conflicted advisers. As a result, the Exemption lacks teeth and is not protective of participants and beneficiaries.

One option is for an annual audit by an independent auditor of issues surrounding the offering of conflicted fiduciary investment advice. The audit should be focused on specific criteria, such as determining whether the advice is biased in favor of the conflicted investment and the reasonableness of the fees. The continued availability of the Class Exemption to that particular Financial Institution and adviser should be conditioned upon continued compliance with the exemption requirements.

X. AARP Suggests That Records Should Be Maintained At Least 10 Years.

AARP recommends that records concerning fiduciary investment advice should be maintained for 10 years in order to correspond with the 10-year period of ineligibility for certain criminal convictions. Also, maintaining records for a 10-year period will help to determine whether any person or institution is engaged in a systemic pattern or practice of violating the conditions of the exemption.

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[85] *See, e.g.*, U.S. Gov't Accountability Office, GAO-07-22, *Employee Benefits Security Administration—Enforcement Improvements Made But Additional Actions Could Further Enhance Pension Plan Oversight* 10, 28 (2007); U.S. Gen. Accounting Office, 4 GAO-02-232*, Pension And Welfare Benefits Administration—Opportunities Exist For Improving Management Of The Enforcement Program* 2-3 (2002); U.S. Dep't of Labor, *PWBA Task Force On Assistance To The Public* (1992).

[86] The Employee Benefits Security Administration in the Department of Labor is responsible for policing over "694,000 retirement plans, approximately 2.2 million health plans, and a similar number of other welfare benefit plans, such as those providing life or disability insurance." U.S. Dep't of Labor, *EBSA Restores Over $2.5 Billion to Employee Benefit Plans, Participants and Beneficiaries*, https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/ebsa-monetary-results.pdf (last visited July 18, 2020). It closed 1,146 civil investigations and 275 criminal investigations in fiscal year 2019. *Id*.

AARP also urges DOL to consider expanding the availability for requests for records concerning a systemic pattern or practice to all potential requesters. Confidentiality as to the investor can be maintained by redaction.

XI. Because The Retirement Industry Has Changed Significantly Since 1996, The Department Should Not Merely Reinstitute IB 96-1, But Seek Notice And Comment For Input From The Retirement Community Concerning The Scope And Effectiveness Of Investment Education.

Since 1996, retirement itself, saving for retirement, the retirement industry, and the financial wellness industry have significantly changed. Social Security's full retirement age has increased. There has been a dramatic decline in defined benefits plans - where advice was generally provided to more sophisticated employer fiduciaries - and a tremendous growth in participant directed defined contribution plans, where advice and investment offerings often are provided to less sophisticated and busy individuals. Today, if a new employer decides to offer a retirement plan, it almost always is a defined contribution plan. And, the variety and complexity of investments available have dramatically changed and continually change.[87] In contrast, Americans' financial literacy has not improved.[88]

This Proposal expands the recipients who may be covered under the Class Exemption. Hence, investment education and to whom it is provided may change. This also provides DOL an opportunity to upgrade its guidance on investment education to meet the financial wellness market. For example, a revised IB 96-1 could include general information relating to retirement-related risks and general methods and strategies for managing assets in retirement; this would remove uncertainty about whether such information would constitute the rendering of fiduciary investment advice. IB 96-1 could also exclude references to specific investment products from the general information that can be provided and instead refer to asset allocation models to identify all investments available under a plan for each asset category (*e.g.*, midcap equity, large cap equities and foreign equities). The identification of all plan investments satisfying a particular asset

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[87] *See, e.g.*, Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 39113 (June 30, 2020) (proposed regulation on environmental, social, and corporate governance (ESG) investing); DOL Info. Ltr. From Louis J. Campagna to Jon W. Breyfogle, Esq. (June 3, 2020), https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/06-03-2020 (use of private equity investments in 401(k) and other defined contribution plans).

[88] FINRA Inv'r Educ. Found., *The State of U.S. Financial Capability: The 2018 National Financial Capability Study* 33 (June 2019), https//www.usfinancialcapability.org/downloads/NFCS_2018_Report_Natl_Findings.pdf (noting a downward trend since 2009 in financial literacy).

class would help participants by educating them about the available options already selected by a plan fiduciary.

For these reasons, AARP believes that the Department should revise IB-96-1 and issue it for notice and comment. Because the line between fiduciary investment advice and investment education has always been difficult to draw, the notice and comment on IB 96-1 should be reviewed at the same time as the regulation surrounding fiduciary investment advice.

XII. Effective Date

Because of the current turmoil in the markets and the health pandemic, AARP submits that the effective date of the proposed Class Exemption should be no earlier than the later of July 1, 2021, 180 days after the date of publication of the final regulation, or 90 days after the end of the public health emergency.

Conclusion

Conflicts of interest are particularly disturbing when they negatively impact participants' retirement accounts. A review of the recent market upheaval and past scandals in the financial world should make it obvious that conflict-driven advice should be avoided, and to the extent permitted by law, common sense compels far more substantial and significant participant protections than the Department has thus far proposed. Without stronger participant protections, the proposed Class Exemption will lead us down a road of conflict of interest problems that ERISA has long sought to prevent. Indeed, the Proposal opens the door to inappropriate treatment of plan participants by plan fiduciaries that double as investment advisers. ERISA is designed to ensure that fiduciaries act solely in the interest of plan participants. We urge the Department to substantially modify or rescind the proposed Class Exemption because it is not protective of participants and beneficiaries.

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AARP appreciates the opportunity to share its views on these important issues to ensure that participants and beneficiaries have the information they need to make informed decisions about their retirement benefits. If you have any questions, please feel free to contact Michele Varnhagen at 202-434-3829 or at mvarnhagen@aarp.org.

Sincerely,

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