Consumer Federation of America

January 2, 2024

Lisa M. Gomez
Assistant Secretary for Employee Benefits Security
Office of Regulations and Interpretations
cc: Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave. NW
Washington, DC 20210

Re: Definition of Fiduciary—RIN 1210–AC02;
Proposed Amendment to Prohibited Transaction Exemption 2020-02, Application No. D–12057;
Proposed Amendment to Prohibited Transaction Exemption 84-24, Application No. D–12060

Dear Assistant Secretary Gomez:

On behalf of Consumer Federation of America (CFA),[1] we write in strong support of the Department of Labor's Retirement Security Proposal, which would provide comprehensive protections for investors who turn to investment professionals for retirement investment advice. The Department's proposed rule would ensure that all investment professionals provide advice that is in retirement investors' best interest and that any conflicts of interest do not taint their advice. We urge the Department to finalize this proposal without undue delay.

I. The 1975 regulatory definition of fiduciary investment advice is inconsistent with the statutory text and protective purpose of ERISA. It allows firms and investment professionals to function as advice providers without complying with the legal obligations appropriate to their advisory role.

The Employee Retirement Income Security Act's (ERISA's) statutory language states that a person is a fiduciary "to the extent [he or she] renders investment advice for a fee or other compensation, direct or indirect…"[2] This statutory text is broad and capacious in order to "promote

[1] The Consumer Federation of America is a non-profit association of more than 250 consumer groups that was established in 1968 to advance the consumer interest through research, advocacy, and education.
[2] ERISA Section 3(21)(A)(ii) (29 U.S.C. §1002(3)(21)). The Internal Revenue Code uses a parallel definition of fiduciary. *See* Internal Revenue Code Section 4975(e)(3)(B).

the interests of employees and their beneficiaries in employee benefit plans."[3] The statute says nothing about the frequency with which advice must be provided for it to be considered fiduciary advice. Nor does it say anything about the extent to which an advice recipient must rely on the advice for it to be considered fiduciary advice.[4]

And yet, the rule that the Department promulgated in 1975 defining fiduciary investment advice significantly narrowed the statutory definition to require advice to be provided on a "regular basis" and there to be a "mutual agreement, arrangement, or understanding" that the advice would form "a primary basis" for the investment decision. As a result of this regulatory narrowing of ERISA's statutory definition, many investment professionals who function as investment advice providers are able to evade ERISA's fiduciary duty. They can provide imprudent advice and engage in self-dealing, to the detriment of the retirement investors who trust and rely on their advice. Allowing investment professionals to function like advisors without requiring them to comply with the legal obligations appropriate to their advisory role defeats retirement investors' legitimate expectations, and is inconsistent with the text and protective purpose of the statute.

A. Changes in the retirement landscape since the 1975 rule was adopted amplify the risks to retirement investors.

When the 1975 regulatory definition was promulgated, most workers relied on traditional defined benefit pension plans for their retirement security. At that time, 401(k)s didn't even exist and Individual Retirement Accounts (IRAs) were just introduced. In the decades that followed, the retirement investing landscape transitioned to rely primarily on defined contribution plans, such as 401(k)s, and IRAs. As 401(k)s and IRAs have become the dominant retirement savings vehicles, there has been a significant increase in rollovers out of retirement plans when workers leave jobs or retire. At the same time, financial products and services have become increasingly complex. The combined effect of these changes has been to render individuals increasingly responsible for making their own retirement investment decisions at a time when those decisions are increasingly difficult to make.

With no particular financial expertise, these individuals nonetheless bear the full weight of responsibility for determining how best to save and invest for retirement, and they bear the full risks of those investments. It should come as no surprise that many turn to investment professionals for advice. When they do so, they place their trust and confidence in their investment professionals, defer to investment professionals' expertise, and reasonably expect and rely on the advice that they receive to be in their best interest.

[3] *Shaw* v. *Delta Air Lines, Inc.,* 463 U.S. 85, 90 (1983).

[4] Similarly, nothing in ERISA states or suggests that ERISA fiduciary status is constrained by the Investment Advisers Act (IAA). In fact, clear differences in the statutory frameworks suggest just the opposite. For example, whereas the IAA provides an exclusion from fiduciary status for broker-dealers who provide incidental advice, ERISA does not exclude any amount or type of advice from the fiduciary duty, stating that a person is a fiduciary "to the extent" he or she renders investment advice. Importantly, however, the IAA does not require anything like the five-part test defining fiduciary investment advice to be satisfied for an investment adviser to owe its client a fiduciary duty. In fact, if an investment adviser provides advice on a one-time basis, that advice is held to a fiduciary standard. Similarly, Reg. BI applies to one-time recommendations, including rollover recommendations.

B. **There are several critical circumstances where loopholes in the regulatory definition of fiduciary investment advice allow investment professionals and firms to evade their fiduciary duty. As a result, they are allowed to place their own interests ahead of retirement investors'.**

Rollovers: When a worker leaves his or her job or retires, the worker is faced with the decision about whether to roll over the money he or she has accumulated in his or her workplace retirement plan. Depending on the cost, quality, and services associated with the plan, as compared with the cost, quality, and services available in the retail IRA market, a rollover may or may not be in the retirement investor's best interest. If the plan is well-run and has access to low-cost, high-quality investments, including institutionally priced funds, it may be very costly for the investor to roll out of the plan.[5] On the other hand, if the plan has very high costs and suboptimal investments, a rollover may benefit the investor. If a retirement investor turns to an investment professional for advice, chances are high that the investment professional will recommend a rollover regardless of what's best for the investor. This is because investment professionals have strong incentives to capture assets and are paid in ways that encourage and reward them to recommend rollovers. Rollovers have moved trillions of dollars out of ERISA plans and into IRAs and this trend is expected to continue.[6]

As discussed above, the regulatory definition of fiduciary investment advice requires advice to be provided on a regular basis. This means that one-time advice, no matter how important, including a recommendation to engage in a rollover, is not covered. This is despite the fact that for many, this decision will be the single most important investment decision of their lives. Because the advice does not meet the regulatory definition, the investment professional can provide self-serving advice, steering the retirement investor into investments with excessively high costs, poor performance, unnecessary risks, or excessive illiquidity.[7] In short, at the time when retirement investors have the most at stake and are most in need of high-quality advice, they are the most vulnerable to being taken advantage of and receiving advice that leaves them worse off.

Plan advice: Many workers have access to a defined contribution plan, such as a 401(k). Because workers are often limited to the investment options that their employer chooses for the plan menu, workers depend on their employer to make prudent decisions about those investment options. The cost and quality of investments offered by a plan can have a profound impact on a retirement investor's ability to grow their nest egg over the course of their career. If the investment options on the menu have high costs or are low quality, workers would be limited to investing in options that are likely to underperform available alternatives, which may mean these workers retire with less money than they otherwise would have if they had access to options that were in their best interest or that they need to work longer to hit their savings goals.

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[5] *See* Pew, *Small Differences in Mutual Fund Fees Can Cut Billions From Americans' Retirement Savings*, Issue Brief (June 30, 2022), https://bit.ly/48Cdk4v.

[6] Retirement investors are projected to move $4.5 trillion from defined contribution plans to IRAs from 2022 through 2027. *See* Proposal at 75915. Employee Benefits Security Administration, Proposed Rule, *Retirement Security Rule: Definition of an Investment Advice Fiduciary*, 88 FR 75890 (Published November 3, 2023). [Proposal]

[7] Similarly, because recommendations to purchase insurance products including annuities are typically made on a one-time basis, they are not covered under the 1975 regulatory definition. In many cases, an investment professional will recommend a retirement investor roll over their assets to an annuity. In addition, to the extent the annuity is not regulated as a security, it is not covered under Regulation Best Interest. *See infra* at 16.

Unfortunately, just like their workers, many employers do not have particular expertise in retirement investing. After all, most employers are small business owners whose main job is not setting up and administering retirement plans. Because they are not retirement experts, they often rely on investment recommendations from the investment professionals who provide services to their plan.[8]

Because advice to plan sponsors such as advice about the menu of investment options that should be included in the plan lineup is not provided on a regular basis, this advice is not covered under the regulatory definition of fiduciary investment advice.[9] Accordingly, service providers can recommend the investment options that pay them the most, rather than the ones that are the highest quality and lowest cost for the plan and its participants. Including plan investments that have high costs and don't perform well can erode workers' hard-earned savings.

Fine-print disclaimers: In addition to requiring advice to be provided on a regular basis, the regulatory definition of fiduciary investment advice requires the advice to be provided pursuant to a "mutual agreement, arrangement, or understanding" that the advice will form a "primary basis" for the investment decision. In order to evade their fiduciary duty, some firms include fine-print legal disclaimers in their disclosures stating that investors should not rely on the firm's advice as a primary basis for their investment decisions. They do so even though the purpose and effect of the advice is to induce reliance.

In some cases, firms are using their Regulation Best Interest (Reg. BI) disclosures to evade their ERISA fiduciary duty. In other cases, firms are using their PTE 2020-02 fiduciary acknowledgment disclosures to evade their ERISA fiduciary duty, which is likely to confuse or mislead investors. It is unlikely that a retirement investor without particular knowledge about these legal distinctions would understand the implications of these disclosures. Below are a few examples of firms' using these kinds of disclaimers:

- Raymond James: "When providing brokerage services, we act solely in the capacity of a registered broker-dealer, and not as a fiduciary under the Employee Retirement Income Security Act of 1974, as amended ("ERISA")."[10]

- Janney: After stating that "fiduciary status is highly technical and dependent on the service you choose," and "Unless we agree in writing, we do not act as a 'fiduciary' under the retirement laws when we provide non-discretionary investment recommendations to you, including when we have a 'best interest' or 'fiduciary' obligation under other federal or state laws," Janney provides a "Fiduciary Acknowledgement" in bold, stating, "When we provide investment advice to you regarding your Retirement Accounts, we are fiduciaries within the meaning of Title I of the Employee Retirement Income Security Act and/or the

[8] *See, e.g.*, American Retirement Association, *Comment Letter Re: Regulation Best Interest*, *Release*, No. 34-83062; File Number S7-07-18, https://bit.ly/3voJcLj ("Broker-dealers routinely advise fiduciaries of small retirement plans concerning the investments that will be made available to participants under such plans. Like individual investors, most small plan business owners acting as retirement plan fiduciaries are not sophisticated investors. Most simply do not have retirement plan investment expertise.").

[9] The recommendations are also not covered under Regulation Best Interest. *See infra* at 16-17.

[10] Raymond James, *Important Client Information* (September 9, 2023), https://bit.ly/3GYKT4Q.

Internal Revenue Code, as applicable, which are laws governing Retirement Accounts." Then, Janney states that, "Not all services or activities that we provide to your Retirement Accounts constitute fiduciary investment advice subject to the provisions above." Janney proceeds to list examples in which the firm is not a fiduciary. Last on the list, it states, "Recommendations that do not meet the definition of fiduciary 'investment advice' in Department of Labor regulation section 2510.3-21. For your information, fiduciary investment advice means investment advice for a fee or other compensation rendered on a regular basis pursuant to a mutual understanding that such advice will serve as a primary basis for your investment decision, and that will be individualized to the particular needs of your IRA or plan account."[11]

- US Bank uses a virtually identical approach to Janney.[12]

- Benjamin F. Edwards: In a document that is titled "DOL Fiduciary Acknowledgment Disclosure: Department of Labor's Improving Investment Advice for Workers and Retirees Exemption (PTE 2020-02)" in bold, Edwards states, "When we provide investment advice to you regarding your retirement plan account or individual retirement account, we are 'fiduciaries' for purposes of Title I of the Employee Retirement Income Security Act (ERISA) and/or the Internal Revenue Code (IRC), as applicable, which are laws governing retirement accounts. Our status as ERISA and/or IRC fiduciaries means that we are subject to special rules designed to ensure that we are acting in your best interest but does not necessarily mean that we are acting as fiduciaries as that term is understood under other laws." Edwards then states, "We provide fiduciary investment advice to you when we receive a fee or other compensation and: (i) We make individualized investment recommendations to you regarding securities or other property held in your retirement plan or individual retirement account, including recommendations about the value of, investing in, purchasing, or selling securities or other property and recommendations regarding rollovers; (ii) You rely upon the advice for your investment decision; and (iii) The advice is provided on a regular basis."[13] No further explanation or context is provided.

- FSC Securities (Member of Advisor Group): On the second page of its Fiduciary Acknowledgement disclosure, FSC states that there are "Limitations to our Acknowledgement of Fiduciary Status." It further states, "There are many communications and recommendations that are not considered to be fiduciary 'investment advice' under the Retirement Laws (which are subject to change), including, but not limited to…Communications that are educational or informational and not intended to be viewed or construed as an individualized/personalized suggestion for you to take a particular course of action with respect to your retirement assets." Then, FSC lists a series of examples, the last of which is, "Episodic or sporadic recommendations and interactions that are not provided as part of an ongoing or regular basis advice relationship, or recommendations made when there is no mutual understanding that our investment advice will serve as a primary basis for your investment decision(s)." FSC further states, "You

[11] Janney, *Janney Montgomery Scott Relationship Disclosures* (Effective February 1, 2022), https://bit.ly/3H24iSE.
[12] U.S. Bank, *U.S. Bancorp Investments, Inc. Guide to Brokerage Recommendations: A Best Interest Disclosure* (July 14, 2023), https://bit.ly/48BMVDG.
[13] Benjamin F. Edwards, *DOL Fiduciary Acknowledgment Disclosure* (2022), https://bit.ly/48yvlRc.

understand that when you engage with the Firm and your financial professional in a commissionable brokerage relationship for your Retirement Account(s), the Firm and your financial professional do not agree to provide investment advice or securities recommendations on a regular or ongoing basis, or provide ongoing monitoring of your Retirement Account(s)."[14]

- Baird: In a disclosure titled "Important Information for Retirement Investors Regarding U.S. Department of Labor Investment Advice Exemption," Baird states in bold and all capital letters, "ACKNOWLEDGEMENT OF FIDUCIARY STATUS." Baird then states, "When Baird and your Baird Financial Advisor ('we') provide investment advice to you regarding your Retirement Account(s), we are fiduciaries within the meaning of Title I of the Employee Retirement Income Security Act (ERISA) and/or the Internal Revenue Code (Code), as applicable, which are laws governing retirement accounts." Later on in their "Limitations to Our Acknowledgement of Fiduciary Status," Baird states that, "Not all services or activities that we provide to your Retirement Accounts constitute fiduciary investment advice subject to the provisions above." Then Baird lists a number of examples, the last two of which are: "Episodic or sporadic recommendations and interactions that are not provided as part of an ongoing or regular basis advice relationship, or recommendations made when there is no mutual understanding that our investment advice will serve as a primary basis for your investment decisions; and "Recommendations that do not meet the definition of fiduciary 'investment advice' in DOL regulation section 2510.3-21. For your information, fiduciary investment advice means investment advice for a fee or other compensation rendered on a regular basis pursuant to a mutual understanding that such advice will serve as a primary basis for your investment decision, and that is individualized to the particular needs of your Retirement Account."[15]

- Stifel,[16] First Republic (part of JPMorgan Wealth Management),[17] and PNC[18] have a similar approach to the examples above.

In short, the 1975 regulatory definition of fiduciary investment advice allows investment professionals and firms to function as advice providers and foster reliance on the advice they provide, while evading the fiduciary duty appropriate to their advisory role. That is plainly inconsistent with the text and purposes of ERISA and it defeats investors' reasonable expectations about the services they are receiving.

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[14] FSC Securities Corporation, *Our Role and Fiduciary Acknowledgment for Retirement Accounts* (Effective February 1, 2022), https://bit.ly/3vi1Swn.
[15] Baird, *Important Information for Retirement Investors Regarding U.S. Department of Labor Investment Advice Exemption* (March 24, 2023), https://bit.ly/48c3RB9.
[16] Stifel, *Our Role and Fiduciary Acknowledgement for Retirement Accounts* (2023), https://bit.ly/3vdQMbD.
[17] First Republic, *Our Role and Fiduciary Acknowledgment for Retirement Accounts* (2023), https://bit.ly/4866cxj.
[18] PNC, *DOL Investment Advice Exemption* (2023), https://bit.ly/4axoZDv.

II. Firms and investment professionals seek to occupy positions of trust and confidence with retirement investors.

In addition to functioning as investment advice providers, firms and investment professionals seek to occupy positions of trust and confidence with retirement investors, further inducing reliance on their advice.

Firms and investment professionals understand that the more likely a retirement investor is to have trust and confidence in them, the more likely the investor will rely on and follow their advice. Recent literature has examined the role of trust in investment advice. For example, Calcagno, Giofré, and Urzì-Brancati found that investors with high trust in their financial advisors were most likely to delegate all of their investment decisions to their advisors, regardless of the investor's level of financial education.[19] Similarly, Burke and Hung found that increased financial trust is associated with higher levels of both seeking and following investment advice.[20]

There are myriad ways in which firms and investment professionals seek to persuade the investing public that they are in relationships of trust and confidence with investors and provide advice in investors' best interests that should be relied upon.[21] For example, investment professionals routinely use titles, such as "financial advisors," "financial consultants," or "wealth managers," giving the impression of specialized advisory expertise. In some cases, including in insurance markets, they characterize themselves as "trusted advisors." In addition, they commonly describe their services as "investment advice" or "retirement planning" and market those services as designed to serve investors' best interests.

Below are a few of the many examples of investment professionals, firms, and their trade associations positioning themselves as in relationships of trust and confidence with investors and providing advice in investors' best interests that should be relied upon.

- In a blog on the National Association of Insurance and Financial Advisors (NAIFA's) website by NAIFA's marketing partner, titled "4 Strategies Financial Advisors Use to Build Trust," it states, "Consider just how much trust someone needs to have in their financial advisor to give them continuous access to, and nearly complete control of, their life's savings, their retirement income, and their future security and dreams. That degree of trust ranks right up there with entrusting your life to a surgeon, your children's wellbeing to a nanny, and your heart to your spouse."[22] Among its recommendations, the blog suggests, "Beyond knowing their financial goals, trusted advisors take the time to get to

[19] Riccardo Calcagno, Maela Giofré, and Maria Cesira Urzí Brancati, *To Trust is Good, But to Control is Better: How Investors Discipline Financial Advisors' Activity*, Journal of Economic Behavior and Organization, Vol. 140 (2017), https://bit.ly/3H1m6wY.

[20] *See* Jeremy Burke and Angela A. Hung, *Trust and Financial Advice*, RAND Labor & Population, Working Paper No. WR-1075 (January 2015), https://bit.ly/3tB8zcs.

[21] *See* Micah Hauptman & Barbara Roper, *Financial Advisor or Investment Salesperson? Brokers and Insurers Want to Have it Both Ways*, Consumer Federation of America (January 18, 2017), http://bit.ly/2jKUbFD.

[22] Luke Acree, *4 Strategies Financial Advisors Use to Build Trust*, NAIFA (December 27, 2021), https://bit.ly/48T2Lu3.

know their clients on a more intimate level. They get to know their clients' likes and dislikes, hobbies, hot button issues, families, and history."[23]

- Redbird Advisors, an insurance marketing services company, states in the "Ultimate Guide to Selling Fixed Annuities," "The idea is when you're in a meeting and the fact finding process starts, your main objective is getting to a place of trust as soon as possible. People want to do business with people they like and trust."[24]

- The Insurance Pro Shop, which provides marketing and sales training to insurance agents, runs a "Trusted Advisor Success Training Workshop" showing insurance agents how they "can have endless streams of new, repeat, and referral business" by "mak[ing] the move from a salesperson to a 'Trusted Advisor!' So that you are the one person that people will want to see!"[25]

- Commenting on a survey F&G conducted to learn how Americans over 50 are thinking about their retirement realities, F&G's president and CEO stated on their website that, "Leveraging the expertise of a trusted financial advisor can often make people more confident and better equipped to navigate the challenges of retirement planning with conviction and clarity."[26]

- The senior vice president at Nationwide Annuity Distribution recently wrote a blog about common misconceptions about annuities, stating, "It's healthy for clients to have questions, concerns or even reservations about costs, flexibility or the type of annuity that may best fit their needs. However, as their trusted advisor, you can work with them to address misperceptions they may bring to the table with facts, options and a clear understanding of your client's specific retirement goals."[27]

- In another blog, the senior vice president of individual annuities at The Standard stated that, "Many clients think of the new year as a time to evaluate and expand their financial portfolio, and even more clients are looking for a safe and effective way to protect their money and help it grow. This means you, their trusted advisor, may be asked to help them rethink their financial plans."[28]

- A company that offers continuing education courses for insurance professionals states on its website titled "Selling Annuities: The Key to Unlocking Success," that "By offering annuities, you position yourself as a trusted advisor in the realm of retirement planning, ensuring your clients' long-term financial security and peace of mind."[29]

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[23] *Id.*
[24] Drew Gurley, *Ultimate Guide to Selling Fixed Annuities*, Redbird Advisors (January 4, 2022), https://bit.ly/3vq484D.
[25] Insurance Pro Shop, *The Best Life Insurance and Annuity Trusted Advisor Success Training Workshop* (2023), https://bit.ly/3tzPdEB.
[26] F&G Annuities & Life, *Retirement Reconsidered* (2023), https://bit.ly/4aGBFbg.
[27] Rona Guymon, *Common Misconceptions About Annuities*, FA Mag (December 11, 2023), https://bit.ly/3vjYGR2.
[28] Chris Conklin, *New Year, New Annuity Options For Your Clients*, InsuranceNewsNet (December 26, 2018), https://bit.ly/3S0ITzt.
[29] SuccessCE, *Selling Annuities: The Key to Unlocking Success* (May 10, 2023), https://bit.ly/3RJkIUy.

- On its website touting the benefits of working with an investment professional, Brighthouse provides the following analogy: "As doctors help take care of physical health, good financial professionals help take care of financial health. Just as you consult a doctor for a range of health questions, you can work with a financial professional on a host of different options regarding your plans for retirement."[30]

- On New York Life's homepage, the company states, "Working with us means never having to make financial decisions alone." We connect you with an agent in your community– someone who understands your needs and priorities. Together, you'll find the right approach to protect your family and help them prosper."[31] On the company's "About Us" page, it states: "Putting your needs first…focused on fulfilling our promises and doing what's best for policy owners, not on delivering profits for others."[32] On the company's annuities page, it states that, "by working with a trusted financial professional, you can discuss your unique circumstances and how best to prepare for the challenges that may lie ahead."[33] On the company's "Find a New York Life Agent" page, it touts the benefits of working with a New York Life professional, stating that the company provides "One-on-one guidance customized to your needs and goals."[34]

- A few years ago, NAIFA launched a consumer advertising campaign called "Trust a NAIFA Advisor," and their website carried the heading "Advisors You Can Trust."[35] The homepage of the website featured the following statement in large capital letters and bold font: "TRUST YOUR FUTURE WITH A NAIFA ADVISOR."[36] There was a video advertisement on the website, with voiceover stating: "Contact a NAIFA member for advice you can trust. NAIFA members adhere to a code of ethics that is about honesty and integrity. They're committed to working with you and guiding you with a financial plan that will lead you to a secure future and a retirement you'll enjoy."[37]

The clear intent of these communications is to convince investors that they should trust that their "advisor" will be looking out for their best interests and to encourage them to rely on their expertise and recommendations. They are also intended to convince investment professionals to position themselves as trusted advisors. Their marketing has undoubtedly "succeeded." In its adopting release for Regulation Best Interest, for example, the Securities and Exchange Commission (SEC) acknowledged that, "In seeking financial advice, a retail investor places not only money but also trust in a financial professional."[38] The release cited to a Chamber of Commerce survey, whose key finding was that, "96% of U.S. investors report that they trust their financial professional and

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[30] Brighthouse Financial, *5 Ways to Help Improve Your Financial Health* (November 5, 2019), https://bit.ly/41HogeX.
[31] New York Life, *Trusted Guidance and Protection: New York Life Insurance*, https://bit.ly/3RC2jt3 (last visited December 29, 2023).
[32] New York Life, *About New York Life*, https://bit.ly/3vdVdDj (last visited December 29, 2023).
[33] New York Life, *Financial Risks in Retirement*, https://bit.ly/3twFUFx (last visited December 29, 2023).
[34] New York Life, *Find a New York Life Agent*, https://bit.ly/3RFQNwD (last visited December 29, 2023).
[35] *See* Micah Hauptman & Barbara Roper, Consumer Federation of America, *Financial Advisor or Investment Salesperson? Brokers and Insurers Want to Have it Both Ways* at 13 (January 18, 2017), http://bit.ly/2jKUbFD.
[36] *Id*.
[37] *Id*.
[38] U.S. Securities & Exchange Commission, Regulation Best Interest: The Broker-Dealer Standard of Conduct, Section III.B.4.a, at 496-500, https://bit.ly/2Xfudkq.

97% believe their financial professional has their best interest in mind."[39] The survey also found that "Feeling secure in their relationship with their financial professional is key to investors."[40]

The Insured Retirement Institute (IRI) along with American Equity and Eagle Life published another survey titled "Aligning Retirement Expectations with Financial Resources."[41] Among the survey's key findings was that, "Financial Advisors are Highly Valued," with "70% of respondents stating that they believe financial advisors are trustworthy." Later in the report, it states that, "Consumers feel that financial advisors are trustworthy, but they also feel advisors should be heavily regulated. This indicates that the desire for regulation is rooted *not in a lack of confidence or trust* in the profession, but rather a contemplation of what is at stake – in effect no different from wanting a board-certified surgeon for a delicate operation."[42]

Retirement investors' beliefs and expectations about the relationships they are in and the services they receive aren't misplaced. Based on how investment professionals, firms, and their trade associations characterize these relationships and the services they provide, any reasonable investor would view these relationships as trusted advice relationships and expect to receive retirement investment advice that is in their best interest. No reasonable investor would view these relationships as arms-length sales relationships like the one a consumer has with a car dealer.

III. Retirement investors suffer harm as a result of conflicted investment advice.

Retirement investors who rely on conflicted and suboptimal advice by investment professionals can be exposed to higher costs, lower returns, greater risks, and excess illiquidity, which can undermine their retirement security. The harms to retirement investors can be particularly acute in the retirement plan and fixed indexed annuity markets, as discussed below.

Harms in the retirement plan market:
As discussed above, without particular expertise in setting up and administering retirement plans, many employers turn to investment professionals for advice and recommendations about the products and services they should offer to their workers.[43] These investment professionals are not typically legally required to act in the best interest of the plan or its participants when providing advice or recommendations to the plan sponsor. They often have conflicts of interest to recommend the products and services that compensate them the most, rather than the ones that are optimal for

[39] Center for Capital Markets Competitiveness, *Working with investment professionals: Opinions of American Investors* (2018), https://bit.ly/3H15aql.
[40] *Id.*
[41] Insured Retirement Institute, *Aligning Retirement Expectations with Financial Resources* (March 10, 2022), https://bit.ly/3GYtfy6.
[42] *Id*. (emphasis added).
[43] *See* Government Accountability Office, *401(k) Plans, Improved Regulation Could Better Protect Participants from Conflicts of Interest*, Report to the Ranking Member, Committee on Education and the Workforce, House of Representatives (January 2011), http://bit.ly/2p3UIZk (Plan sponsors and plan officials that rely on biased advice "may make poor investment decisions," which can in turn compromise participants' retirement security.); *See also* American Retirement Association, *Comment Letter Re: Regulation Best Interest, Release*, No. 34-83062; File Number S7-07-18, https://bit.ly/3voJcLj ("Broker-dealers routinely advise fiduciaries of small retirement plans concerning the investments that will be made available to participants under such plans. Like individual investors, most small plan business owners acting as retirement plan fiduciaries are not sophisticated investors. Most simply do not have retirement plan investment expertise.").

the plan and its participants. It can be very difficult for employers to assess the nature or extent of these conflicts of interest, factor these conflicts of interest into their decision making, or independently assess the quality of the advice and recommendations they receive. As a result, employers often rely on the advice and recommendations they receive, potentially to the detriment of their workers. Because fees cut into the ultimate returns investors receive, the unnecessarily high fees that many retirement investors in 401(k)s are paying reduce their returns, undermining their ability to attain a secure and independent retirement.

A study by Professors Ian Ayres of Yale Law School and Quinn Curtis of the University of Virginia School of Law, published in the *Yale Law Journal*, found that a significant portion of 401(k) plans have investment menus that predictably lead investors to hold high-cost portfolios.[44] In the study, the authors examined more than 3,500 401(k) plans with more than $120 billion in assets. Based on their analysis, the authors concluded that fees and menu restrictions in an *average plan* led to a cost of 78 basis points (0.78 percent) in excess of the cost of index funds. As the authors explained, "Since investors in retirement plans are limited to choosing from the menu offered by their employers, high-cost funds in the menu can greatly affect the performance of a retirement account. The stakes are high: reforms that reduce fees incurred by investors by only ten basis points on average would save more than $4.4 billion annually, and these savings compound over the course of investors' careers."

The problem of excessive fees is "especially acute in small company plans, where there is less competition and fewer resources are likely to be devoted by the plan sponsor to administering the plan," according to Ayres and Curtis. Further, they found that investors in many plans bear costs well in excess of retail index funds that "are unlikely to be fully mitigated by returns." In 16 percent of the plans that they analyzed, which included plans of all sizes, Ayres and Curtis estimated that fees are so high "that they consume the tax benefits of investing in a 401(k) for a young employee."

A study by Veronika K. Pool, Clemens Sialm, and Irina Stefanescu, published in the *Journal of Finance*, raised similar concerns with regard to the harmful impact of conflicts that arise when mutual fund families acting as service providers in 401(k) plans display favoritism toward their own affiliated funds.[45] The study found that "affiliated mutual funds are less likely to be removed from and more likely to be added to a 401(k) menu. In addition, fund deletions and additions are less sensitive to prior performance for affiliated than for unaffiliated funds." The authors found "no evidence that plan participants undo this affiliation bias through their investment choices." On the contrary, the study found that "the reluctance to remove poorly-performing affiliated funds from the menu generates a significant subsequent negative abnormal return for participants investing in those funds."

A more recent study by the same authors examined how revenue sharing affects plan menu design.[46] The study found that "high revenue-sharing funds are favored by plans: they are more likely to be added as an investment option and are also more likely to be retained." The authors

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[44] Ian Ayres and Quinn Curtis, *Beyond Diversification: The Pervasive Problem of Excessive Fees and "Dominated Funds" in 401(k) Plans*, Yale Law Journal (March 2015), https://bit.ly/41HG0qq.
[45] Veronika K. Pool, Clemens Sialm, and Irina Stefanescu, *It Pays to Set the Menu: Mutual Fund Investment Options in 401(k) Plans*, Journal of Finance 71, 1779–1812 (2016), https://bit.ly/4ayh4pr.
[46] Veronika K. Pool, Clemens Sialm, and Irina Stefanescu, *Mutual Fund Revenue Sharing in 401(k) Plans*, NBER Working Paper No. 30721 (December 2022), https://bit.ly/48gk3RM.

also documented that participants in revenue sharing plans face significantly higher fees. The study's results are "consistent with the notion that these less transparent indirect payments allow recordkeepers to extract additional rents from plan participants, and this further varies based on plan size and the relative market power of the recordkeeper in the network of providers," according to the authors.

While larger plans tend to have lower fees than smaller plans as a percentage of plan assets, plan size alone does not determine the cost of a retirement plan. The range of costs small plans pay can vary widely, likely reflecting a range in plan sponsor investment expertise and the extent to which they rely on conflicted advice. For example, according to ICI/Brightscope data, the median total annual cost for a plan with less than $1 million in assets is 1.02 percent, while the 90th percentile cost is 2.40 percent and the 10th percentile is 0.20 percent.[47]

To illustrate how detrimental high costs can be on workers, we've constructed a few examples comparing high- and low-cost plans on worker balances over time. A hypothetical worker who participates in a high-cost plan (2.40 percent per year) with less than $1 million in assets for 30 years, contributes $500 per month over those years, and receives an average 7% real annual rate of return, could retire with approximately $202,000 less than if this worker participated in a low-cost plan (0.20 percent per year) with less than $1 million in assets. To make up this difference, a worker earning the national average wage would need to work for a little more than 3 years longer.

Similarly, the median total annual cost for a plan with between $1 million and $10 million in assets is 0.96 percent, while the 90th percentile cost is 1.56 percent and the 10th percentile is 0.47 percent.

A hypothetical worker who participates in a high-cost plan (1.56 percent per year) with between $1 million and $10 million in assets for 30 years could retire with approximately $106,000 less than if this worker participated in a similarly sized low-cost plan (0.47 percent per year). To make up this difference, a worker earning the national average wage would need to work for more than 1.5 years longer.

Analysis published by Employee Fiduciary, a retirement service provider that provides recordkeeping and Third-Party Administrator services to small businesses, yielded similar findings. In its most recent plan fee study, Employee Fiduciary analyzed 104 small business plans with less than $5 million in assets.[48] The average plan in the study had 22 employees and $1.2 million in assets and had an all-in average annual fee of 1.18 percent. Employee Fiduciary then compared that all-in fee to the all-in fee that a similarly sized plan would cost if it received services from Employee Fiduciary, 0.33 percent per year.[49] According to their assumptions of a hypothetical 30-year-old with a $50,000 balance, making annual contributions of $10,000, investing for 35 years, and receiving a 7 percent annual return, Employee Fiduciary found that this hypothetical investor would have $382,380 in additional savings at age 65 due to the reduced fees.

[47] BrightScope and Investment Company Institute, *The BrightScope/ICI Defined Contribution Plan Profile: A Close Look at 401(k) Plans*, Exhibit 4.2 (September 2023), https://bit.ly/41JoD8Q.
[48] Eric Droblyen, *401(k) Fee Study: 75% of Small Business Plans Pay Hidden Fees*, Employee Fiduciary (January 26, 2023), https://bit.ly/3tt6X4D.
[49] Eric Droblyen, *How Much Lower 401(k) Fees Can Grow Your Retirement Savings*, Employee Fiduciary (January 26, 2023), https://bit.ly/3RJWKIW.

All of the available evidence strongly suggests that millions of participants in hundreds of thousands of plans are afflicted by excessive fees, which are driven in large part by advisory conflicts of interest. Cumulatively, this amounts to billions of dollars in lost savings annually for retirement investors.

<u>Harms in the fixed indexed annuity market</u>:
Without particular expertise in retirement investing, many retirement investors turn to investment professionals who recommend that the investor purchase an annuity. Because these recommendations typically occur on a one-time basis, they do not meet the regulatory definition of fiduciary investment advice.[50] As a result, the investment professional can steer the retirement investor to the annuity that provides the maximum compensation to the professional, rather than the annuity that is the best fit for the retirement investor.

The costs and conflicts in the fixed indexed annuity market can be particularly acute for retirement investors. These products can be complex, opaque, and have features that are detrimental to retirement investors, including suboptimal crediting methods based on complex and obscure factors, such as proprietary indices, participation rates, interest rate caps, and spread/margin asset fees. They can also impose substantial surrender charges that persist for years. Worse, insurance companies generally reserve the power to unilaterally change terms and conditions to lower a fixed indexed annuity investor's effective return, leaving the investor with little or no recourse. The shared complexity and opacity of these products fosters a dependence on professional advice, creating an environment in which conflicts of interest are more likely to thrive.

When they were originally introduced, indexed annuities were typically tied to well-known indices, such as the S&P 500 or Russell 2000. However, insurance companies have recently launched proprietary hybrid indices, which often claim to provide impressive results, but in reality, offer questionable and unproven benefits over traditional indices.[51] It is often virtually impossible to understand these indices' properties and these indices can be used to limit investor returns indirectly and opaquely. Today, only about one-third of fixed annuity premium is pegged via options to the S&P 500 Price Index, according to Kerry Pechter and Sheryl Moore, in a Retirement Income Journal analysis of the market.[52] Almost 60 percent goes into hybrids, of which there are dozens. "When I started in this business, there were 12 indexes," Moore said. "The last time I counted, there were 150."[53]

Many of the indices that are used "have little or no track record."[54] They are often promoted based on hypothetical "back-testing," which are often the result of data mining based on the benefit of

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[50] As discussed *infra* at 16, because these products are not regulated as securities, they are also not subject to Regulation Best Interest (Reg. BI). This has resulted in a fractured regulatory environment and uneven protections for investors, where annuities that are regulated as securities are subject to Reg. BI, while annuities that are not regulated as securities, such as fixed indexed annuities, are not.
[51] *See* Greg Iacurci, *Have Indexed Annuities Become Too Complicated?*, InvestmentNews (December 16, 2016), http://bit.ly/2pBAaU3.
[52] Kerry Pechter and Sheryl Moore, *Fixed Indexed Annuities: What's Changed (or Not) in Ten Years*, Retirement Income Journal (June 8, 2022), https://bit.ly/3RDIqBP.
[53] *Id.*
[54] *Id.*

hindsight.[55] Of course, manufacturing a strategy that worked in the past tells us nothing about whether it will work in the future. And all too often, what worked in a backtest does not work going forward, in which case the product manufacturer may just come up with a new index. Put simply, hypothetical performance represents imaginary, not real returns that any investor ever actually received. Presenting imaginary returns that no investors actually received as if they are real is therefore inherently misleading. By their very nature, they create unrealistic expectations.

In addition, many of these indices are designed with volatility controls that limit their performance. "Because the controls are internal and unseen, the issuers don't need to declare strict external performance limits, such as single-digit caps or sub-100% participation rates," according to the Pechter and Moore article. Such features are "particularly attractive to investors, because gains appear unlimited," according to the article. "That's a big sales incentive," Moore said.

Fixed indexed annuities also often have surrender charges that effectively lock up an investor's money for years and make it costly to reverse the investment decision. Examples of fixed indexed annuities with surrender periods longer than 10 years and surrender charges as high as 10 percent of premiums are not uncommon, including:

- Athene Performance Elite® 15: 15-year surrender period, surrender charge as high as 15 percent of premiums;[56]
- Fidelity and Guaranty AccumulatorPlus14: 14-year surrender period, surrender charge as high as 14.75 percent;[57]
- Midland National Life MNL IncomeVantage 14: 14-year surrender period, 10 percent surrender charge for the first five years;[58]
- North American Charter Plus 14: 14-year surrender period, surrender charge as high as 12 percent;[59]
- American Equity Retirement Gold: 10-year surrender period, surrender charge as high as 12.5 percent;[60] and
- Nationwide New Heights Select 12: 12-year surrender period, surrender charge as high as 10 percent.[61]

Fixed-indexed annuities' hefty surrender charges are positively correlated with the lofty commissions that these products pay to encourage and reward investment professionals for recommending and selling them. Higher commission products have longer surrender periods, while lower commission products have shorter surrender periods.[62] For example, according to New Horizons Insurance Marketing's "A Beginner's Guide to Selling Fixed Indexed Annuities," "the

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[55] *See, e.g.*, Spencer Look, *Be Wary of Fixed Indexed Annuity Illustrations*, Morningstar (August 2, 2023), https://bit.ly/48zxWua.
[56] Athene, *Athene Performance Elite® 15 Fixed Indexed Annuity*, Product Guide (Rates effective December 30, 2023), https://bit.ly/48mxEHq.
[57] Fidelity & Guaranty Life Insurance Company, *At-a-Glance: Accelerator Plus® 14*, Product Brochure (Revised November 2023), https://bit.ly/3H0VKLz.
[58] Midland National, *MNL RetireVantage® 14*, Product Brochure (Revised March 2023), https://bit.ly/41FG75K.
[59] North American, *North American Charter® Plus 14*, Product Brochure (Revised August 2023), https://bit.ly/3S2pQF0.
[60] American Equity, *Retirement Gold Fixed Index Annuity*, Product Brochure (2017), https://bit.ly/47gRW3x.
[61] Nationwide, *Nationwide New Heights® Select 12*, Product Brochure (2023), https://bit.ly/47e3Bjv.
[62] Cyril Tuohy, *Rise in Shorter-Term Surrender FIAs Means Commission Declines*, InsuranceNewsNet (June 20, 2017), https://bit.ly/3tCXAzg.

longer the FIA contract, the higher the commission. For example, the 14-year pays a lot more than a 7-year." This means investment professionals have a strong incentive to recommend retirement investors lock up their money for longer than is necessary. In short, what's better for the investment professional is worse for the investor.

According to financial planner and blogger Michael Kitces, "In fact, the whole purpose of surrender charges on annuities is simply to ensure that when an insurance agent is paid a commission upfront, the annuity funds will remain invested long enough with the ongoing interest rate spread extracted from the investor return to allow the insurance company to recover that commission cost from the investor (or else he/she pays a surrender charge to make up the difference!)."[63] This structure explains why commission-based annuities more often include longer surrender periods and larger surrender charges than fee-based annuities.[64]

While commissions for fixed indexed annuities have come down in recent years, they are still typically the highest in the market–higher than other annuities and higher than securities investments–which can influence investment professionals to recommend them.[65] We understand that commissions for these products are often highest in the Independent Marketing Organization (IMO) channel.

In addition to receiving high commissions for recommending and selling fixed indexed annuities, investment professionals can receive non-cash compensation, such as all-expense paid vacations to exotic locations, entertainment, golf outings, meals, and jewelry, which further encourage and reward them for recommending and selling these products.[66] These kinds of incentives create financial headwinds that would be challenging for even the most ethical investment professional to overcome.

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[63] Michael Kitces, *The Myth Of "Free" No-Expense Fixed Or Equity Indexed Annuities*, KITCES.COM (March 18, 2015), https://bit.ly/48fClmd.

[64] *See, e.g.*, Jackson, *Fee-Based Annuity Solutions*, https://bit.ly/41FGn4I (last visited December 30, 2023) ("No surrender charges, withdrawal charges, or contingent deferred sales charges. Your clients' money is not locked up, because the insurance company doesn't have to recover commissions or penalize clients for ending the contract too soon.").

[65] *See, e.g.*, Drew Gurley, *Ultimate Guide to Selling Fixed Annuities*, Redbird Advisors (January 4, 2022), https://bit.ly/3vq484D ("Fixed indexed annuity contracts are typically going to pay the highest agent commissions….The average street level commission for fixed indexed annuities is 4%-7%. For example, if you're [sic] client rolls over their $250,000 orphaned 401K from an old employer into a fixed indexed annuity, the commission could be anywhere from $10,000 – $15,000."); *see also* Kirk Sarff, A Beginner's Guide to Selling Fixed Index Annuities (FIAs), New Horizons Marketing (November 2, 2021), https://bit.ly/3H4DyAR ("FIAs give about 4 times the commission of a MYGA."); Holly Mornoe, *Insurance 101: The Complicated World of Producer Licensing for Selling Annuities*, Agent Sync (May 22, 2023), https://bit.ly/3TL8Gga ("Typically, that commission is higher than what they can make selling other insurance products, due to the long-term and complex nature of annuity contracts. With a little research and understanding, agents can sell these high-commission products with nearly the same amount of work as low-commission products but with 5-10 times the payoff."); Kerry Pechter and Sheryl Moore, *Fixed Indexed Annuities: What's Changed (or Not) in Ten Years*, Retirement Income Journal (June 8, 2022), https://bit.ly/47jDUhu (According to Sheryl Moore, "The top-selling annuity pays a 6.5% street-level commission, which is the maximum that [wholesalers, such as field marketing organizations or FMOs] can advertise. The street-level rate doesn't include the 'override' that the wholesalers receive, which can be as high 3%. The average all-in distribution cost is about 8% to 9%.").

[66] *See* Office of Senator Elizabeth Warren, *Villas, Castles, and Vacations: Americans' New Protections from Financial Adviser Kickbacks, High Fees, & Commissions are at Risk: 2017 Edition* (February 2017), http://bit.ly/2l3OUbI.

IV. The SEC and NAIC have not fully solved the problem of conflicted retirement investment advice.

Despite industry opponents' claims to the contrary, the Securities and Exchange Commission (SEC) and the National Association of Insurance Commissioners (NAIC) have not solved the problem of conflicted retirement investment advice. The Department is the only agency that can comprehensively address this problem.

A. The SEC has not fully solved the problem.

While the SEC finalized Regulation Best Interest (Reg. BI) in 2019 to enhance the standard of conduct for broker-dealers, this standard does not apply to all investment professionals, all products, or all accounts. Specifically, Reg. BI's applicability is limited to securities recommendations to retail customers. Thus, Reg. BI doesn't apply when an investment professional makes recommendations about non-securities. Similarly, Reg. BI doesn't apply when an investment professional makes recommendations to retirement plans. As a result, there is a lack of uniform protections for retirement investors, which leaves them vulnerable to harmful conflicts of interest.

1. Reg. BI does not apply when an investment professional makes recommendations about non-securities.

Many retirement investors who turn to investment professionals for investment advice receive advice to purchase investments that are not securities, including certain insurance and annuities products (including fixed indexed annuities), bank products (including certificates of deposit and collective investment trusts), commodities, real estate, or cryptocurrencies.

So, for example, if an insurance professional recommends that a retirement investor purchase a fixed indexed annuity, because a fixed indexed annuity is not regulated as a security, that recommendation would not be subject to Reg. BI. Therefore, none of the protections that Reg. BI provides would apply to this recommended transaction. This has resulted in a fractured regulatory environment and uneven protections for investors, where annuities that are regulated as securities, such as variable and registered index linked annuities, are subject to Reg. BI while annuities that are not regulated as securities, such as fixed indexed annuities, are not. This has the potential to create incentives for regulatory arbitrage to recommend and sell the products that carry the least regulatory scrutiny.

2. Reg. BI does not apply to recommendations made to retirement plans.

As discussed above, because workers are often limited to the investment options that their employer chooses for the plan menu, workers depend on their employer to make prudent decisions about those investment options. Unfortunately, many employers do not have particular expertise in choosing plan menus and they often rely on the investment recommendations of the firms and investment professionals who provide services to their plan. Reg. BI doesn't apply to these recommendations.

Reg. BI only applies to recommendations made to individual retail customers. Reg. BI defines a retail customer as a natural person, or representative of a natural person, who uses a recommendation primarily for personal, family, or household purposes. According to Reg. BI's adopting release, workplace retirement plans or their representatives and service providers generally would fall outside this definition.[67]

This creates a fractured regulatory environment and uneven protections for investors, where retail investors receive stronger protections than retirement plan sponsors. In some cases, the retail investor and plan sponsor can be the same person, dealing with the same investment professional. For example, if Sarah, a small business employer, seeks recommendations from Barry, who works for a broker-dealer, about the menu of mutual fund options to offer her employees in her company's 401(k), those recommendations would not receive Reg. BI's protections. As a result, Barry could recommend that Sarah include high-cost, low-quality funds that maximize Barry's and his firm's revenue. In that same conversation, if Sarah asked Barry for recommendations on what options she should personally invest in, those recommendations would receive Reg. BI's protections. Most small business owners are not going to understand these fine distinctions.

In highlighting this gap in which retirement plans do not receive Reg. BI's protections, the adopting release suggested it expected the Department to fill this gap by updating its fiduciary rule.[68] We agree that the Department must now ensure that employers receive the same high level of protections as retail investors when receiving investment recommendations from investment professionals. These protections should apply regardless of how the investment professional and their firm are otherwise regulated.

B. The NAIC Model Suitability Rule for annuities is a best interest in name only standard. It fails to provide the protections retirement investors need and reasonably expect.

The National Association of Insurance Commissioners (NAIC) adopted updates to its Annuity Transactions Model Regulation (#275) in 2020, but it does not protect annuity investors. Unlike Reg. BI, which imposes an explicit best interest obligation on broker-dealers, the NAIC Model Rule states that an insurance professional "has met" their best interest obligation if they satisfy four component obligations, none of which includes an explicit requirement to act in the consumer's best interest. The key standard they have to meet, "having a reasonable basis to believe the recommended option effectively addresses the consumer's financial situation, insurance needs,

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[67] *See* U.S. Securities & Exchange Commission, *Regulation Best Interest: The Broker-Dealer Standard of Conduct* at 33344 ("The Commission does not believe that workplace retirement plans or their representatives and service providers generally fall within the definition of retail customer for purposes of Regulation Best Interest because the workplace retirement plan is not a natural person, and therefore the workplace retirement plan representatives are not a non-professional representative of a natural person that is receiving a recommendation directly from a broker-dealer for 'personal, family, or household purposes.'").

[68] *See* U.S. Securities & Exchange Commission, *Regulation Best Interest: The Broker-Dealer Standard of Conduct* at footnote 254 ("Although workplace retirement plans are not generally covered by the definition of retail customer in by Regulation Best Interest, based on preliminary discussions with DOL staff, we understand that the DOL is considering regulatory options in light of the Fifth Circuit's decision vacating the DOL Fiduciary Rule, including the types of protections available to such workplace retirement plans and their representatives.").

and financial objectives," is largely a restatement of the previous suitability rule. That's not a true best interest standard.

In addition, unlike Reg. BI, which defines "material conflict of interest" broadly to include all forms of compensation and requires firms to mitigate conflicts of interest that create incentives for investment professionals to place their or their firm's interest ahead of the retail customer's interest, the NAIC Model Rule excludes cash and non-cash compensation from its definition of "material conflict of interest." As a result, the NAIC Model Rule does not require investment professionals recommending annuities to mitigate their compensation-related conflicts. This fractured regulatory environment has created uneven protections for investors and illogical dynamics in the annuity market, where annuities that are regulated as securities are subject to Reg. BI, while annuities that are not regulated as securities, such as fixed indexed annuities, are subject to the weaker NAIC Model Rule. As discussed above, this could create incentives for regulatory arbitrage where investment professionals have incentives to recommend and sell fixed indexed annuities over variable annuities, even when a variable annuity would be a better fit for the retirement investor.

The NAIC Model Rule also does not apply to recommendations of annuities inside retirement plans. As a result, retirement investors who receive advice to purchase annuities in plans would not receive even the most minimal protections that the standard purports to provide. In addition, employers who sponsor and operate retirement plans for their employees could receive conflicted advice to include annuities with suboptimal features in their plan for employees to purchase. Excluding annuity recommendations to plans from coverage poses enhanced risks as more plans decide to include annuities in their lineups.

Retirement investors should receive the same high level of protections regardless of the type of product they purchase, financial professional they turn to, or account they use. Unfortunately, because neither the SEC nor the NAIC have fully addressed the problem of conflicted retirement advice, retirement investors remain exposed in a number of key areas to receiving conflicted advice that undermines their retirement security. The Department is the only agency that can fill these gaps to protect retirement investors comprehensively.

V. The proposed revised definition of fiduciary investment is faithful to the text and purpose of ERISA, would honor retirement investors' legitimate expectations, and would provide retirement investors with the strong protections they need.

We strongly support the proposed revised definition of fiduciary investment advice. In contrast to the 1975 regulatory definition, which is inconsistent with the statutory text and protective purpose of ERISA and defeats retirement investors' legitimate expectations, the proposed definition of fiduciary investment advice is faithful to the text and purpose of ERISA and would honor retirement investors' legitimate expectations when receiving advice from investment professionals who hold themselves out and function as trusted advice providers.

First, the proposal would close the "regular basis" loophole to cover rollover and other one-time recommendations. This would ensure that retirement investors receive strong protections when they often have large sums of money at stake and are most vulnerable to receiving conflicted advice that harms their financial security.

Second, the proposal would cover advice to sponsors of retirement plans to ensure that advice to employers about selecting a menu of investment options for their employees is not tainted by conflicts of interest. As a result, plan participants would benefit from higher quality, lower cost options in their plans.

Third, the proposal would apply to all retirement investments, including securities and non-securities, including fixed indexed annuities. This would level the playing field between products, ensuring investment professionals don't have improper incentives to recommend non-securities over securities.

Fourth, the proposal would not allow firms to use fine-print disclaimers to evade their fiduciary duty. Specifically, when a disclaimer is at odds with the investment advice provider's oral communications, marketing material, state or federal law, or other interactions, the disclaimer would be insufficient to defeat the retirement investor's legitimate expectations.

In short, the proposal would not only close loopholes in the current definition of who is an investment advice fiduciary under ERISA, it would fill gaps that have resulted from Reg. BI and apply them more broadly to ensure that, regardless of the type of investment professional a retirement investor works with or the type of product the professional recommends, their advice would be subject to a strong best interest framework that ensures conflicts of interest do not taint their advice. The proposal would also remedy the deficiencies in the NAIC Model Rule.

Under the proposal, a person who makes an investment recommendation in one of the following contexts would be a fiduciary:

> (1) The person has discretionary authority or control over the retirement investor's investments;
>
> (2) The person makes investment recommendations on a regular basis as part of their business and the recommendation is provided under circumstances indicating that the recommendation is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest; or
>
> (3) The person represents or acknowledges that they are a fiduciary.

We support each of these tests to determine fiduciary status. Each one is designed to ensure that ERISA's fiduciary standards uniformly apply to all situations where retirement investors reasonably expect that their relationship with an advice provider is one in which the investor can and should place trust and confidence in the investment professional. For example, we agree that someone who has discretionary authority or control over the investment of a retirement investor's assets necessarily is in a relationship of trust and confidence with the retirement investor.

Similarly, a retirement investor who receives an investment recommendation by someone who provides investment recommendations as part of their business can reasonably expect that such a person has expertise on the matter. Moreover, when such a recommendation is provided under circumstances indicating that it is based on the particular needs or individual circumstances of the retirement investor and that it may be relied upon as a basis for investment decisions that are in the retirement investor's best interest, the retirement investor would reasonably place their confidence and trust in the person and the recommendation. And we agree that a retirement investor would place their confidence and trust in someone who uses titles or engages in other practices in which they hold themselves out as a trusted source of advice, as such practices would send the message that their advice is based on the particular needs or individual circumstances of the retirement investor and may be relied upon as a basis for investment decisions that are in the retirement investor's best interest.

Finally, we agree that a retirement investor who is told by a person that the person will be acting as a fiduciary would reasonably and appropriately place their trust and confidence in that person.

The Department should not provide a seller's carveout in a final rule.
To the extent industry opponents claim the Department's definition of fiduciary investment advice conflates arms-length sales and advice, we would like to remind the Department that the industry opponents are themselves guilty of blurring that line.

For example, the American Council of Life Insurers (ACLI):

- has repeatedly highlighted the "benefits of using a financial *adviser*;"[69]
- stated that "families turn to life insurance companies and *trusted agents and advisors* to protect their financial futures,"[70]
- referred to the need to preserve "*advice* about annuity purchases,"[71] and
- compared the value of "commission-based *advice*" to "fee-based advice," suggesting that the critical difference between the two is the method of payment for the advice, not that they are different services and relationships altogether.[72]

Similarly, the Financial Services Institute (FSI) has stated that it advocates "on behalf of independent financial *advisors…so* they can provide affordable, objective financial *advice* to hard-working Main Street Americans."[73] FSI has further stated that, "Now more than ever, individual investors need to have *confidence* in the *reliability* of the investment *advice* they receive."[74]

And as discussed above, IRI put out a survey, "Aligning Retirement Expectations with Financial Resources," stating that "Financial *Advisors* are Highly Valued" and that consumers' desire for regulation is "rooted *not in a lack of confidence or trust* in the profession, but rather a

[69] American Council of Life Insurers, Letter to the Department of Labor (July 21, 2015), https://bit.ly/48kM8qQ (emphasis added).
[70] Press Release, "Life Insurance Professionals Bring Message of Financial Security to Capitol Hill," (February 25, 2013), https://bit.ly/4amRxiM (emphasis added).
[71] Carl B. Wilkerson, Vice President & Chief Counsel, Securities & Litigation American Council of Life Insurers (October 5, 2015), https://bit.ly/3NqROaA (emphasis added).
[72] Statement for the Record, Submitted to the U.S. House Committee on Financial Services Subcommittee on Investor Protection, Entrepreneurship and Capital Markets, "Putting Investors First? Examining the SEC's Best Interest Rule," On Behalf of Susan K. Neely, President and CEO, The American Council of Life Insurers (March 14, 2019), https://bit.ly/4akPifT (emphasis added).
[73] Financial Services Institute, Letter to the Department of Labor (July 21, 2015), https://bit.ly/4ajww8B (emphasis added).
[74] *Id*.

contemplation of what is at stake…."[75] The title "Financial Advisor" appears in that document 52 times. The word salesperson or something similar never appears.

In short, in their eagerness to portray their members as trusted advisors who provide cost-efficient advice to investors, industry opponents have erased whatever distinction that might otherwise have existed and served as the basis for a seller's carveout. Industry participants have done the same, making it impossible for retirement investors to determine whether their own investment professional is a salesperson or an adviser and whether the service being offered constitutes sales or advice.[76]

In addition, recent regulatory updates have dispensed with the notion that sales and advice are distinct. For example, in Reg. BI's adopting release, the SEC stated that the standard "draws from key fiduciary principles" and referred to broker-dealer recommendations as "broker-dealer advice."[77] Similarly, the NAIC Model Rule's definition of recommendation equates sales recommendations with advice, stating, "'Recommendation' means *advice* provided by a producer to an individual consumer that was intended to result or does result in a purchase, an exchange or a replacement of an annuity in accordance with that advice."[78]

Given these considerations, the Department should not provide a seller's carveout.

<u>The Department should not provide a "sophisticated investor" carve-out in a final rule</u>.

Relatedly, the Department should not provide a seller's carve-out to "sophisticated" investors. In advocating this approach, proponents typically point to the "accredited investor" definition under the securities laws as the appropriate vehicle for achieving their policy goal. But the accredited investor definition, as currently drafted, cannot reasonably be relied on to identify a population of financially sophisticated individuals capable of independently assessing the recommendations they receive from investment professionals. To our knowledge, no other widely accepted measure of financial sophistication exists that could be used in its place. In the absence of a reliable measure of financial sophistication, such an approach is simply not workable.

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75 Insured Retirement Institute, *Aligning Retirement Expectations with Financial Resources* (March 10, 2022), https://bit.ly/3GYtfy6 (emphasis added).

76 The 2015 proposal's comment file is full of examples of industry's blurring the line between sales and advice. *See, e.g.*, Oliver Wyman (on behalf of Ameriprise Financial, Charles Schwab, Edward Jones, LPL Financial, Primerica, Raymond James, Stephens Inc. and Stifel), *The Role of Financial Advisors in the U.S. Retirement Market* (July 13, 2015), https://bit.ly/47ogeIN ("There has been substantial public debate recently about the value of financial advice and the importance of financial advisors. Many people continue to believe financial advisors perform a critical service helping individuals and small businesses successfully navigate complex financial challenges. Others have sought to portray financial advisors as self-interested salesmen and saleswomen, who provide conflicted advice to sell high-cost products. Against this background, Oliver Wyman was engaged to perform a rigorous investigation of the role of financial advisors in the US retirement market, and quantify differences in investing behavior and outcomes between advised and non-advised individuals." In other words, the report was submitted in order to provide evidence broker-dealers (referred to as financial advisors) provide advice and to rebut assertions that sales recommendations are distinct from advice.).

77 U.S. Securities & Exchange Commission, *Regulation Best Interest: The Broker-Dealer Standard of Conduct* at 33333, 33405-6.

78 NAIC, Suitability in Annuity Transactions Model Regulation, NAIC Model Laws, Regulations, Guidelines and Other Resources, MDL-275 (2020), https://bit.ly/4aI1gR5 (emphasis added).

The accredited investor definition is used to identify individuals to whom private securities can be sold on the presumption that individuals who meet the definition are capable of "fending for themselves" without the protections afforded in the public securities markets. The determination of whether an individual investor can "fend for himself" has traditionally hinged on three factors: whether the individual has the financial sophistication and knowledge to independently evaluate the potential risks and benefits of an investment; whether they have the ability to negotiate access to information needed to make an informed decision; and whether they have the financial wherewithal to withstand potential losses associated with often risky and illiquid private investments. Over time, however, the Securities and Exchange Commission has come to rely on income and net worth as proxies for financial sophistication. Thus, under the definition, an individual is deemed to be an accredited investor if he or she has annual income of $200,000 or more for two successive years ($300,000 per household) or a net worth of $1 million not including the value of their primary residence.

There is no evidence, however, that financial thresholds of this kind serve as an effective proxy for financial sophistication. Research that looks specifically at the financial sophistication of older accredited investors shows that, while accredited investors typically demonstrate higher levels of financial literacy than non-accredited investors within particular age groups, significant numbers of accredited investors, particularly among the oldest age groups, do not appear to be financially sophisticated.[79]

Nor are the financial thresholds in the accredited investor definition sufficient to ensure that investors can bear the risk of loss. While $1 million is a considerable sum, it may not provide a sufficient cushion against risk, especially if the money is tied up in an illiquid asset, such as a family farm or closely held family business, or, as is particularly relevant in this context, if it consists of a retirement nest egg needed to provide a steady and reliable stream of income over many years. It would be contrary to the goals of this rulemaking if retirement investors who had diligently saved their entire careers were suddenly denied the protections of the proposed rule once their nest egg reached the $1 million mark. Moreover, the financial thresholds in the definition are likely to become steadily less protective over time.[80] Investor advocates have argued for years that the thresholds, first set in 1982, should be adjusted to reflect inflation, but industry groups have successfully stymied those efforts.

It is worth noting, moreover, that there is no accredited investor carve-out from the protections of the fiduciary duty that applies to investment advisers under the securities laws. On the contrary, investment advisers are considered fiduciaries with regard to all their clients, including institutional investors. Similarly, Reg. BI applies to recommendations about securities to all retail

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[79] *See* Michael S. Finke and Tao Guo, *The Unsophisticated Sophisticated: Old Age and the Accredited Investor Definition* (September 22, 2019), https://bit.ly/3veWzhf; Recommendation of the Investor Advisory Committee: Accredited Investor Definition (October 9, 2014), https://bit.ly/41DK7Up.

[80] *See* Staff of the U.S. Securities & Exchange Commission, *Review of the "Accredited Investor" Definition under the Dodd-Frank Act* (December 14, 2023), https://bit.ly/3TJJhDF (Whereas approximately 1 in 50 households qualified as accredited investors in 1983, close to 1 in 5 do today. Without any changes to reflect inflation, in 10 years, close to 1 in 3 households will qualify; in 20 years, 1 in 2 households will qualify; and in 30 years, close to 2 in 3 households will qualify.).

investors, regardless of accredited investor status.[81] There is even less justification for creating such a carve-out in the context of advice to those who are investing through tax-advantaged retirement accounts. In addition, ERISA does not distinguish between sophisticated and unsophisticated investment advice recipients when determining fiduciary status.

The Department also should not provide a “sophisticated” investor carveout for retirement plans, particularly small plans. These plans are typically run by small business employers who are focused on running their business, not administering a retirement plan. These plan sponsors typically don’t have the ability to “fend for themselves.” Like most retail investors, most plan sponsors are not financial experts, are unaware of the magnitude and impact of conflicts of interest, and are unable to effectively assess the quality of the advice they receive.

VI. We support the proposed revisions to PTE 2020-02.

When an investment professional or financial institution has a conflict of interest when providing fiduciary investment advice to a retirement investor, that conflict must be properly mitigated to ensure that the conflict does not taint the quality of the advice. Prohibited Transaction Exemption (PTE) 2020-02 provides a mechanism to ensure this result. We agree that it is vital for the Department to maintain the core components in the PTE, including the Impartial Conduct Standards and the requirement for strong policies and procedures, as these fundamental investor protections are necessary to ensure that financial institutions and investment professionals provide investment advice that is in retirement investors’ best interest. We also agree that the proposed revisions to the PTE will further enhance protections for retirement investors and provide more clarity to financial institutions and investment professionals about their obligations, thereby promoting greater compliance.

First, we support providing more guidance on how financial institutions and investment professionals can best comply with the Impartial Conduct Standards and implement the policies and procedures condition. Specifically, we support adding an example to the operative text from the 2020–02 preamble specifying that it is impermissible for an investment professional to recommend a product that is worse for the retirement investor because it is better for the investment professional's or the financial institution's bottom line. This language is consistent with the SEC's standards for both registered investment advisers and broker-dealers, prohibiting those investment professionals and firms from placing their own interest ahead of an investor’s interest. We agree that this language will provide further clarity on the types of harmful conflicts that the standard prohibits.

Further, we support adding clarifying language that financial institutions may not use quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, or other similar actions or incentives that are intended, or that a reasonable person would conclude are likely, to encourage investment professionals to make recommendations that are not in retirement investors’ best interest. We also agree that a financial institution should not

[81] U.S. Securities & Exchange Commission, *Regulation Best Interest: The Broker-Dealer Standard of Conduct* at 33343 (“We believe the benefits of Regulation Best Interest justify compliance costs as these individuals could benefit from the protections included in Regulation Best Interest regardless of their net worth, which may not necessarily correlate to a particular level of financial sophistication.”).

offer incentive vacations, or even paid trips to educational conferences, if the desirability of the destination is based on sales volume and satisfaction of sales quotas, as these kinds of incentives would encourage investment professionals to violate their best interest obligation.

In addition, we support clarifying and tightening the existing text of PTE 2020-02 to enhance the disclosure requirements. Specifically, the proposal would require financial institutions to inform retirement investors of their right to obtain specific information regarding costs, fees, and compensation that is described in dollar amounts, percentages, formulas, or other means reasonably designed to present materially accurate disclosure of their scope, magnitude, and nature. The financial institution must provide the information in sufficient detail for the retirement investor to make an informed judgment about the costs of the transaction and the significance and severity of conflicts of interest. This includes the total compensation that the firm and investment professional receive, not just the costs directly paid by the retirement investor. We agree that these additional disclosures would ensure that investors have sufficient information to make informed decisions about the costs of an investment advice transaction and about the significance and severity of the investment advice fiduciary’s conflicts of interest.

We also support retaining the requirement that, before engaging in a rollover or making a recommendation to a plan participant as to the post-rollover investment of assets currently held in a plan, the financial institution and investment professional must consider and document their conclusions as to whether a rollover is in the retirement investor's best interest and provide that documentation to the retirement investor. Further, we support extending this requirement to recommendations regarding rollovers from a plan to another plan or IRA, from an IRA to a plan, from an IRA to another IRA, or from one type of account to another (*e.g.*, from a commission-based account to a fee-based account). These are all major life decisions for investors that require careful analysis. Requiring financial institutions and investment professionals to undertake a written analysis documenting their reasoning for recommending these transactions will help to ensure that they are well-supported and comply with the Impartial Conduct Standards. We also agree that investment professionals and financial institutions should make diligent and prudent efforts to obtain information about the fees, expenses, and investment options offered in the retirement investor's plan account. Without such information, they would be operating without sufficient information about the costs and benefits of a rollover and accordingly would not be able to prudently recommend such a transaction.

In addition, we support allowing financial institutions providing investment advice through computer models to rely on the exemption. We agree that this would simplify compliance for financial institutions that combine recommendations based on computer models and recommendations by investment professionals.

Finally, we support requiring financial institutions to provide their complete policies and procedures to the Department upon request within 10 business days of request. Potentially having to provide their policies and procedures to the Department for review would provide a meaningful incentive for financial institutions to ensure that those policies and procedures are reasonably designed. We also agree that the Department should retain the annual retrospective review requirement. Financial institutions should undertake a regular process to ensure that their policies and procedures are reasonably designed to detect and prevent violations of, and achieve compliance with, the conditions of the exemption.

In sum, based on our review of the proposed modifications to PTE 2020-02, we believe this proposal is administratively feasible, in the interests of plans and their participants and beneficiaries and IRA owners, and protective of the rights of the participants and beneficiaries of such plans and IRA owners.

VII. We support the proposed revisions to PTE 84-24.

We agree that when an independent insurance producer provides fiduciary investment advice about an annuity and receives a commission, they should be required to comply with similar conditions as contained in PTE 2020–02, but which are more tailored to protect retirement investors from the specific conflicts that can arise in this context. Accordingly, we support the proposed amendments to PTE 84-24, which in our view would accomplish these goals.

In the independent channel, insurance companies exercise less oversight over producers relative to broker-dealers and investment advisers, and conflicts of interest can be significant. For example, fixed indexed annuities are often sold by independent producers. And as discussed above, cash and non-cash compensation for the sale of these products can be significant, relative to other securities products and other annuities. The conditions of this PTE properly address these concerns.

First, we support limiting the exemption to independent insurance producers selling non-securities annuities or other insurance products not regulated by the SEC to retirement investors. When an investment professional sells securities, they must work as a representative of a financial institution, which must exercise strict oversight over its representatives and be a co-fiduciary with its representatives. We agree that any such conflicted investment advice arrangements are more appropriately addressed by PTE 2020-02.

We also support limiting the exemption to simple sales commissions, as opposed to any related or alternative forms of compensation, which may be opaque and difficult for retirement investors to understand how they may influence a recommendation.

Next, we support requiring the independent producer to provide a written statement of the amount of the insurance sales commission it will be paid in connection with the purchase by the retirement investor of the recommended annuity. Given the particularly acute conflicts of interest with the sale of non-security annuities, including fixed indexed annuities, it's critical that the retirement investor understand the amount of money that the independent producer will make on the transaction. We agree that this statement should be disclosed in both dollars and as a percentage of gross annual premium payments. We also agree that, if applicable, the statement must also disclose the amount the independent producer will be paid for the first year and each succeeding year, as producers are often given a choice of how they receive their compensation, either as a one-time commission or as a trailing commission.

We also support the requirement for independent producers to consider and document its conclusions that the recommended annuity is in the retirement investor's best interest and provide that documentation to the retirement investor and the insurer. As with rollover and account recommendations, the decision to purchase an annuity can be a major life decision. Outside of a free-look period, annuity transactions can be extremely difficult and costly to reverse. And annuities can be recommended and sold based on acute conflicts of interest. Given these considerations, it's critical that producers undertake a written analysis documenting their reasoning for recommending these transactions. Doing so would help to ensure that these recommendations are well-supported and comply with the Impartial Conduct Standards.

In addition, we support the requirement that independent producers carefully analyze and disclose the various incentives available from different insurers that could affect the recommendation. We agree that without a single insurer overseeing each recommendation relative to reasonably available alternatives, there is greater risk that the recommendation could be tainted by conflicts of interest because different insurance companies could offer competing incentives for independent producers to recommend their products.

Finally, we agree that it's important that insurance companies, while not co-fiduciaries in this context, must exercise oversight over independent producers to the extent producers sell insurance companies' own products. In this regard, it's critical that insurance companies have reasonably designed policies and procedures so as not to encourage or reward producers for violating the Impartial Conduct Standards. Accordingly, offering quotas, appraisals, bonuses, contests, special awards, differential compensation, riders and or other similar features that are intended, or that a reasonable person would conclude are likely, to incentivize independent producers to provide recommendations that do not meet the Impartial Conduct Standards should be prohibited. Similarly, offering "educational" opportunities that are based on production would incentivize producers to violate the Impartial Conduct Standards and should also be prohibited. We agree that education should be offered equally to all producers and not connected to sales volume because training is a necessary component of providing best interest advice.

In sum, based on our review of the proposed modifications to PTE 84-24, we believe this proposal is administratively feasible, in the interests of plans and their participants and beneficiaries and IRA owners, and protective of the rights of the participants and beneficiaries of such plans and IRA owners.

VIII. Industry opponents' arguments against the rule are groundless.

Some industry opponents have argued that small savers, those with low account balances or of modest means, would lose access to investment advice under this rule and would be worse off. This is an industry scare tactic that has no basis in fact.

Small savers are especially vulnerable to the detrimental effects of conflicted advice. With fewer economic resources, small savers can least afford to lose any of their retirement savings due to harmful conflicts of interest. Small savers therefore have the most to gain from receiving high quality advice that serves their best interest rather than the interests of investment professionals or their firms. In addition, many investment professionals support a strong fiduciary standard and operate under it very successfully, while serving clients all along the income spectrum. If some firms were to decide to pull out of the market, others would step in to provide high quality products and services without harmful conflicts.

To the extent any industry claims about a potential loss of access to advice are based on the 2016 rulemaking, that rule was substantially different from the current rulemaking. For example, the 2016 definition of investment advice was significantly broader than the current proposal and the 2016 Best Interest Contract Exemption imposed onerous contract and warranty conditions that created private liability in the IRA market. There is no contract or warranty requirement in the current proposal. As a result, any comparisons to the 2016 rule are not applicable to the current proposal. We also urge the Department to be skeptical of any "evidence" against the rule that industry opponents repackage from 2016. Most of what they have offered are biased industry surveys based on opaque, non-verifiable information.

However, to the extent the Department considers the effects of the 2016 rule, it should include in its analysis all of the beneficial effects that rule had on the market. For example:

- clean share mutual funds were introduced, with fewer embedded conflicts of interest and lower costs;
- fee-based annuities were introduced, with shorter surrender periods, lower surrender charges, lower costs, and more opportunity for greater upside;
- several firms lowered required minimum investment amounts and introduced new advisory offerings; and
- a wave of technology offerings were announced to ease compliance with the rule.

In short, those firms that were genuinely committed to serving retirement investors' best interests acted to expand access to fiduciary advice, reduce conflicts, lower costs, increase transparency, and improve the quality of their advice and products.

In addition, the proposal broadly aligns with the SEC's Reg. BI. We are not aware of any evidence that Reg. BI has reduced small savers' access to investment recommendations from broker-dealers. Just the opposite, Reg. BI showed that investment professionals and firms can be subject to an explicit best interest standard that requires conflicts of interest to be mitigated, while still allowing investment professionals to be paid by commission. We expect the Department's rule and exemptions to operate similarly, aligning and extending these protections to retirement plans and their participants and to retirement investors who invest in non-securities.

Finally, to the extent any industry claims about a loss of access to advice are made by the same parties who challenged the 2016 rule, we would like to remind the Department that they claimed that they don't provide advice, they provide arms-length sales recommendations like car dealers. While we strongly disagree with that assertion, they can't be allowed to continue to make mutually inconsistent arguments to different audiences, based on whatever is most advantageous to them at the time. Also, if one were to accept their argument, then retirement investors wouldn't lose access to advice, they'd lose access to self-interested sales pitches deceptively disguised as advice.

Conclusion

We applaud the Department for its persistence in pursuing this much needed regulatory reform and we urge the Department to move forward expeditiously to finalize this important regulatory project.

Respectfully submitted,

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