January 2, 2024

Assistant Secretary Lisa M. Gomez
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Submitted via: e-ORI@dol.gov

Re: Proposed Retirement Security Rule: Definition of an Investment Advice Fiduciary; [RIN-1210-AC02]

Dear Assistant Secretary Gomez:

AARP, which advocates for the more than 100 million Americans age 50 and older, appreciates the opportunity to comment on the proposal by the Department of Labor (Department) to amend the definition of "Investment Advice Fiduciary" (Proposal). AARP believes this Proposal is an important step in improving protections for retirement savers and ensuring the advice they receive from financial advisers is in their best interest – a requirement many savers are surprised to learn does not already exist.

This Proposal will address gaps in existing regulations, which are now 50 years old and do not reflect the current landscape of how Americans save for retirement. According to the Federal Reserve's Economic Well-Being of Households Survey of 2022, only 31 percent of non-retirees thought their retirement saving was on track, down from 40 percent in 2021.[1] We have a retirement crisis and AARP knows how vital it is to ensure Americans can save and effectively manage adequate retirement assets to retire with dignity.

One of the challenges that retirement savers face is conflicted advice from financial professionals, which can cost them up to 20 percent of their retirement savings over a lifetime.[2] Under the existing set of requirements, those retired and those planning for retirement (collectively Retirees) operate in an environment that does not always require investment advice

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[1] Board of Governors of the Federal Reserve System, "Economic Well-Being of U.S. Households in 2022", May 2023, https://www.federalreserve.gov/publications/files/2022-report-economic-well-being-us-households-202305.pdf.
[2] The White House, "FACT SHEET: President Biden to Announce New Actions to Protect Retirement Security by Cracking Down on Junk Fees in Retirement Investment Advice," October 31, 2023, https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/31/fact-sheet-president-biden-to-announce-new-actions-to-protect-retirement-security-by-cracking-down-on-junk-fees-in-retirement-investment-advice/.

providers to act in their best interests. This results in lower performing assets and excessive risk.[3] Any gaps in laws or regulations that make this harder must be addressed.

According to AARP polling, 87 percent of adults 50-plus say they use professional financial advice to make important financial decisions, and 89 percent expect that advice to be in their best interests.[4] However, despite the widespread expectation that financial advice will be in their best interest, many of those who have used a financial professional for help with retirement planning (43 percent) admit that they actually don't know whether the most recent professional they used was required to give them advice in their best interest.[5] These poll results make it clear that people use the advice from financial professionals to make important financial decisions and expect it to be in their best interest, but do not understand the legal obligations of their advisers. This underscores the importance of providing retirement savers with the protections they expect when they seek out professional advice from financial professionals.

The Proposal seeks to rectify this unacceptable situation by doing what Congress intended with the 1974 enactment of the Employee Retirement Income Security Act (ERISA), putting in place a uniform fiduciary standard that requires investment advice providers to act in the best interests of Retirees. The Proposal does so by addressing the structural changes in the system of retirement that have occurred since 1974; better aligning standards of behavior with other regulators, particularly the Securities and Exchange Commission (SEC); and putting in place a regulatory framework that better comports with the goals and expectations of Congress.

The Proposal also prioritizes the needs and expectations of Retirees. In particular, the Proposal addresses important gaps that have left advice related to rollovers sometimes not covered, extends protections that have been provided under the SEC's Regulation Best Interest (Regulation BI) to other retirement products not covered by the SEC, and covers advice provided to plan sponsors. Where fine print disclaims away a best interest obligation but the job title of the advice provider, the marketing materials, and other surrounding circumstances suggest otherwise, the Proposal resolves the conflict by giving effect to the expectations of Retirees.

Finally, the Proposal will largely end the impossibly complex, out of date, and confusing set of duties that can vary with the product, the industry, the type of recommendation, and the fine print in an agreement. With the changes set out in the Proposal, retirees will rightfully trust that their investment advice providers will act in their best interests.[6]

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[3] Retirement Security Rule: Definition of an Investment Advice Fiduciary, RIN 1210–AC02 (Oct. 24, 2024) ("Fiduciary Release") ("Overall, evidence demonstrates that the combination of inexpert customers and conflicted advisers results in investment underperformance and negative outcomes for investors. According to a 2015 report by the Council of Economic Advisers, approximately $1.7 trillion of IRA assets were invested in products with a payment structure that generates conflicts of interests. A substantial body of research has shown that IRA holders receiving conflicted investment advice can expect their investments to underperform by approximately 50 to 100 basis points per year.").
[4] AARP Research, "Unbiased Financial Advice about Retirement: Importance to Adults 50+," January 2024, https://www.aarp.org/pri/topics/work-finances-retirement/financial-security-retirement/fiduciary-duty-retirement/.
[5] Id.
[6] AARP Research, "Fiduciary Duty and Investment Advice: Attitudes of 401(k) and 403(b) Participants," September 10, 2013, https://www.aarp.org/pri/topics/work-finances-retirement/financial-security-retirement/fiduciary-duty-and-investment-advice---attitudes-of-401-k--and-4.html. (AARP survey of 401(k) and 403(b) participants found that

I. There has been a well-documented retirement plan shift from defined benefit to defined contribution savings vehicles and existing regulatory schemes do not adequately protect participants and beneficiaries.

Before ERISA was enacted, Congress passed the Welfare and Pension Plan Disclosure Act of 1958 (WPPDA) "purportedly to protect the interest of welfare and pension plan participants and beneficiaries through disclosure of information with respect to such plans."[7] This statute required plan administrators to file annual reports with the Secretary of Labor and furnish them on request to participants, so that "the knowledge thus disseminated would enable participants to police their plans."[8] However, Congress concluded that this scheme was "'weak,' both because of 'limited disclosure requirements' and, more importantly, because it was "wholly lacking in substantive fiduciary standards."[9] Although Congress relied on trust law as the foundation of ERISA,[10] it realized that trust law was inadequate to completely protect participants.[11] Thus, ERISA's fiduciary requirements imposed duties of prudence, loyalty, and care with respect to the management of trust funds upon plan fiduciaries.[12]

When ERISA was enacted in 1974, Individual Retirement Accounts (IRAs) had only recently been created and 401(k) plans did not yet even exist. Defined benefit plans like pensions were how most Americans were covered, and these retirement plans were afforded strong protections under ERISA. However, significant structural changes in our retirement system have taken place since then. Defined benefit plans have significantly declined. IRAs now hold the largest portion of retirement assets. For example, in 1975, 27.2 million people participated in private sector defined benefit plans and just 11.2 million in defined contribution plans. By 2019, these numbers had shifted dramatically, with 12.6 million people participating in private sector defined benefit plans and 85.5 million in private sector defined contribution plans.[13]

Other changes have also opened retirement savers up to potential conflicts of interest. For example, more rapid employment turnover has increased the frequency of rollovers of plan assets. In 1996, $114 billion in retirement assets were rolled into IRAs, primarily from employer-

when made aware that advice from plan providers was not required to be in the best interest of plan participants, half (50%) of respondents indicate that this information makes them "less likely" to trust their 401(k) or 403(b) provider for advice while just over one in three (37%) indicated that it has "no impact" on their level of trust.").

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

[8] Id.

[9] Id.

[10] *See, e.g., Tibble v. Edison Int'l*, 575 U.S. 523, 135 S. Ct. 1823, 1828 (2015) ("Under trust law, a trustee has a continuing duty to monitor trust investments and remove imprudent ones."); *Central States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc*., 472 U.S. 559, 569-71 (1985) (fiduciary powers must be exercised in accordance with trust law standards).

[11] *See Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996) ("ERISA's standards and procedural protections partly reflect a congressional determination that the common law of trusts did not offer completely satisfactory protection."); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 264 (1993) (Congress made "an express statutory departure" from the common law of trusts in its definition of fiduciary).

[12] ERISA § 404, 29 U.S.C. § 1104.

[13] CRS, "A Visual Depiction of the Shift from Defined Benefit (DB) to Defined Contribution (DC) Pension Plans in the Private Sector, December 27, 2021, https://crsreports.congress.gov/product/pdf/IF/IF12007.

sponsored plans. By 2020, this annual number was $594.8 billion.[14] At the same time, investment products have become more numerous and complex.

As a result, responsibility for investment risk has, to a significant degree, shifted from plan fiduciaries to individuals who must plan for and manage financial assets throughout retirement. This has frequently left individuals with the ultimate responsibility for assessing economic and market risks, sifting through complex financial products, and determining contribution levels, all over a decades-long time horizon. In making these determinations, Retirees will invariably confront life changes that can force reconsideration of, and changes to, even the most thoughtful and thorough retirement plan.

II. The current lack of protections for investors harms retirees.

In making important financial decisions, retirement savers often rely on investment professionals to provide the necessary advice and recommendations. In doing so, Retirees assume and trust that those providing these recommendations act in their exclusive or best interests.[15] That trust, however, can be misplaced.

Many of those in the business of providing investment advice to Retirees already apply a best interests approach, either out of legal obligation, the concerns over their clients' interests, or both. The adoption of Regulation BI and the prior efforts by the Department to put in place a uniform fiduciary standard have accelerated this process.[16]

Yet some do not. Those advice providers have more room to act out of self-interest or with serious and undisclosed conflicts. They may steer clients into higher cost, lower performing, risky and illiquid investments that maximize their profits while eroding their clients' hard-earned savings. Indeed, some advice providers may rely on business models that depend upon higher fees and excessive transaction costs paid by Retirees and other clients.[17]

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[14] Investment Company Institute, "Report: The US Retirement Market, Third Quarter 2023," December 13, 2023, https://www.ici.org/research/stats/retirement.

[15] See *supra* note 4.

[16] Mark L. Egan, Shan Ge & Johnny Tang, *Conflicting Interests and the Effect of Fiduciary Duty — Evidence from Variable Annuities*, National Bureau of Economic Research, July 2020, ("we find that the DOL fiduciary rule had a large impact on broker and insurer behavior. Following the proposal, variable annuity sales declined by 19%. The decline in annuity sales was primarily driven by a decline in high-expense variable annuity sales. Sales of high-expense annuities fell by 43% more than low-expense annuities. Insurers also decreased the relative availability of high-expense products. The DOL fiduciary rule was effective in shifting the incentives of brokers and insurers and resulted in a 10% decline in average expenses paid by investors.").

[17] Fiduciary Release, *supra* note 3. ("Overall, evidence demonstrates that the combination of inexpert customers and conflicted advisers results in investment underperformance and negative outcomes for investors. According to a 2015 report by the Council of Economic Advisers, approximately $1.7 trillion of IRA assets were invested in products with a payment structure that generates conflicts of interests. A substantial body of research has shown that IRA holders receiving conflicted investment advice can expect their investments to underperform by approximately 50 to 100 basis points per year.")

While the monetary losses can be staggering to Retirees, so are the effects.[18] Retirement may be delayed or indefinitely postponed. The quality of life in a post-retirement environment can be significantly reduced. Moreover, retirement savers are often unaware of the risks that they incur through reliance on advice providers not obligated to act in their best interests.[19]

Particularly as prospective Retirees get closer to retirement, they may be more vulnerable to the negative impact of advice that is not in their best interests because the assets they have to invest are larger and not all investors have strong financial literacy skills, particularly against a backdrop where financial products are becoming more complex. In addition, the detrimental effects of advice that is not in investors' best interests may have the most negative potential impact on individuals with modest balances as they have fewer economic resources – any additional costs or losses will diminish what little savings they have. For all these reasons, investors close to retirement are especially vulnerable as they make significant and often one-time decisions such as moving retirement savings out of more protected employer-based plans.

III. There are gaps in the current regulatory regime that allow for different standards depending on the type of adviser and product being recommended.

Retirees for the most part trust that their financial advice providers give recommendations in their best interest.[20] But no such uniform requirement exists. And while most are unaware of this, those that are confront an unconscionably complex task of determining the applicable duties. These duties depend upon a myriad of factors that can include the financial product subject to the recommendation, the industry employing the advice providers, the frequency and nature of any recommendations, and the fine print of an agreement.

Broker-dealers registered with the SEC, for example, are subject to a "best interests" requirement as implemented in Regulation BI in 2019.[21] The standard, however, has limited application. For one thing, it only applies to retail investors and therefore does not extend to recommendations made to retirement plans. For another, the standard applies to "investment securities." As a result, the standard does not generally include such investments as real estate, certificates of deposit, certain insurance products, or commodities. Even more complex, the same investment may or may not be a security depending upon the circumstances, such as gold coins or interests in limited liability companies.

Annuities further illustrate the complexity. Variable annuities are subject to the federal securities laws; fixed annuities are not. The status of fixed index annuities, according to the SEC, "may or

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[18] See *supra* note 3. In mutual funds alone, the underperformance during a 20-year period totaled between $202 and $404 billion.

[19] In a study commissioned by AARP, Kleimann Communications Group, a non-affiliated third party, for two separate research projects. found that overall participants had difficulty distinguishing the standards of conduct between different financial professionals. They did not understand how conflicts of interest could affect them, and they struggled with the language used on the form, especially with respect to fees and conflicts of interest.

[20] AARP Research, "Unbiased Financial Advice about Retirement: Importance to Adults 50+," January 2024, https://www.aarp.org/pri/topics/work-finances-retirement/financial-security-retirement/fiduciary-duty-retirement/.

[21] Regulation Best Interest: The Broker-Dealer Standard of Conduct, Exchange Act Release No 86031 (June 5, 2019) (effective Sept. 10, 2019).

may not" be a security.[22] Broker-dealers providing recommendations on an array of annuities could find themselves subject to Regulation BI for some of them but not others. And in the case of fixed index annuities, even the advice provider may not be sure whether the best interests standard applies. While the National Association of Insurance Commissioners (NAIC) Model Rule would impose some obligations on those selling fixed annuities, the standard has not been universally adopted, reflects more of a "suitability" test than a "best interests" standard, and excludes cash and non-cash compensation in determining material conflicts (which is the very source of many conflicts).[23] This can be addressed though – a study from the National Bureau of Economic Research found that when applied in the annuities market, the fiduciary standard increased risk-adjusted returns by 25 basis points, improving investor outcomes.[24]

The standard applicable to advice given to Retirees can also vary depending upon the frequency of the recommendations. Fiduciary status currently applies only to advice given on a "regular basis," excluding for the most part one-time advice. Thus, a single recommendation to convert an entire account balance into a fixed annuity is not subject to the existing standards. At the same time, advice providers giving the same advice more gradually through a series of recommendations would not fall within the exception.

Recommendations to rollover plan assets into an IRA likewise may or may not be subject to a best interests standard. This is true even though the "decision to roll over assets from a plan to an IRA is often the single most important financial decision a plan participant makes, involving a lifetime of retirement savings" and the fact that these recommendations "carry with them an inherent conflict of interest."[25] And while rollovers are more common among Retirees exiting from defined contribution plans, those entitled to defined benefit pensions may also be in a position to rollover assets when receiving a lump-sum pay out.

Conflicted advice in rollovers can significantly eat into retirement savings. According to a study from the Pew Charitable Trusts, "in 2018 alone, investors rolled $516.7 billion from employer retirement plans into traditional IRAs. An analysis of fee differentials suggests that over a hypothetical retirement period of 25 years, those retail investors could see an aggregate reduction

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[22] *See* Annuities, Investor.gov, SEC, last visited Nov. 27, 2023, https://www.investor.gov/introduction-investing/investing-basics/glossary/annuities ("Variable annuities are securities regulated by the SEC. An indexed annuity may or may not be a security; however, most indexed annuities are not registered with the SEC. Fixed annuities are not securities and are not regulated by the SEC.").
[23] *See* National Association of Insurance Commissioners, "Suitability in Annuity Transactions Model Regulation," Spring 2020, https://content.naic.org/sites/default/files/inline-files/MDL-275.pdf, ("Section 6. Duties of Insurers and Producers…(A)(1)(d) "The requirements under this subsection do not create a fiduciary obligation or relationship and only create a regulatory obligation as established in this regulation." And Section 5(I)(2) ""Material conflict of interest" does not include cash compensation or non-cash compensation.").
[24] Bhattacharya, Illanes, and Padi, "Fiduciary Duty and the Market for Financial Advice," National Bureau of Economic Research, November 2023, https://www.nber.org/system/files/working_papers/w25861/w25861.pdf.
[25] Fiduciary Release, *supra* note 3 ("Financial institutions face an innate conflict of interest, in that a financial institution that provides a recommendation or advice concerning a rollover to a retirement investor may expect to earn transaction-based compensation such as commissions and/or receive an ongoing advisory fee that it likely would not receive if the assets were to remain in an ERISA-covered plan. Further, under the 1975 rule, if an investment advice provider makes a one-time recommendation that the worker move the entire balance of their retirement plan into an IRA and invest it in a particular annuity, then the advice provider has no fiduciary obligation under ERISA to honor the worker's best interest unless this recommendation is part of an `ongoing'' advice relationship. The resulting compensation represents a significant revenue source for investment advice providers.").

in savings of about $45.5 billion—just from that single year of rollovers." Failure to ensure best interest advice for rollovers is a glaring gap that can harm the long-term financial security of retirement savers.[26]

Finally, there's the fine print. Language making fiduciary relationships dependent upon "mutual agreement, arrangement, or understanding" has resulted in "fine print disclaimers" even when advice providers use titles or otherwise market themselves as "providing tailored or individualized advice."[27]

Collectively, this creates an impossible situation for Retirees. Moreover, given the complexity, we suspect that even some advice providers are confused about, or unsure of, the legal standard applicable to recommendations. The lack of a common standard is made worse by the inability of Retirees to obtain adequate information on the backgrounds of many of their financial providers.[28]

IV. The Rule Proposal

The Proposal would address loopholes in existing regulations that allow financial professionals to take advantage of their clients and recommend they invest in ill-suited, high-fee products by focusing on the expectations of Retirees – that their financial advisers will put their clients' best interests before their own. First, the Proposal will do what Congress expected, and provide a uniform standard for those falling within the definition of investment advice fiduciary. In adopting ERISA, Congress sought to implement "uniform fiduciary standards" designed to "prevent transactions which dissipate or endanger" retirement assets.[29] Those providing investment advice for compensation would be subject to the best interests standard when Retirees expect and trust that this is the case. The uniform standard would apply to advice providers who hold themselves out as fiduciaries, exercise discretionary control over retirement assets, or are in the business of making such recommendations on a regular and particularized basis.

Second, the best interests standard will no longer depend upon the number of recommendations or the amount of advice. The Proposal will eliminate the "one time" exception in the current outdated regulation – an exception not found in the statute. Recommendations to convert the entire balance of a retirement account into one investment will need to be in the retiree's best

[26] Pew Charitable Trusts, "Small Differences in Mutual Fund Fees Can Cut Billions From Americans' Retirement Savings," June 30, 2022, https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2022/06/small-differences-in-mutual-fund-fees-can-cut-billions-from-americans-retirement-savings.
[27] Fiduciary Release, *supra* note 3.
[28] *See* Recommendation of the Investor Advisory Committee: Empowering Elders and Other Investors: Background Checks in the Financial Markets, Securities and Exchange Commission, July 16, 2015
[29] Statement by Hon. Harrison A. Williams, Jr., Chairman, Senate Committee on Labor and Public Welfare, introducing the Conference Report on HR 2, 120 Congressional Record S 15737 (August 22,1974) ("the legislation imposes strict fiduciary obligations on those who have discretion or responsibility respecting the management, handling, or disposition of pension or welfare plan assets. The objectives of these provisions are to make applicable the law of trusts; to prohibit exculpatory clauses that have often been used in this field; to establish uniform fiduciary standards to prevent transactions which dissipate or endanger plan assets; and to provide affective remedies for breaches of trust.").

interest, irrespective of whether the advice is provided in a single recommendation or through multiple recommendations.

Third, the Proposal would fill gaps in the existing regulatory regime by better aligning the Department's approach with what other regulators have already done. The Proposal is very similar to the SEC's Regulation BI, which governs the standards applicable to broker-dealers when dealing with retail clients. The Proposal will apply the best interests standard to recommendations concerning plan distributions, decisions not to engage in transactions, and investment strategies.

Fourth, the definition of recommendation will explicitly include rollovers, even when not accompanied by a specific recommendation concerning the investment of the assets.[30] Those deciding on whether to pull assets from a retirement plan and put them in an IRA will know that the recommendation must be in their best interests.

Fifth, the effect of fine-print disclaimers will be limited. Under the proposal, disclaimers will not automatically control an investment advice fiduciary's status, at least where inconsistent with "the person's oral communications, marketing materials, applicable State or Federal law, or other interactions with the retirement investor." Where such an inconsistency arises, the disclaimer will be "insufficient to defeat the retirement investor's legitimate expectations."

Finally, while we have focused primarily on changes designed to ensure that Retirees receive recommendations in their best interests, we strongly support the Department's decision to make clear that platform providers have the same duty, at least where they make specific recommendations about the securities to be offered. As the Department knows, small employers often are sold such platforms with representations that the platform will satisfy the employer's fiduciary obligations.

V. Additional Considerations

The Proposal asks for comment on the exception from investment recommendations for educational materials and the role of IB 96-1. 29 CFR § 2509.96-1. Such an exception is appropriate, and we agree that IB 96-1 sets out a useful framework. The bulletin, however, mostly speaks to those providing the materials by defining specific categories of information that are deemed educational.

While the topics are of course relevant, so are the circumstances. Given the focus of the Proposal on the interests of Retirees, the availability of the exception for materials labeled "educational" should depend upon how they would be perceived by Retirees and whether, in fact, the materials were designed to cause Retirees to make an investment decision about a specific product offered

[30] Fiduciary Release, *supra* note 3 ("The Department continues to believe that advice provided in connection with a rollover decision, even if not accompanied by a specific recommendation on how to invest assets, should be treated as fiduciary investment advice.").

by a specific advice provider.[31] For example, repeated emails seeking to "educate" a Retiree about a particular investment that includes a link to a specific advice provider could cross the line between education and recommendation.

When considering the matter from the perspective of Retirees, we believe that in most cases the distinction between education and recommendation is not difficult. Nonetheless, the Proposal could benefit from additional insight, perhaps in the narrative accompanying the final rule, or more specific examples, that better apprises advice providers of the kinds of circumstances that can result in materials being treated as recommendations. The insight could address the impact of electronic communications and other types of interaction that largely did not exist at the time IB 96-1 was originally written.

The Proposal also asks whether particular titles are "perceived to convey" that the professional is providing advice on a "regular basis." We agree that the titles mentioned in the release (financial consultant, financial planner, wealth planner) signal to Retirees that, in general, advice providers are in the business of regularly providing investment recommendations. The myriad of available titles, however, make specific examples helpful but insufficient.

The final rule or the narrative accompanying the final rule would benefit from a set of principles or guidelines that help clarify when titles or business slogans or advertising convey to Retirees that advice providers are providing recommendations on a regular basis. For example, particular titles or advertising slogans that involve advising or planning or consulting suggest a regular business of making recommendations. Similarly, those advertising "solutions" in a retirement context, particularly when the problems that need to be solved relate to long-term risk or value, also can convey investment advice on a regular basis.

We also note that at the Employee Benefits Security Administration Retirement Security Rulemaking Hearings held on December 12 & 13, 2023 (Hearings), some suggested that the "best interests" element could result in the extension of the standard to car dealers, life coaches, and other professions unrelated to those traditionally providing investment advice to Retirees.

We do not view these concerns as serious or even reasonable. Persons in such industries do not provide investment advice. Even if their comments could be construed as such, they do not do so on a "regular basis." Moreover, were car dealers to routinely suggest that retirement assets be used to fund the purchase of a vehicle, no part of their compensation would be in return for an investment recommendation.

Nonetheless, we would not be troubled by language in the final rule or narrative accompanying the final rule that, for those in industries not traditionally considered by Retirees as a source of investment advice, they were presumed not to provide investment recommendations on a "regular basis." Of course, any presumption would have to take into account those who might use an untraditional title but in fact give particularized investment advice to Retirees on a regular basis in return for fees or compensation.

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[31] The Proposal notes this concern. *See* Fiduciary Proposal *supra* note 3 ("The Department cautions, however, that to the extent a provider goes beyond providing education and gives investment advice on a specific investment or investment strategy, it is not appropriate to broadly exempt those communications from fiduciary liability.")

VI. Criticisms of the Rule Proposal are Misplaced

We are aware of a number of criticisms that have surfaced with respect to the Proposal, some raised at the Hearings. They are in many ways a reprise of the views expressed in connection with the Department's efforts in 2016.

Some have asserted that the best interests standard should apply to "advice" but not "sales". The criticisms were often reflected in the rejoinder that the Proposal would transform sales forces into fiduciaries. The attempt to create a sharp distinction between sales and advice is confusing and counter intuitive. Sales can and often do arise out of investment recommendations. The Proposal instead rightfully focuses on Retirees by looking to the relationship between advice providers and Retirees and the nature of the advice and recommendations that they provide.

Some have also asserted that a uniform best interests standard would effectively deprive Retirees of investment services, particularly for those Retirees of modest means. These criticisms are built on a faulty premise. They ignore the economics. Retirees pay for the advice, with demand likely to increase in a best interests environment.[32]

In meeting that demand, the advisory profession is dynamic, with capacity increasing.[33] The profession includes plenty of advice providers who already have business models that rely on a best interests standard when making recommendations to Retirees. Moreover, testimony at the Hearings provided evidence of firms developing and implementing a "best interests" business model specifically aimed at advice to Retirees with modest means.[34] While those with a business model built around self-interested recommendations and conflicted, even predatory, advice, may need to exit the market, Retirees will benefit and will retain plenty of additional choice with respect to those providing investment advice.

Many of the critics of the Proposal elevate the interests of advice providers over those of Retirees. They fail to deal with the consequences of their position, particularly when arguing for the exclusion of categories of advice providers from the "best interests" standard. Their approach will continue to allow for advice to Retirees that is self-interested and conflicted and leave in place existing but abusive practices such as the use of fine print to disclaim a best interests relationship even where the circumstances mislead Retirees into believing otherwise.

The approach will also disadvantage the professionals who in fact act in the best interests of Retirees. Those who do will have to compete with those who do not. And those who do not will be in a position to mislead Retirees into thinking that they are acting in their best interests, whether through titles, marketing materials, or other communication.

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[32] Testimony of Benjamin Edwards, Professor of Law William S. Boyd School of Law University of Nevada, Las Vegas, DOL Hearing, via Zoom, December 13, 2023.

[33] This can be seen, for example, from the growth in the number of investment advisers registered with the SEC. *See* Snapshot 2023, Investment Adviser Industry, 2023 https://investmentadviser.org/wp-content/uploads/2023/06/Snapshot2023_Final.pdf (noting that the number of SEC investment advisers increased from 12,993 in 2018 to 15,114 in 2022).

[34] Testimony of Kamila Elliott, Collective Wealth Partners, DOL Hearing, December 13, 2023, https://www.cfp.net/news/2023/12/kamila-elliott-testimony.

Failure to update the current standard will not only frustrate both Retirees and the purpose of ERISA, but will undermine the enormous national priority, as evident in the hundreds of billions of tax subsidies provided, to ensure that Retirees accumulate adequate income for their retirement years. Those Retirees who seek financial advice in their retirement plans should be assured that investment advice is being provided in their best interests.

VII. Conclusion

It is clear there is a retirement savings crisis in America and any policies that inhibit savers' ability to build their retirement savings and exacerbate this situation must be remedied. Policies must be in place to maximize individuals' retirements accounts, not eat away at them. The Proposal contains necessary changes that bring the standards applicable to Retirees in alignment with what Congress intended, Retirees expect, and other regulations have already implemented.

The need for a uniform "best interest" standard for investment advice is critically important to our country's system of retirement. Where advice providers are not required to observe a best interest standard, retirement security is undermined, and retirees suffer the consequences.

Every day this continues, many retirees will see their retirement assets eaten away by excess fees and conflicted advice, falling short of potential investment gains if advice had been provided under a best interests standard. And, for the most part, the Retirees will not even know. Retirees will continue to trust that their advice providers are acting in their best interests when making recommendations, even when in fact they are not. We therefore urge the Department to act without delay.

Thank you again for the opportunity to share AARP's views on the Department's Proposal.
If you have any questions, please feel free to have your staff contact me or Clark Flynt-Barr of our Government Affairs office at cflyntbarr@aarp.org.

Sincerely,

David Certner

David Certner
Legislative Counsel and Legislative Policy Director
Government Affairs