



May 5, 2014

President Barack Obama  
The White House  
1600 Pennsylvania Avenue, NW  
Washington, DC 20500

Re: Fiduciary Duty Rules to Protect America's Retirees

Dear Mr. President:

Better Markets<sup>1</sup> is writing to address the critical issues of protecting the tens of millions of American families saving for retirement and their need for unbiased investment advice, free of conflicts and hidden fees that dramatically reduce retirement savings. These concerns have been the subject of increasing debate, as reflected, for example, in a recent letter to you dated April 11, 2014 from members of the United States Senate ("Letter," a copy of which is attached).

However, rather than focusing on the conflicts between brokers and their customers trying to save for retirement, the Letter expresses concern about possible conflicts that might arise between the efforts of the Department of Labor ("DOL") and the Securities and Exchange Commission ("SEC") as each agency exercises its unique and independent statutory duty to establish appropriate fiduciary standards for those within their jurisdictions who provide financial advice. In addition, again rather than focusing on the urgent need to protect retirement savers, the Letter urges you to effectively halt the DOL's efforts to protect this ever-expanding group by requiring the DOL to wait until the SEC "completes its work in this area" at some indeterminate point in time.

We wholeheartedly agree with the shared goals of increasing retirement savings and improving retirement security, but achieving those goals also requires strong, clear, robust, and long-overdue protections to ensure that those savings are not siphoned off by fees and inappropriate financial products. This is happening now, and it will dramatically increase the gap between what Americans are saving for retirement, what they think they are saving for retirement, and what they will actually have when they retire.

While the concerns set forth in the Letter are well-meaning, they are misguided. First, the Letter reflects a number of misconceptions about the DOL's forthcoming rule that opponents of an appropriate fiduciary duty have disseminated widely in Congress and throughout the public debate on this important issue. For example, in reality, the DOL

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<sup>1</sup> Better Markets, Inc. ("Better Markets") is a nonprofit organization based in Washington, DC, that promotes the public interest in the capital and commodity markets. It advocates for greater transparency, accountability, and oversight in our financial system through a variety of activities, including regulatory comment, public advocacy, litigation, and independent research.

itself, through the tireless efforts of your team at the Department of Labor (including in particular your Secretary, Tom Perez, and Assistant Secretary, Phyllis Borzi) have made clear that the rule will **not** in fact prohibit the forms of compensation that the brokerage industry has long relied upon, such as commissions. Moreover, even if such changes were implemented in the DOL's rule, there is no credible evidence that those prohibitions would impair the ability of any workers or retirees (including those with low or moderate incomes) to obtain valuable financial advice or for small businesses to offer appropriate plans.

Second, the recommended course of action—forcing the DOL to wait for the SEC before finalizing its rule—will prove disastrous for millions of workers and retirees and their families who need and deserve sound financial advice, untainted by the conflicts of interest that are bleeding retirement accounts with hidden fees and saddling them with financial products that perform badly. The SEC has failed thus far to timely address this issue in any meaningful way and there is no basis to believe that it will do so in the foreseeable future. Thus, holding a DOL rule hostage to SEC action is effectively the same as ordering that there be no rule at all. In addition to requiring the DOL to ignore its independent statutory duty, this would needlessly leave the huge wave of future retirees without essential protections, which should have been in place long ago and must not be delayed any further.

The stakes are enormous. As of 2013, defined contribution plans and IRAs together held almost \$12 trillion in assets.<sup>2</sup> Moreover, rollovers from 401(k) plans to IRAs and other vehicles represent a huge outflow of funds at just the time when retirees will be most in need of unbiased, unconflicted advice. By one estimate, the annual rollover market will reach \$600 billion next year alone.<sup>3</sup>

The stakes in terms of quality of life for millions of soon-to- retire Americans are equally enormous. With so few employer-guaranteed retirement plans remaining, almost all retirees have to rely on their own savings and investments when they retire. Those savings and investments are all that stand between our senior citizens and poverty. The DOL's adoption as soon as possible of an appropriately clear and strong conflicts of interest rule must be viewed with these interests foremost in mind.

**An appropriate fiduciary duty rule that will protect retirees more effectively is critically important, and the DOL should be encouraged in its effort to achieve this objective as soon as possible.**

Among the most basic and self-evident truths in financial regulation is that all investors deserve honest, unconflicted investment advice—advice that serves their best interest, not that of the broker, adviser, or anyone else. This principle applies above all to retirees, who are often legitimately concerned about their retirement needs; extremely

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<sup>2</sup> Investment Company Institute, *Retirement Assets Total \$21.9 Trillion in Third Quarter 2013*, [http://www.ici.org/research/stats/retirement/ret\\_13\\_q3](http://www.ici.org/research/stats/retirement/ret_13_q3), at Table 2 (last visited Feb. 19, 2014).

<sup>3</sup> BlackRock, *Retirement Account Rollover and Conversions*, <https://www2.blackrock.com/us/financial-professionals/tools/business-builders/retirement-account-rollover-and-conversions> (last visited Feb. 19, 2014).

vulnerable to misleading sales tactics and confusing terminology; and, above all, poorly positioned to recover financially if they suffer losses in their retirement accounts.

The Letter itself cites one of the most compelling reasons for the DOL to proceed expeditiously: “The gap between what Americans are saving for retirement and what they will need for a comfortable retirement is in the *trillions* of dollars.”<sup>4</sup> Precisely because of this gap, the conflicts of interest that are sapping retirement accounts every day in this country must be eliminated. Retirees simply cannot afford losses caused by poor-performing investments and hidden fees. Unless an appropriate fiduciary standard is put in place soon, the gap cited in the Letter will never close. Indeed, it will only widen.

The dramatic changes in the retirement landscape over the last four decades make these concerns all the more acute:

- The sheer number of workers and retirees who will be affected by the DOL’s fiduciary duty rule is skyrocketing as millions more of the baby-boom generation enter their retirement years.
- Workers and retirees increasingly must rely on their own investment decisions, as defined contribution plans and individual retirement accounts (“IRAs”) have largely replaced the traditional employer defined benefit plans that were professionally managed on behalf of the employees.
- The financial products available to workers and retirees have become more varied and complex.
- The relationships between various industry participants, where many conflicts of interest arise, have become more complex and difficult to discern and understand, even for sophisticated investors.
- And, retirees are still trying to recover from the financial crisis of 2008, which took countless senior workers out of the workforce prematurely, slashed home values, and inflicted investment losses that millions of Americans have yet to recoup.

For all of the foregoing reasons, the DOL is to be commended for acting on the urgent need to update its fiduciary duty rule, which has not changed since President Ford was in office 40 years ago. Given the vast changes over those 40 years, including the shift away from employer-guaranteed defined benefit plans, the increasing complexity of financial products, and the forthcoming surge in retirees, an updated rule is long overdue. Any further delay would be inexcusable.

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<sup>4</sup> Letter at 1 (emphasis in original).

**The anticipated protections in the DOL's new rule will preserve access to financial advice.**

One of the concerns identified in the Letter is that “proposals which seek to eliminate commission-based advice and revenue sharing like the [DOL’s] 2010 proposed rule will likely limit access to meaningful investment advice and products available to millions of IRA investors while increasing costs.”<sup>5</sup>

This concern is unfounded for three reasons. First, it assumes that the DOL re-proposal will outlaw commissions and other forms of compensation that the brokerage industry relies upon heavily. But, the DOL has expressly disavowed such an intention.<sup>6</sup>

Second, and more importantly, even if the DOL were to prohibit certain forms of compensation, there is no credible evidence to suggest that any investors—low-income or otherwise—would be deprived of valuable investment advice as a result. In fact, there is evidence showing that the imposition of a fiduciary duty on brokerage firms will not in fact cause them to abandon clients who are planning for retirement or deprive those clients of advisory services. For example, one study demonstrates that the application of a fiduciary duty to broker-dealers has little, if any, effect on the availability of investment advice to clients, including those with moderate levels of income or assets.<sup>7</sup> This stands to reason, of course, since the brokerage industry is unlikely to forego enormous amounts of revenue, which will be increasing each year astronomically as millions more baby boomers retire.

Third and finally, even if some brokers decide they cannot or will not provide advisory services without the right to put their own self-interest ahead of their clients’ best interest, then investment advisers and other brokers will assuredly fill any possible gap, provide advice in accordance with the new rule, and collect the fees they earn from their clients.

History proves the point. Since the inception of financial regulation in the United States, every possible change has caused concerns and often dire warnings. Yet, for more than 100 years now, the financial services industry has not only adapted to new regulations again and again, but also thrived in the process.

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<sup>5</sup> Letter at 1.

<sup>6</sup> See, e.g., Mark Schoeff Jr., *A fiduciary standard? Don't hold your breath*, InvestmentNews, Mar. 12, 2014, <http://www.investmentnews.com/article/20140312/FREE/140319965> (reporting that the new proposal will include prohibited-transaction exemptions related to commissions and revenue sharing, according to remarks by Assistance Secretary Borzi).

<sup>7</sup> Michael Finke & Thomas Langdon, *The Impact of the Broker-Dealer Fiduciary Standard on Financial Advice* (Mar. 9, 2012), <http://ssrn.com/abstract=2019090>.

**Congress did not intend the DOL to subordinate its rulemaking on fiduciary duty to the SEC, and forcing the DOL to wait for the SEC to act will further victimize workers and retirees.**

The Letter claims that “[i]n Section 913, Congress intended a single best interest standard to apply to all retail accounts, including retirement accounts.”<sup>8</sup> The Letter further implies that Congress intended the SEC to establish that uniform standard in accordance with Section 913. On this basis, the Letter urges you to ensure that the DOL does not finalize its fiduciary duty rule before the SEC “completes its work” on its own rule, “so as not disrupt the SEC’s fulfillment of a Congressional directive.”

These assertions are unfounded. There is no evidence that Congress intended the SEC to establish a uniform fiduciary standard under Section 913 of the Dodd-Frank Act that would supersede the fiduciary standard under the Employee Retirement Income Security Act (“ERISA”). Nor is there any evidence that Congress intended the two standards to be the same. To the contrary, Congress enacted ERISA almost 40 years ago, long before it enacted Section 913 of the Dodd-Frank Act. In ERISA, Congress established a clear and strong fiduciary standard that the DOL must administer. That standard was intended to protect a uniquely important and vulnerable class of investors: workers who are saving for retirement, and retirees who must manage assets to last throughout retirement. Reflecting the breadth and importance of that goal, the ERISA fiduciary duty applies to investment advice concerning a wide variety of retirement plan assets, including “any moneys or other property,” not just securities. Nowhere is the application of an appropriate fiduciary duty more important.

Congress’s approach to a fiduciary duty in the SEC-context has been markedly different. Congress refrained from establishing a fiduciary standard for securities broker-dealers in Section 913 of the Dodd-Frank Act. It chose instead simply to authorize the SEC to establish such a standard by rule, but it did not require the agency to do so. In short, the premise of the Letter—that Congress has given the SEC a mandate and the DOL should wait for the SEC—is simply inaccurate.

None of this is to suggest that the DOL and the SEC should not coordinate with each other as they move forward under their respective jurisdictions. In this case, the public record makes abundantly clear that the DOL has consulted extensively and appropriately with other regulators, including the SEC and the Commodity Futures Trading Commission, to ensure that standards do not undermine effective regulation of those who advise retirees. This coordination has encompassed not only regulatory issues, but also enforcement matters, and it has taken the form of dialogue, meetings, and even memoranda of understanding. The DOL should be commended for these efforts.

What does raise serious concerns, however, is that the call for regulatory harmony can also be used as a tactic to delay or weaken an anticipated regulatory proposal. We fear that will be the result, if not the intent, if the DOL is forced to wait for the SEC to act before finalizing its new fiduciary duty rule under ERISA. The SEC has already spent far too many

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<sup>8</sup> Letter at 1.

years considering whether to take any action to ensure that broker-dealers giving securities advice to investors are held to the proper standard—the fiduciary duty. The SEC has little to show for this effort, and it appears that if the agency ever acts, it will not be for years to come.

Therefore, what the DOL must not be asked to do is slow its rulemaking process and wait for another agency, such as the SEC, to act. Such an approach will result in a long and potentially indefinite delay, causing many retirees to suffer needlessly in the meantime.

## **CONCLUSION**

We hope these comments provide useful context and input on the issues raised in the Letter.

Sincerely,



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The Honorable Mary Jo White, Chair, Securities and Exchange Commission