



September 24, 2015

Office of Regulations and Interpretations  
Employee Benefits Security Administration  
Attn: Conflict of Interest Rule  
Room N-5655  
U.S. Department of Labor  
200 Constitution Avenue N.W.  
Washington, D.C. 20210

Re: Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice (DOL RIN 1210—AB32)

Dear Sir or Madam:

Better Markets<sup>1</sup> appreciates the opportunity to submit further comment on the above-captioned Proposed Rule (“Proposed Rule” or “proposal”) published by the Department of Labor (“DOL” or “Department”) in the Federal Register on April 20, 2015, over five months ago. The proposal will update the DOL’s 40-year rule that defines when a person is providing investment advice and is therefore assuming fiduciary status under the Employee Retirement Income Security Act (“ERISA” or “the Act”) and under provisions of the Internal Revenue Code (“Code”).

The DOL has extended the comment period on the Proposed Rule to ensure that all interested parties have ample opportunity to submit their views in light of the exhaustive, four-day public hearing that the DOL convened from August 10-13, 2015.

The single most important lesson learned from the hearing is this: No new facts or arguments were raised in opposition to the rule. Witnesses tried to cast their arguments against the rule in novel ways, but their testimony was comprised of the same baseless attacks that were made during the initial comment period and in the years of lobbying the DOL that preceded the initial comment period and the hearing. None of the testimony

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<sup>1</sup> Better Markets, Inc. is a nonprofit organization that promotes the public interest in the domestic and global capital and commodity markets. It advocates for transparency, oversight, and accountability in the financial markets.

delivered at the hearing, and none of the comments submitted to the DOL, have altered the following basic facts:

- Retirement savers are suffering huge and unjustifiable losses as a result of the conflicts of interest that are pervasive among advisers. Some estimates place the damage as high as high as \$43 billion a year, and it is probably much higher.
- The DOL's proposal is a well-designed solution to this problem, one that re-establishes the essential investor protections Congress intended under ERISA, while generously (if in some respects unwisely) accommodating many of the industry's objections, including their foremost desire to preserve their business models.
- The industry's relentless attacks on the rule are disingenuous and meritless. They are based on misleading distortions about what the rule actually requires, coupled with unsupported and dire predictions about the impact of the rule.
- The DOL has followed an extraordinarily open, lengthy, and inclusive rulemaking process, one that goes well beyond the requirements of the Administrative Procedures Act. It should finalize its proposal without delay so that all Americans saving for retirement can begin receiving the protections they expect and deserve as they struggle to save for a retirement with dignity and security.

In this supplemental comment letter, we address a number of specific issues relating to the substance of the rule proposal; we revisit some of the industry's baseless arguments against the rule; and we highlight the most glaring flaws in the latest procedural hurdles that opponents are attempting to raise against the proposal. Our overarching point is that everything is now in place to finalize the rule without delay once the comment period ends on September 24. No further accommodations to industry criticisms or counterproposals are necessary or warranted, and no further procedural steps in the nature of comment periods, hearings, or re-proposals should stand in the way of a final rule.

#### **I. THE DOL MUST NOT DILUTE THE PROPOSED RULE.**

The DOL's proposal is an effective solution to the problem of conflicts of interest among advisers. At the same time, it makes significant concessions to the financial industry, and in fact, should be strengthened in some respects.<sup>2</sup> At a minimum, then, as it finalizes the rule, the DOL must at least not weaken or dilute any aspect of the proposal. The only changes that could be warranted are minor adjustments that (1) streamline the requirements without in any way weakening the protections set forth in the rule; or (2) clarify the terms of the rule, again without in any way weakening its protections.

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<sup>2</sup> Our primary concerns with the proposal were included in our July 21, 2015 comment letter, which we incorporate by reference as if fully set forth herein.

A. The core provisions of the rule must remain intact.

The DOL must above all preserve the key provisions in its proposal that address the most significant defects in the current, 40-year old rule. These include measures that—

- Close the loopholes in the old rule, including the “regular basis” loophole and the “mutual understanding/primary basis” loophole;
- Extend the fiduciary protections to advice relating to rollovers and IRA accounts;
- Establish a remedy under the Best Interest Contract exemption, allowing investors injured by a breach of the exemption to seek redress for breach of contract.

B. The disclosure requirements under the BIC are appropriate and necessary, and they should not be scaled back.

Industry opponents have criticized the disclosure requirements under the BIC. The BIC was a very generous accommodation to the industry’s relentless demands to preserve their commission-based business model, and it allows advisers to continue charging commissions and other forms of ***inherently conflicted compensation***, subject to certain conditions. Among those conditions are various disclosures, and all of them are necessary and appropriate.

In reality, industry’s opposition to those requirements is based not on the alleged compliance burdens they would impose, but on the impact of real transparency: With these disclosures, coupled with the fiduciary duty, firms will no longer be able to gouge their clients with hidden commissions and fees, and the influence of third party payments on investment recommendations will be exposed. The DOL should resist calls to dilute the disclosure requirements.

As a threshold matter, those disclosure requirements fall well within the scope of the DOL’s legal authority. ERISA grants the DOL wide discretion in determining whether to grant exemptions and how to fashion them.<sup>3</sup> The statute also conditions the grant of any exemption on a set of overarching principles. Among them is that the exemption ***must be***

- “in the interests of the plan and of its participants and beneficiaries,” and
- “protective of the rights of participants and beneficiaries of such plan.”

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<sup>3</sup> 29 U.S.C. § 1108(a).

Thus, in designing the BIC, the DOL has broad leeway to incorporate whatever conditions it deems necessary and appropriate to meet these standards and protect the interests of plans, plan participants, and beneficiaries.<sup>4</sup>

With respect to the disclosure obligations, the DOL has proposed requirements in the BIC exemption that are effective but also reasonable in terms of content, timing, and format. Occupying less than a single page of the Federal Register release, they amount to the following:

- (1) In the BIC contract, disclosure of the adviser's "material conflicts of interest," along with information about where the investor can obtain details about fees, proprietary products, and third party payments;
- (2) At the point of sale, disclosure of the total cost of each recommended investment over three time periods;
- (3) On an annual basis, a recap of the assets sold to the investor, the fees and expenses, and third party payments; and

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<sup>4</sup> Under ERISA, exemptions are also conditioned on a DOL finding that they are "administratively feasible." 29 U.S.C. § 1108. Critics of the conflict of interest rule have claimed that the rule and any exemptions must be "workable" or "administratively feasible" from the standpoint of the industry to pass legal muster. But this critique is based on a fundamental misinterpretation of ERISA. The phrase "administratively feasible" refers to the agency's capacity to administer the rule, not an industry assessment of whether the rule is too burdensome, costly, or otherwise "unworkable." This follows primarily from the structure of Section 1108. Two of the three criteria for exemptions set forth in Section 1108 relate to the protection of plans and their participants and beneficiaries. It would be anomalous to read the third prong—"administratively feasible"—as a sudden expression of Congressional concern about the burdens the rule might impose on the regulated industry. Such a reading would violate the canon of statutory construction providing that statutory provisions must be interpreted in a manner consistent with the structure of the statute. See *Eli Lilly & Co. v. Medtronic, Inc.*, 496 U.S. 661, 668-69 (1990); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 59 (1987). It would further offend "[t]he commonsense canon of *noscitur a sociis*, which counsels that a word is given more precise content by the neighboring words with which it is associated. *United States v. Williams*, 553 U.S. 285, 294 (2008). "The rule of *noscitur a sociis* is intended to prevent ascribing to one word a meaning so expansive that it conflicts with other terms of the provision in a manner that gives unintended breadth to the Acts of Congress." *Dolan v. United States Postal Serv.*, 546 U.S. 481, 495 (2007) (internal citations omitted). In addition, it would create a de facto industry veto power over agency action they deem to be too onerous. Although ERISA's "administratively feasible" language has not been subject to judicial interpretation, scholarly commentary and government publications endorse the foregoing interpretation. See Bill Schmidheiser, ERISA's Prohibited Transaction Restrictions: Policies and Problems, 4 J. Corp. L. 377, 405 (1978) (citing [1976] 91 PENS. REP. (BNA) A-4) ("Administratively feasible' means feasible for the Departments to administer, given the Departments' resources and the nature of the transaction sought to be exempted."); see also FDIC Trust Examination Manual, Appendix E, Employee Benefit Law (using the phrase "administratively feasible" in the context of the Department of Labor's resource allocation decisions).

- (4) On a web page, “freely accessible to the public,” all compensation payable to the adviser for each investment it sells, the source of such compensation, and how it varies among assets.

These disclosures were designed largely for the immediate benefit of individual investors, and they are important because they help investors understand an adviser’s recommendations, all of the costs they will pay for the investments, and the conflicts of interest that underlie the recommendations. Armed with such information, investors are better equipped to understand whether their adviser is really serving their best interest.

The web-based disclosures will result in a broader, public dissemination of information, and over time, they will effectuate positive structural changes in the entire advisory industry. That information can be more widely assimilated and analyzed by investment professionals, investor advocates, journalists, and others. This huge increase in transparency regarding industry pricing and compensation practices will result in more robust and fair price competition for the benefit of all investors. The prospect of this reform is undoubtedly driving the industry’s ferocious opposition to the rule, because it limits their ability to conceal and inflate their fees and profits. However, it is one of the most important innovations in the rule and it should be retained in the final version.

C. An additional exemption for so-called sophisticated investors would open a large and dangerous loophole.

Critics of the proposed rule have also argued for a sophisticated investor exemption. This step would be unwise for a host of reasons, and if incorporated into the final rule, would inevitably result in an “open season” on countless investors who will lose the protections of the fiduciary duty.

The proposed rule already creates a seller’s exemption that may itself prove to be a dangerous loophole. Fortunately, the DOL limited the scope of that exemption to large plans, making it unavailable to small plans or individual retail investors regardless of their net worth or sophistication. As articulated in the release, the rationale for that limitation is that

“Most retail investors and many small plan sponsors are not financial experts, are unaware of the magnitude of and impact of conflicts of interest, and are unable effectively to assess the quality of the advice they receive.”<sup>5</sup>

The release also explained that disclaimers intended to alert investors that they are not receiving objective advice are ineffective, and may even exacerbate investor vulnerability.<sup>6</sup>

These observations are true for the vast majority of investors. Attempting to differentiate the very few genuinely sophisticated investors from this large group is the wrong approach. First, of course, the concept has no legal basis in ERISA. The statute does

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<sup>5</sup> Release at 21,942.

<sup>6</sup> *Id.*

not say or suggest that retirement savers should receive different levels of protection depending on their degree of sophistication or their net worth and their ability to absorb losses from conflicted advice.

Second, there is a growing recognition that the very notion of the sophisticated investor is a myth. Put another way, while there *may be* some small number of individuals who have the knowledge to fend for themselves in the retirement marketplace and the financial wherewithal to absorb losses, it is impossible to know who they are. Net worth, no matter how high, is certainly not a reliable measure of financial sophistication. And with respect to absorption of losses, the net worth thresholds typically suggested for such an exemption are far too low to identify investors who are truly capable of sustaining significant losses without suffering a material change in their prospects for a secure retirement.

Finally, there is simply no convincing reason or rationale for such an exemption. Stripping away fiduciary protections—even if they may be unnecessary for a handful of truly sophisticated investors—certainly does not confer any *benefit* upon those sophisticated investors. The notion, for example, that sophisticated investors really need advice about riskier asset classes under the BIC is nonsense. Any truly sophisticated investor who wants to invest their retirement funds in a broader range of assets can easily seek them out and procure them, regardless of the reasonable restrictions on permissible investments under the BIC. And sparing advisory firms some marginal amount of compliance cost cannot possibly justify the exemption.

In fact, all that a sophisticated investor exemption would do is expose countless investors improperly categorized as “sophisticated” to the predations of advisers who do not want to be held to the fiduciary standard. The idea should be rejected.

## II. SMALL SAVERS WILL NOT LOSE ACCESS TO VALUABLE ADVICE.

Industry continues to rely on myths and scare tactics to attack the rule. One of their core arguments is that the rule would actually harm small savers by depriving them of the access to advice they supposedly enjoy now. This is a disingenuous and cynical rhetorical strategy, divorced from reality and designed to stir opposition among politicians and an understandably confused public that struggles to make sense out of the bewildering world of financial advice. It is simply wrong on every level.

### A. Brokerage firms do not serve small savers now, so it is disingenuous for them to claim that the rule would force them to abandon those clients.

Brokerage firms do not provide genuine investment *advice* to any clients, rich or poor. What they actually do is make *sales pitches* to push investment products that pay them the most in hidden commissions and fees, all in the guise of helpful, objective advice.

But even assuming that these firms actually do provide bona fide advice to their clients at least some of the time, they certainly aren’t interested in providing it to those savers who have modest retirement account balances. In fact, many of the larger brokerage firms have adopted firm-wide policies designed to encourage their sales force to focus on

higher net worth clients rather than smaller accounts that are not as profitable for the firm. As one Wall Street recruiter has said, “[i]t is no secret, of course, that full-service securities firms have been phasing in punitive pricing policies on small accounts.”<sup>7</sup> “Brokerages have always used compensation plans to incent behavior.”<sup>8</sup> Consider the following examples:

- **Bank of America Merrill Lynch (BAML)** does not pay its advisers to service clients with less than \$250,000.<sup>9</sup> Customers whose accounts hold less than \$250,000 in assets are directed to the Merrill’s Edge platform, which uses employees in centralized call centers and bank branches to provide customer assistance. BAML made this policy change because it wanted brokers focused on finding and working with wealthier clients.<sup>10</sup>
- **UBS** does not pay its advisers to service clients with less than \$100,000.” We adjust to make sure our compensation plan aligns with our strategies,” Jason Chandler, head of the firm’s approximately 7,100 brokers, said in an interview. Chandler’s assertion suggest that the firm create compensation incentives that are in the firm’s best interests, rather than customers’. The firm also provides a bonus to encourage brokers to serve wealthier households with at least \$1 million to invest. Chandler’s reasoning for the new bonus program was that, “We had too many advisers focused on households with lower levels than we wanted.”<sup>11</sup>
- **Morgan Stanley Smith Barney** also imposes a \$100,000 minimum account size on which the company’s advisers can get paid a fee.<sup>12</sup> MSSB also charges quarterly fees of \$50 on “Low Balance Households”-- those with total accounts under \$25,000.<sup>13</sup>

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<sup>7</sup> Jed Horowitz, *MSSB Hits Small Accounts With New Fees*, Reuters (Apr. 18, 2010, 12:01 AM), <http://www.investmentnews.com/article/20100418/REG/304189983/mssb-hits-small-accounts-with-new-fees> (quoting Wall Street recruiter Mindy Diamond, of Diamond Consultants).

<sup>8</sup> Mary Thompson, *Morgan Stanley’s New Broker Plan Takes Aim At Its Wealthy Clients*, CNBC (Dec. 7, 2012, 10:37 AM), <http://www.cnbc.com/id/100290083> (quoting Wall Street recruiter Mindy Diamond, of Diamond Consultants).

<sup>9</sup> Jed Horowitz, *Merrill Lynch Pivots to Mildly Affluent Clients*, Reuters (Jun. 18, 2015, 6:06 PM), <http://www.reuters.com/article/2015/06/08/us-wealth-summit-merrill-lynch-idUSKBN0002IH20150608>.

<sup>10</sup> Michael Wursthorn, *Merrill Lynch’s Brokers Want An Edge*, Wall St. J. (May 5, 2015, 9:27 AM), <http://www.wsj.com/articles/merrill-lynchs-brokers-want-an-edge-1430832419>.

<sup>11</sup> Jed Horowitz, *UBS Gives Brokers Higher Expense Accounts To Lure the Wealthy*, Chicago Tribune (Dec. 13, 2013), [http://articles.chicagotribune.com/2013-12-03/news/sns-rt-ubs-pay-20131203\\_1\\_expense-accounts-brokers-households](http://articles.chicagotribune.com/2013-12-03/news/sns-rt-ubs-pay-20131203_1_expense-accounts-brokers-households).

<sup>12</sup> Lauren Tara Lacapra and Jennifer Hoyt Cummings, *Morgan Stanley Shifts Broker Bonuses To Reward Growth*, Reuters (Dec. 6, 2012), <http://www.reuters.com/article/2012/12/07/us-morgan-stanley-compensation-idUSBRE8B51FD20121207>.

<sup>13</sup> Morgan Stanley Account and Service Fees (Sep. 24, 2015), [https://www.morganstanley.com/wealth-relationshipwithms/pdfs/account\\_and\\_service\\_fees.pdf](https://www.morganstanley.com/wealth-relationshipwithms/pdfs/account_and_service_fees.pdf).

- According to a 2006 FINRA Investor Alert, brokerage customer advisory call centers are sales-oriented and often characterized by “A client base that may be determined by account transaction activity, portfolio size or household assets (for example, household assets of \$100,000 or less).<sup>14</sup>

These facts demonstrate that the vast majority of brokers cannot honestly claim that the proposed rule would prevent them from serving retirement savers with modest accounts, since they do not currently serve those investors with genuine advice, and would prefer not to serve them at all. Indeed, as the facts show, they actually prevent their representatives from advising such clients, or they create powerful disincentives that discourage them from doing so.

**B. Industry’s alarmist predictions are thoroughly discredited by Wall Street’s long history of adaptation to new regulation.**

Since the emergence of financial market regulation, the financial services industry has claimed that new regulatory requirements will have a devastating impact by imposing unbearable compliance costs. Yet Wall Street has always absorbed the cost of those new regulations and has consistently remained one of the most profitable sectors in our economy. For example, a century ago, when securities regulation first emerged at the state level, Wall Street railed against it as an “unwarranted” and “revolutionary” attack upon legitimate business that would cause nothing but harm.<sup>15</sup> However, in the years following this early appearance of financial regulation, banks and their profits grew handsomely.<sup>16</sup>

Subsequently, when the federal securities laws were adopted, Wall Street staunchly opposed them, claiming that they would slow economic recovery by impeding the capital formation process and discouraging the issuance of new securities. In fact, in the years after the enactment of the federal securities laws, the nation’s securities markets flourished and became what has often been described as the envy of the world. The same pattern has been repeated with each new effort to strengthen financial regulation, including deposit insurance, the Glass-Steagall Act, mutual fund reform, the national market initiatives of the mid-1970s,<sup>17</sup> and virtually every other financial regulation no matter how modest and sensible.

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<sup>14</sup> FINRA Investor Alert (Sep. 24, 2015), <http://www.finra.org/investors/alerts/customer-advisory-centers-not-your-typical-securities-firm-call-center#sthash.nUmthGMR.dpuf>.

<sup>15</sup> See Marcus Baram, *The Bankers Who Cried Wolf: Wall Street’s History of Hyperbole About Regulation*, THE HUFFINGTON POST (Jun. 21, 2011, 6:56 PM), [http://www.huffingtonpost.com/2011/06/21/wall-street-historyhyperbole-regulation\\_n\\_881775.html](http://www.huffingtonpost.com/2011/06/21/wall-street-historyhyperbole-regulation_n_881775.html).

<sup>16</sup> Paul G. Mahoney, *The Origins of the Blue-Sky Laws: A Test of Competing Hypotheses*, 46 J.L. & ECON. 229, 249 (2003) (“In the 5 years following adoption of a merit review statute [the most stringent type of blue sky law statute], bank profits increased on average by nearly 5 percentage points . . .”).

<sup>17</sup> Marcus Baram, *supra* note 82; see also Nicholas Economides et al., *The Political Economy of Branching Restrictions and Deposit Insurance: A Model of Monopolistic Competition Among Small and Large Banks*, 39 J. L. & ECON. 667, 698 (1996) (“The American Bankers Association fights to the last ditch deposit guarantee



Recently, critics of the 2010 Dodd-Frank Act reforms relentlessly pursued the same tactics, yet their “sky is falling” predictions have proven equally baseless. For example, the mortgage lending industry fiercely opposed new mortgage underwriting standards to be administered by the Consumer Financial Protection Bureau. In messaging that is strikingly similar to what brokers are saying about the DOL proposal, the lending industry hysterically predicted that the new rules would “cripple credit availability and spur banks, credit unions, and mortgage lenders to **quit the business entirely**.”<sup>18</sup> However, the most recent data shows that this simply has not happened, and that in fact, lending activity has increased.<sup>19</sup> The lesson to be learned from this history is that when faced with new regulations, members of the regulated industry routinely argue that the costs and burdens are too heavy—but then they invariably adapt and thrive.

Opponents of the DOL rule are following this familiar pattern, and their attempts to defeat or weaken the rule must be similarly discounted.<sup>20</sup> This is particularly true in light of the enormous amount of money at stake. Between defined contribution plans such as 401(k)s, and IRAs, Americans collectively have managed to save over \$14 trillion,<sup>21</sup> and they

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provisions of Glass-Steagall Bill as unsound, unscientific, unjust and dangerous. Overwhelmingly, opinion of experienced bankers is emphatically opposed to deposit guarantee which compels strong and well-managed banks to pay losses of the weak . . . The guarantee of bank deposits has been tried in a number of states and resulted invariably in confusion and disaster . . . and would drive the stronger banks from the Federal Reserve System.”) (quoting Francis H. Sisson, president of the American Bankers Association).

<sup>18</sup> John Heltman, *Mortgage Rules Not Chilling Market as Feared, Data Shows*, American Banker (Sep. 24, 2015), <http://www.americanbanker.com/news/law-regulation/mortgage-rules-not-chilling-market-as-feared-data-shows-1076899-1.html> (emphasis added).

<sup>19</sup> *Id.*

<sup>20</sup> Bradley Keoun & Jonathan D. Salant, *Obama Plan Gets Wary Reception from Banks, Lawmakers* (Update1), BLOOMBERG (June 18, 2009), <http://www.bloomberg.com/apps/news?pid=20601087&sid=ae85nCexFOv0> (“The brewing legislative battle recalls the industry’s reluctance to accept reforms after the 1929 stock-market crash. I don’t think anyone can buy the argument that by regulating too tightly, we’ll choke off capitalism. . . That argument is as shallow now as it was then.”) (citing Charles Geisst, Professor, Manhattan College); *see also* Fowler West, former CFTC Commissioner, Comment Letter No. 32607 to CFTC for Proposed Rule 76 FR 4752, Mar. 25, 2011, <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=32607&SearchText> (urging CFTC to act despite industry objection and recalling that when the CFTC mandated traders on futures exchanges to time their trades to the nearest minute, rather than half hour, “the largest of the exchanges, as a part of its campaign to thwart our effort, created large buttons for their employees to wear that read: ‘Endangered Species—Ask the CFTC.’”). Those seeking to block reform are not only exaggerating the impact of regulation, but also submitting incomplete, misleading, or inaccurate cost estimates. *See, e.g.*, John E. Parsons & Antonio S. Mello, *Nera Doubles Down*, BETTING AGAINST THE BUSINESS, Mar. 19, 2012, <http://bettingthebusiness.com/2012/03/19/nera-doubles-down/> (challenging industry estimates of the cost of margin requirements in derivatives transactions).

<sup>21</sup> *Retirement Assets Total \$24.8 Trillion in Second Quarter 2015*, Investment Company Institute (Sep. 24, 2015), [https://www.ici.org/research/stats/retirement/ret\\_15\\_q2](https://www.ici.org/research/stats/retirement/ret_15_q2)

need advice—unconflicted advice—about how best to invest it so that they have some hope of a decent retirement. Brokerage firms and insurance companies will never voluntarily walk away from the opportunity to earn even a modest share of such an enormous amount of money. Once they are forced to comply with the higher fiduciary standard, they will, with relative ease, adjust their compliance systems and dispense advice to retirement savers of all types at affordable rates in accordance with the best interest standard. As discussed below, this is precisely what thousands of advisers already do.

C. Even if brokers and other advisers refuse to comply with the rule, a vast and growing population of advisers will serve the needs of all retirement savers in full compliance with the rule.

If any brokerage firms and insurance agencies really do withdraw their retirement investment “advice” because they claim they cannot or will not comply with the DOL best interest rule, then that will have little if any impact on those saving for retirement. Even under this implausible scenario, the rule would never create an advice gap because savers at all income levels will have ready access to a wide variety of affordable advisory services under the fiduciary standard. Industry opponents have attempted to portray the world of fiduciary advisers as small, high-priced, and available only to affluent retirement savers with a significant stockpile of assets. That is not the reality: Today’s financial marketplace includes thousands of investment advisers, financial planners, and innovative new companies who already offer fiduciary advice to investors and retirement savers at all income levels under affordable fee structures.

For example, a vast number of investment advisers are registered with the SEC and state securities regulators under the Investment Advisers Act of 1940, and they are bound by the fiduciary duty when they give investment advice about securities. This already large and well-established group of advisers is growing. A recent report from the Investment Adviser Association (IAA) and National Regulatory Services (NRS) found that, in the last year, SEC-registered firms grew by 5.3%, to 11,473 firms.<sup>22</sup> The universe of smaller, state-registered IA firms is even larger, totaling 17,782. And the number of individual representatives of IA firms comes to 325,000.

The report shows these advisers are also serving more clients. Over the past year, the number of advisory clients being served by investment advisers bound by the fiduciary duty increased by almost two million, reaching a total of more than 29.7 million clients nationwide.<sup>23</sup> Assets managed by investment advisers required to put their clients’ best interests first now total \$66.7 trillion, representing an 8.1 percent increase over 2014.<sup>24</sup> The

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<sup>22</sup> *A Profile of the Investment Adviser Profession*, Investment Adviser Association and National Regulatory Services Evolution Revolution Report 1, 3 (2015) ([https://www.investmentadviser.org/eweb/docs/Publications\\_News/EVREV/evolution\\_revolution\\_2015.pdf](https://www.investmentadviser.org/eweb/docs/Publications_News/EVREV/evolution_revolution_2015.pdf)).

<sup>23</sup> *Id.* at 14.

<sup>24</sup> *Id.* at 3.

report also shows that the majority of all registered advisers have both high net worth and non-high net worth individuals as clients.<sup>25</sup> While not all of these advisers provide retirement investment advice under ERISA, many do.

In addition, there is a large universe of financial planners who provide fiduciary advice to individual savers on a broad range of investment and money management issues. Many of them are committed to advising clients at affordable rates and without regard to account size. Just one example is the Garrett Planning Network, described as follows:

The Garrett Planning Network has a nationwide membership of over 300 independent, Fee-Only financial planners providing advice to people from all walks of life, without minimum account requirements, sales commissions, or long-term commitments. Our members proudly embrace their fiduciary duty, always placing their clients' best interest first.<sup>26</sup>

In addition, the Financial Planning Coalition represents a broad swath of planners who serve everyday Americans in need of planning and investment advice. It is a voluntary coalition comprised of three organizations: The Certified Financial Planner Board of Standards, the Financial Planning Association, and the National Association of Personal Financial Advisers ("NAPFA"). The three members of the coalition are dedicated to ensuring that "Financial planning services are delivered to the public with fiduciary accountability and transparency, while always serving the client's best interest." They also promote a voluntary credentialing system, embodied in the Certified Financial Planner designation, which helps planners maintain high professional and ethical standards, including the fiduciary duty. And NAPFA represents financial advisers who are singularly committed to serving their clients' best interests strictly on a fee-only basis, so that the conflicts of interest arising from commission compensation never come into play.

In addition to these established sources of affordable fiduciary advice, a new generation of advisers has appeared and is growing rapidly. These companies rely on modern portfolio theory and technology to provide advisory and investment management services for retirement savers at very low and fully transparent prices. Examples include Rebalance IRA, Betterment, Wealthfront, and Personal Capital. Even some well-established Wall Street firms are turning to this approach, exemplified by Schwab Intelligent Portfolios and Vanguard Personal Adviser. Some rely heavily on internet interaction with clients, while others emphasize the role of personal advisers in their platforms. In either case, they are making high-quality, affordable fiduciary advice available to retirement savers.

Their fee structures are low by any measure, all under 1% and typically on the order of .25% to .50% annually. The cost of this advice is likely to be far lower than the advice provided under the traditional commission-based model that broker-dealers and insurance agents are fighting so hard to preserve. That inherently conflicted advice comes with hidden

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<sup>25</sup> *Id.* at 7.

<sup>26</sup> Garrett Planning Network, <http://www.garrettplanningnetwork.com/> (last visited Sep. 24, 2015); see also XY Planning Network Website, available at <http://www.xyplanningnetwork.com/> (last visited Sep. 24, 2015).

and bloated commissions that can easily exceed 5% on a single investment product. In addition, those higher-priced investments tend to perform relatively poorly. As indicated in the DOL's Regulatory Impact Analysis, the cumulative cost of these high fees and subpar returns is enormous.

The less expensive, better-performing advice provided by these new companies (as well as the advisers and planners described above) is available to savers at all levels. These firms have set account minimums that are all **below** \$100,000, typically on the order of \$10,000, and in some cases at or below \$500.

The success of all of these advisers—the IAs, planners, and innovators discussed above—is especially noteworthy because it has evolved on an uneven playing field. These firms operate under the fiduciary standard, while their competitors at traditional brokerage firms and insurance agencies are subject only to the suitability standard, or something even less rigorous. One benefit of the DOL rule is that it would promote fair competition among all types of advisers, and spur the development of fiduciary advice for all savers under affordable fee structures.

The existence of these fiduciary advisers highlights two important points. First, it is clearly possible to provide fiduciary advice to a broad spectrum of clients at affordable rates and still succeed as an adviser. Thus, once traditional brokers and insurance agents are **uniformly required** to adhere to the fiduciary standard under the DOL rule, it will certainly be possible for them to adapt. Second, if they nonetheless inexplicably refuse to do so, an abundant supply of fiduciary advice will be available to all of the clients they choose to abandon.

### **III. THE PROCEDURAL HURDLES BEING THROWN UP BY INDUSTRY OPPONENTS OF THE RULE HAVE NO JUSTIFICATION.**

For years, industry opponents and their allies have attacked every facet of the DOL's rulemaking. In addition to denying the existence of a problem and challenging the substance of the rule, they have also faulted the DOL's rulemaking process. They have even questioned the DOL's basic institutional competence to fix its own outdated rule. Yet it is very clear that only the DOL has the legal authority and expertise to protect retirement savers under ERISA. Moreover, its rulemaking process has been extraordinarily thorough, transparent, and inclusive, leaving no room for any argument that more time or "process" of any sort is needed to finalize the rule.

- A. The SEC has no authority to solve the problems with the DOL rule, and it is years away from improving its own deficient regulatory standards governing securities advice within its jurisdiction.

Industry opponents have argued strenuously that the DOL should be forced to suddenly halt its nearly complete rulemaking and wait until the SEC addresses the gaps in the standards of loyalty applicable in the limited realm of **securities** investment advice. This argument has no basis in the law or reality, and it is being advanced solely to defeat or delay the DOL's rule and sow confusion.

The SEC has no legal authority to issue or update any rules implementing ERISA. Congress gave that responsibility to the DOL, recognizing the unique importance of tax-advantaged retirement assets and the need to protect them under a separate regime applying the highest possible standards of loyalty and care.

Furthermore, the SEC lacks any authority to regulate advice about investments that are not securities. Yet, retirement accounts routinely include a variety of non-securities investments, including insurance products, real estate, and even commodities. Unlike the SEC, the DOL has broad authority over all of these assets as well as any “moneys or other property” of a plan.

Arguments that Congress intended the SEC to lead in setting advisory standards under ERISA have absolutely no basis. Congress passed the Investment Advisers Act in 1940 to establish a regulatory regime governing those who give investment advice about securities, not retirement plans. Over the ensuing decades, a vast body of SEC regulations and judicial decisions evolved under the IAA, a jurisprudence well known to Congress. In 1974, fully aware of the regime it had created for SEC registered investment advisers, Congress determined that a separate regulatory regime was necessary to ensure that Americans’ retirement assets were adequately protected from fraud, abuse, and conflicts of interest. Fueling this initiative was a recognition that retirement assets play a unique and critical role in determining the quality of life for all Americans once they leave the workforce. In addition, Congress understood the need to confer special protections for retirement savings in light of their privileged tax status. ERISA was the result, and DOL has been tasked with administering it. Congress clearly intended that the SEC and DOL would oversee distinct sets of rules designed for distinct purposes.

Section 913 of the Dodd-Frank Act only reinforces this conclusion. In Section 913, Congress gave the SEC explicit authority to raise the standards of conduct applicable to broker-dealers who give advice about securities investments. Again in recognition of the two separate roles of the DOL and the SEC, Congress declined in Section 913 to subordinate or alter the DOL’s authority over retirement assets, or to link it in any way to the SEC’s oversight of securities, broker dealers, and investment advisers.

As a practical matter, forcing the DOL to wait for the SEC means indefinite delay, lasting years at a minimum. The SEC is just beginning to decide whether or not it should even embark on a rulemaking to enhance adviser standards under the securities laws. The agency is still undecided, even though five years ago, Congress expressly authorized it to act and the SEC’s own staff strongly recommended that it move forward with a rule. Recent statements from SEC Chair White confirm these points. For example, in a recent letter to the Hill, SEC Chair Mary Jo White reiterated that so far, she has simply asked staff to develop rulemaking recommendations for Commission consideration, thus indicating that her agency is in the earliest possible stages of deliberation on the issue.<sup>27</sup> America’s workers and

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<sup>27</sup> Letter from Mary Jo White, SEC Chair, to Sen. Tim Scott, U.S. Senator (Sep. 18, 2015). Chair White also repeated other important themes that bear on the DOL’s rulemaking: Those who give investment advice

retirees cannot afford to wait any longer, as their retirement savings are being depleted by conflicts of interest every day.

B. From the standpoint of the rulemaking process, the DOL has surpassed all applicable requirements, and industry calls for a re-proposal of the rule are meritless.

The DOL has followed what can only be described as an extraordinarily transparent, thorough, and consultative rulemaking process, far exceeding the applicable legal requirements. The process has really been underway for years. Since the release of the 2010 rule proposal, the DOL has continuously been receiving and considering input about a possible revised rule.

Officially, in April, the DOL established an initial comment period for the current proposal of 75 days, a reasonable time frame by any measure. Nevertheless, at the urging of industry opponents, the DOL agreed to extend the comment period for an additional 15 days. It also scheduled four full days of hearings on the proposal, providing a large and diverse set of stakeholders an opportunity to share their views in person with the DOL and engage in a dialogue about the proposed rule. The DOL then extended the comment period yet again. The record will thus have been open, in effect, for at least 163 days, from April 14, 2015 until September 24, 2015.

In addition, before and after issuance of the proposal, the Secretary of Labor, his Assistant Secretary of Labor, and their professional staff members all participated in innumerable meetings, conversations, events, and media interactions, to gather additional input from all points of view and, when appropriate, to share their thinking about the contours of a possible rule. The vast majority of meetings on the proposed rule have been with industry advocates. Remarkably, this comes *after* years of input already on the prior proposed rule and a possible re-proposal, which the industry explicitly and repeatedly requested. In light of this exceptionally lengthy and diligent rulemaking process, any industry insistence on more “process” should be dismissed.

Nevertheless, in a relentless effort to further delay and potentially kill the rulemaking, industry opponents have recently launched the argument that the DOL must re-propose the rule. This suggestion has no basis in fact or law, and it is nothing more than a bid to restart the rulemaking process and protract it for months, if not years.

The argument is clearly premature and in any case wholly unrealistic. The legal test for whether re-proposal of a rule is required focuses on whether the final rule was a “logical outgrowth” of the proposal and the comments received. The formulations of this standard vary, but in the D.C. Circuit, a final rule qualifies as a logical outgrowth of the proposed rule “if interested parties ‘should have anticipated’ that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period.” *Ne. Md. Waste Disposal Auth. V. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004) (internal citations omitted). By contrast, a final rule fails the logical outgrowth test (and thus violates

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should be subject to a fiduciary standard, and while the DOL and the SEC are separate agencies, they have nevertheless consulted extensively during the DOL rulemaking process and will continue to do so.

the APA's notice requirement) when "interested parties would have had to 'divine the agency's unspoken thoughts,' because the final rule was surprisingly distant from the proposed rule." *Int'l Union, United Mine Workers of Am. V. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259-60 (D.C. Cir. 2005) (internal citations omitted); *see also NRDC v. Thomas*, 838 F.2d 1224, 1242 (D.C. Cir. 1988) (a final rule is considered the "logical outgrowth" of the proposed rule if at least the 'germ' of the outcome is found in the original proposal.").

Clearly then, whether a re-proposal is necessary depends on how the final rule envisioned by the DOL compares with the proposal that was issued for comment, and the law allows for very substantial evolution in a proposal as it takes final form. Here, of course, the DOL has not yet decided on what if any changes it will make as it finalizes the proposed rule, and industry opponents are in no position to insist on a re-proposal at this stage.

To circumvent this conclusive obstacle, advocates for re-proposal have set up a false premise. They contend that the DOL is **already obligated** to make major changes in the rule, to accommodate the wishes of industry commenters who have insisted that the rule is "unworkable" in its current form.<sup>28</sup> Based on this fabricated assumption, they say that a re-proposal is already clearly necessary, even before the process has concluded.

However, neither the DOL nor any other agency is required to accommodate the preferences of the regulated industry that will be subject to its rules. While the DOL may be duty-bound to consider the comments it receives from industry, it retains the power and authority to implement the statutory regime as it sees fit, absent an abuse of discretion. Under ERISA, the DOL's ultimate obligation is to protect Americans saving for retirement, not those in the financial services industry seeking to preserve the status quo and maximize their profits. In light of this mission, it is exceedingly **unlikely** that the DOL will adopt the dramatic alterations in the rule sought by industry. In short, no re-proposal is or will be necessary.

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<sup>28</sup> This argument is apparently based in part on the ERISA requirement that exemptions must be "administratively feasible." But as explained in footnote 4 above, any attempt to read this phrase as a requirement that all rule provisions be "workable" to the satisfaction of industry cannot succeed. In fact, the language simply means that any exemptions must be "feasible for the **Departments** to administer, given the **Departments'** resources and the nature of the transaction sought to be exempted." *See* footnote 4 *supra* (quoting Schmidheiser) (emphasis added).

**CONCLUSION**

We again commend the DOL for moving forward with the Proposed Rule. It will dramatically improve the ability of millions of American workers and retirees to save and invest for a dignified retirement. We urge you to resist calls for changes in the proposal that will dilute the protections it offers or open dangerous loopholes for the industry to exploit at the expense of retirement savers. Americans deserve unconflicted advice; they deserve to have their best interests put first; and, they deserve a final rule that accomplishes these goals as soon as possible.

Sincerely,



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