January 2, 2024

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210
Attention: Definition of Fiduciary—RIN 1210-AC02
Via Federal eRulemaking Portal: http://www.regulations.gov

Employee Benefits Security Administration
Office of Exemption Determinations
U.S. Department of Labor
200 Constitution Ave., NW
Suite 400
Washington, DC 20210
Application No. D-12057
Via Federal eRulemaking Portal: http://www.regulations.gov

Re: Retirement Security Rule: Definition of an Investment Advice Fiduciary, 88 Fed. Reg. 75890 (Nov. 3, 2023); Proposed Amendment to Prohibited Transaction Exemption 2020-02, 88 Fed. Reg. 75979 (Nov. 3, 2023)

Dear Department of Labor:

Better Markets Inc.[1] appreciates the opportunity to comment on the above-captioned notices of proposed rulemaking (together, the "Proposals"), issued by the Department of Labor ("DOL"). For decades, financial advisers have been allowed to recommend investment products, trading strategies, and account types that cost too much, pose excessive risks, lock up savings in illiquid investments, and provide meager returns for retirement savers. The advisers increase their profits, win bonuses, or receive lavish non-cash rewards, while the retirement savings of millions of hard-working Americans are eaten away. These practices, driven by adviser conflicts of

[1] Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system, one that protects Americans' jobs, savings, retirements, and more.

interest, cost tens of billions of dollars a year in lost retirement assets, and they degrade the quality of life that many workers can sustain in their retirement years. These rules will help put a stop to this practice and protect millions of Americans struggling to save for a decent retirement. They will close huge loopholes in the current rules and upgrade the requirements that advisers must follow when recommending investments for retirement accounts. We strongly support these reforms and urge the DOL to finalize them as soon as possible.

The Proposals would revise the definition of investment advice fiduciary (the "Revised Definition" proposal) to close long-standing loopholes that allow a large swath of advice to retirement savers to escape the high standards of care and loyalty established in the Employee Retirement Income Security Act of 1974 ("ERISA"), which Congress enacted specifically to protect Americans' retirement savings. The Proposals would also make modest but important changes to prohibited transaction exemption 2022-02 (the "Revised PTE" proposal), which specifies the conditions under which investment advice fiduciaries may receive compensation or engage in principal transactions that would otherwise be prohibited under ERISA.[2]

We commend the DOL for taking action to better protect retirement savers from the powerful conflicts of interest among financial advisers that inflict real harm. In this letter—

- we provide background on the evolution of the standards governing investment advice fiduciaries under ERISA and the relentless opposition from some sectors in the financial industry;

- we review the evidence showing that adviser conflicts of interest continue to inflict enormous financial harm on retirement savers, who remain unaware that many advisers act primarily in their own self-interest and at the expense of their clients;

- we offer comments in support of the proposed Revised Definition of an investment advice fiduciary;

[2] The DOL is also proposing to amend a number of other prohibited transaction exemptions, including PTEs 75-1, 77-4, 80-83, 83-1, 86-128, and 84-24, largely to ensure that investment advice fiduciaries are more consistently required to seek relief under PTE 2020-02. PTE 84–24 would be amended to limit relief for investment advice to independent insurance producers (i.e., independent insurance agencies) that recommend annuities from an unaffiliated financial institution to retirement investors on a commission or fee basis. PTEs 75–1 Parts III and IV, 77–4, 80–83, 83–1, and 86– 128 would be amended to eliminate relief for transactions resulting from fiduciary investment advice, as defined under ERISA. Under these amended provisions, rather than look to an assortment of different exemptions with different conditions for different transactions, investment advice fiduciaries—apart from independent insurance producers—would generally be expected to rely solely on the amended PTE 2020–02 for exemptive relief for covered investment advice transactions. Our comments in this letter focus on the Revised Definition and the Revised PTE 2020-02.

- we offer comments in support of the proposed Revised PTE 2020-02, including comments highlighting ways in which the DOL should make it stronger; and

- we refute the arguments tirelessly advanced by many in the financial services industry in opposition to these essential reforms.

SUMMARY OF COMMENTS

First, adviser conflicts of interest continue to take a huge toll on the financial resources and the quality of life that millions of American workers can sustain in retirement. The damage is conservatively estimated at tens of billions of dollars a year. Numerous studies over the years have established this level of harm, and the damage has remained largely unchecked because the definition of an investment advice fiduciary dating back to 1975 suffers from major gaps that remain intact to this day. As a result, many if not most recommendations to retirement savers, including rollover transactions often involving a lifetime of savings, have not been subject to the strong fiduciary standards set forth in ERISA. Moreover, other regulatory frameworks, including notably the National Association of Insurance Commissioners' ("NAIC's") model rule on annuity transactions, have done little to curb the powerful conflicts of interest that motivate many advisers.

Second, the updated definition of an investment advice fiduciary is absolutely necessary to mitigate the harmful impact of conflicted investment advice. The current definition is nearly 50 years old, and it contains huge loopholes that allow advisers to avoid their fiduciary duties and place their own interests ahead of their clients' best interest. The DOL's proposed rule would close those gaps.

Third, the proposed changes to PTE 2020-02 will strengthen and clarify the PTE. While we believe that it should be even stronger, it will, in conjunction with the Revised Definition, provide important safeguards against the toxic effects of conflicts of interest, for the benefit of all retirement savers. The amendments to the other PTEs are appropriate and will help ensure that those who render investment advice are more consistently required to comply with PTE 2022-02.

Fourth and finally, there are no persuasive arguments being advanced in opposition to the Proposals. Contrary to what some opponents claim,

1. <u>Neither the Securities and Exchange Commission's ("SEC's") Regulation Best Interest ("Reg BI") nor the state insurance regulations patterned on the NAIC's model annuity rule are adequate substitutes for the safeguards in ERISA.</u> Nor is there a shred of evidence that Congress intended alternative regulatory provisions to substitute for the stringent standards it chose to incorporate in ERISA. On the contrary, Congress acted against the backdrop of decades of securities and insurance regulation and determined that additional measures to protect retirement savers were essential.

2. <u>Disclosures alone cannot adequately protect retirement savers.</u> While disclosure is an essential component of financial regulation, it suffers from numerous limitations and it

therefore cannot possibly substitute for the affirmative obligation under ERISA to act solely in the interest of a client.

3. The DOL has ample, explicit, and specific authority to promulgate the Proposals. In addition, the so-called "major questions" doctrine is inapplicable here. Far from threatening the rare and extreme type of economic upheaval that might trigger the major questions doctrine, the Revised Definition merely closes loopholes and aligns the DOL's rules governing investment advice with what Congress said and intended in ERISA in 1974. And the amendments to PTE 2022-02 are minor, essentially leaving intact the same requirements that have been applicable to retirement advisers since 2020. In any event, the DOL's authority to promulgate these rules is clear and broad. Therefore, to the extent these reforms could possibly be perceived as revolutionary, they are nevertheless what Congress authorized the DOL to implement.

4. The Proposals respect and reflect the core—albeit erroneous—holdings of the Fifth Circuit's 2018 decision vacating the DOL's 2016 rules,[3] which were also designed to close the loopholes in the 1974 definition of an investment advice fiduciary and strengthen the protections against conflicts of interest afforded to retirement savers. Specifically, the Revised Definition incorporates conditions ensuring that recommendations are covered only where it is reasonable to conclude that a relationship of trust and confidence between adviser and client is present. Moreover, in another accommodation to the Fifth Circuit's decision, the Proposals nowhere impose contractual or warranty obligations that could give rise to a private action for violations of the Revised PTE.

5. Retirement savers with small nest eggs will not lose access to advice once these important rules are in place. On their face, none of the Proposals can reasonably be expected to have such a restrictive impact. And experience proves the point. There is no persuasive evidence suggesting that similar reforms, such as the SEC's Reg BI or the laws in some states imposing a fiduciary duty on broker-dealers, have impaired the ability of retirement savers of modest means to obtain quality, affordable advice. Most telling, some advisers currently operate under the fiduciary standard and they serve retirement savers all across the income and asset spectrum.

6. The Proposals satisfy all of the rulemaking requirements under the APA. They are the result of reasoned decision-making, based on an ample record, and supported by a thorough economic analysis. Procedurally, the DOL has provided a more than sufficient comment period and has even convened two full days of public hearings at which all perspectives on

[3] *Chamber of Commerce of United States of Am. v. U.S. Dep't of Labor*, 885 F.3d 360 (5th Cir. 2018).

the rules were encouraged and received, especially from representatives of the regulated industry.[4]

BACKGROUND

Briefly reviewing the evolution of the regulatory standards governing investment advice fiduciaries provides helpful context for evaluating the Proposals. It highlights in particular the overriding Congressional objective that must guide the DOL's rulemaking. It also starkly illustrates the intense hostility that elements in the financial services industry harbor against these reforms and their unremitting attempt to protect their ability to take unfair advantage of unsuspecting retirement savers for their own gain.

In 1974, Congress enacted ERISA to ensure that Americans' critically important retirement assets were protected with the highest possible standards of loyalty and care imposed on those who manage or administer retirement plans or give investment advice about retirement plan assets. Congress expressly articulated the important purposes of the law by observing that "the continued well-being and security of millions of employees and their dependents are directly affected by" retirement plans; that "adequate safeguards" were not in place to protect those assets; and that it was therefore important to establish "standards of conduct, responsibility, and obligation for fiduciaries" of such plans.[5]

ERISA section 404 requires Title I plan fiduciaries to act with the "care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."[6] Further, fiduciaries must carry out their duties "***solely*** in the interest of the participants and beneficiaries and for the ***exclusive purpose*** of providing benefits to participants and their beneficiaries."[7] As courts have observed, the obligations in ERISA are considered "the highest known to the law."[8]

These fiduciary duties are reinforced by ***flat prohibitions*** against transactions involving conflicts of interest because of the dangers such transactions pose to retirement plans and their participants. The prohibited transaction provisions of ERISA, including Title II of ERISA which is codified in the Internal Revenue Code (Code), categorically forbid a fiduciary from "deal[ing] with the assets of the plan in his own interest or for his own account," and "receiv[ing] any

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4 Notice of Hearing on Retirement Security Rule: Definition of and Investment Advice Fiduciary and Associated Prohibited Transaction Exemption Amendments, 88 Fed. Reg. 80648 (Nov. 20, 2033), https://www.govinfo.gov/content/pkg/FR-2023-11-20/pdf/2023-25522.pdf.

5 29 U.S.C. § 1001(a), (b).

6 29 U.S.C. § 1104.

7 29 U.S.C. § 1104 (emphasis added).

8 Revised Definition Release at 75900.

consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan."[9]

At the same time, Congress also gave the DOL authority to grant conditional administrative ***exemptions*** from the prohibited transaction provisions, but only if the DOL finds that the exemption is (1) administratively feasible for the DOL, (2) in the interests of the plan and of its participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries of such plan.[10]

ERISA includes a statutory definition of a fiduciary in section 3(21)(A),[11] which provides that a person is a fiduciary with respect to a plan to the extent the person (i) exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii***) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so*****,** or (iii) has any discretionary authority or discretionary responsibility in the administration of such plan. The second prong of this definition, which governs the regulatory implementation in the Revised Definition, broadly and simply provides, in essence, that a person is subject to ERISA's fiduciary standards if they give investment advice about retirement plan assets for compensation.

Yet in 1975, just a year after ERISA was enacted, the DOL hastily issued a rule implementing the statutory definition of an investment advice fiduciary under ERISA that clearly and substantially deviated from the statutory text. Unlike the straightforward language in ERISA, the 1975 rule established a convoluted five-part test for determining when an adviser is a fiduciary subject to the high standards of care and loyalty in ERISA and the prohibitions on self-dealing and compensation in ERISA and the Internal Revenue Code. That five-part test provided, and continues to provide, that a person is considered a fiduciary only if they:

(1) render advice as to the value of securities or other property or the advisability of investing in, purchasing, or selling securities or other property;
(2) on a ***regular basis***;
(3) pursuant to a ***mutual agreement***, arrangement, or understanding with the plan or IRA owner that the advice;
(4) will serve as a ***primary basis*** for investment decisions as to plan assets; and
(5) will be individualized based on the particular needs of the plan.[12]

The rule thus exempted a great deal of investment advice from the requirements established under ERISA to protect retirement savers from conflicts of interest. Whatever justification that

[9] 29 U.S.C. § 1106.
[10] 29 U.S.C. § 1108.
[11] 29 U.S.C. § 1002.
[12] *Nat'l Ass'n for Fixed Annuities v. Perez*, 217 F. Supp. 3d 1, 13 (D.D.C. 2016) (hereinafter "*NAFA*").

test may have had in 1975, the market for retirement advice steadily outgrew it. There was a marked shift away from defined-benefit retirement plans, in which employers guaranteed employees a certain amount upon retirement and bore responsibility for managing plans assets, towards defined-contribution plans such as 401(k)s, in which employees are responsible for managing their own retirement assets.

Faced with navigating the increasingly complex investment marketplace on their own, retirement savers have increasingly turned to financial advisers. At the same time, many of those advisers have easily exploited the loopholes in the 1975 Rule, recommending investments that enriched the advisers at the expense of their clients through products carrying excessive costs, undue risks, and poor performance. Moreover, sporadic or one-time advice about rolling large accumulations of plan assets into new types of accounts became increasingly frequent and important, highlighting the need for reforms that would close the regulatory loopholes in the 1975 rule. As further explained below, losses attributable to conflicts of interest among advisers have continued to mount, reaching a staggering level, estimated conservatively at tens of billions of dollars per year.

In 2010, the DOL began the process of re-examining the outdated 1975 rule and crafting a new rule that would better reflect the reality of the market for investment advice and establish better protections for retirement savers. In 2016, based on an extensive and thoroughly supported record, the DOL concluded that to satisfy the explicit requirements and the underlying purposes of ERISA, it was necessary to substantially strengthen the regulatory protections for retirement savers against damaging conflicts of interest among advisers. That record included evidence that retirement savers were suffering enormous losses every year as a result of conflicts of interest motivating their advisers; that the massive loopholes in the definition of an investment advice fiduciary were largely responsible for those losses; and that the conditions for any exemption from the prohibited transactions relating to conflicted compensation or other self-dealing practices needed to be strengthened in keeping with the requirements in ERISA and the Internal Revenue Code.

Accordingly, the DOL finalized a rule that closed the definitional loopholes by eliminating the regular basis and primary basis prongs. The DOL also established a strong set of conditions known as the Best Interest Contract exemption, requiring advisers to recommend investments "without regard to the financial or other interests of the adviser." The 2016 rule also required advisers to retirement savers with an IRA to enter an enforceable contract setting forth the conditions for the exemption.[13]

[13] Definition of the Term "Fiduciary"; Conflict of Interest Rule-Retirement Investment Advice, 81 Fed. Reg. 20,945 (Apr. 8, 2016).

As soon as the 2016 rule was issued, broker-dealers and insurance agents launched a series of attacks against it in multiple federal courts.[14] The 2016 rule fared well in these cases, with court after court rejecting the varied challenges to the rule, including the implausible claim that it exceeded the DOL's authority under ERISA's broad, remedial statutory framework. However, in 2018, after forum-shopping their way into a favorable, pro-industry court, industry representatives persuaded a divided panel of the Fifth Circuit Court of Appeals to vacate the 2016 rule, over the strong dissent of the Chief Judge. The court held in part that the DOL had exceeded its authority under ERISA when it dispensed with the five-part test in the 2016 rule and when it established contractual obligations the Court viewed as creating an impermissible new cause of action.[15]

The Trump Administration acquiesced in the Fifth Circuit's ruling and abandoned any effort to seek reversal of the decision either through a petition for rehearing en banc or a petition for certiorari to the U.S. Supreme Court. The DOL subsequently established an interim enforcement policy and announced its intention to revisit the regulatory requirements governing investment advice fiduciaries in light of the Fifth Circuit's decision. In July 2020, the DOL

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[14] Better Markets participated extensively in this series of cases as an amicus supporting the DOL's position. *See* Brief of Amici Curiae AARP, AARP Foundation, Americans for Financial Reform, Better Markets, Consumer Federal of America, National Employment Law Project & Public Investors Arbitration Bar Association in Support of Defendants-Appellees and Urging Affirmance, *Mkt. Synergy Grp. v. U.S. Dep't of Labor*, 885 F.3d 676 (10th Cir. 2018) (No. 17-3038), https://bettermarkets.com/sites/default/files/Markets_Synergy_Group_v._DOL_%2810th%20Cir%29-Amicus%20Brief-9-27-2017.pdf; Brief of Amici Curiae AARP, AARP Foundation, Americans for Financial Reform, Better Markets, Consumer Federal of America, National Employment Law Project & Public Investors Arbitration Bar Association Urging Affirmance of the District Court's Decision in its Entirety, *Nat'l Ass'n for Fixed Annuities v. U.S. Dept. of Labor* (D.C. Cir., filed Sept. 22, 2017) (No. 16-5345), https://bettermarkets.com/sites/default/files/NAFA_v.DOL_%28D.C.%20Cir%29-Amicus%20Brief-9-22-2017.pdf; Brief of Amici Curiae AARP, AARP Foundation, Americans for Financial Reform, Better Markets, Consumer Federation of America & National Employment Law Project Urging Affirmance of the District Court's Decision in its Entirety, *Chamber of Commerce of United States of Am. v. U.S. Dep't of Labor*, 885 F.3d 360 (5th Cir. 2018) (No. 17-10238), https://bettermarkets.com/sites/default/files/Chamber_of_Commerce_v.DOL_%2810th%20Cir.%29-Amicus_Brief%20-7-6-2017.pdf; Amicus Brief of Better Markets, Inc., Consumer Federation of America, & Americans for Financial Reform in Support of Defendants, *Market Synergy Group, Inc. v. U.S. Dept. of Labor* (D. Kan. 2016) (No. 16-4083). https://bettermarkets.com/sites/default/files/Amicus%20Brief%20filed%20by%20Better%20Markets%20et%20al.%20in%20Market%20Synergy%20v.%20DOL%20%207-29-16.pdf; Amicus Brief of Better Markets, Inc., Consumer Federation of America, & Americans for Financial Reform in Support of Defendants, *Nat'l. Ass'n for Fixed Annuities v. U.S. Dept. of Labor*, (D.D.C. 2016) (No. 16-1035), https://bettermarkets.com/sites/default/files/NAFA%20v.%20DOL%20-%20Amicus%20Brief%207-15-16%20Final%20for%20Filing_0.pdf.

[15] *Chamber of Commerce of United States of Am. v. U.S. Dep't of Labor*, 885 F.3d 360 (5th Cir. 2018).

summarily reinstated the 1974 definitional rule in its entirety, feeling unconditionally bound by the Fifth Circuit's errant decision. In December of 2020, it issued PTE 2020-02, which established a series of important new investor protections at least governing any investment advice that did not fall through the cavernous loopholes in the 1975 definitional rule.[16]

Appropriately recognizing the need to ensure that rollover transactions, often involving a worker's entire retirement savings, were covered by the safeguards in PTE 2020-02, the DOL issued guidance in April of 2021.[17] It made clear that a recommendation involving a rollover transaction could be considered "on a regular basis" and therefore covered under the definitional rule if it marked the beginning of an ongoing relationship between the adviser and the client.

Yet even this guidance drew the ire of some advice providers who challenged it, so far successfully, in two separate cases. On February 13, 2023, the U.S. District Court for the Middle District of Florida issued an opinion vacating the policy referenced in FAQ 7 (entitled "When is advice to roll over assets from an employee benefit plan to an IRA considered to be on a 'regular basis'?") and remanded it to the DOL for future proceedings.[18] On June 30, 2023, a magistrate judge in the Northern District of Texas filed a report with the judge's findings, conclusions, and recommendations, including that the court should vacate portions of PTE 2020–02 that permit consideration of actual or expected investment advice relationships when determining fiduciary status.[19]

Fortunately and finally, under the Biden administration and new agency leadership, the DOL has proposed the Revised Definition of an investment advice fiduciary, along with proposed enhancements to PTE 2020-02, specifying the requirements that advisers must satisfy to receive compensation for their advice. These essential rules, once final and successfully defended against the inevitable legal attacks, will improve the lives of tens of millions of hardworking Americans who need, expect, and deserve unbiased, unconflicted investment advice to enter and sustain a decent and dignified retirement.

I. <u>**Adviser conflicts of interest continue to inflict enormous financial harm on retirement savers, many of whom remain unaware that their advisers act primarily in their own self-interest and at the expense of their clients.**</u>

Because of the ***loopholes*** in the definition of an investment advice fiduciary, conflicted investment advice continues to inflict massive harm on retirement savers, depleting their

[16] Prohibited Transaction Exemption 2020–02, Improving Investment Advice for Workers & Retirees, 85 Fed. Reg. 82798 (Dec. 18, 2020).

[17] New Fiduciary Advice Exemption: PTE 2020-02 Improving Investment Advice for Workers & Retirees Frequently Asked Questions (Apr. 16, 2021), https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/new-fiduciary-advice-exemption.

[18] *Am. Sec. Ass'n. v. U.S. Dep't of Labor*, 2023 WL 1967573, at * 22–23.

[19] *See* Findings, Conclusions, and Recommendations of the United States Magistrate Judge, *Fed'n of Ams. for Consumer Choice v. U.S. Dep't of Labor*, No. 3:22–CV–00243–K–BT, 2023 WL 5682411, at *27–29 (N.D. Tex. June 30, 2023).

retirement accounts, delaying their retirements, and degrading the quality of life they can sustain throughout retirement. For decades, financial advisers have been allowed to give bad advice to retirement savers, saddling them with overpriced, under-performing, and overly risky investments but enriching their advisers. It costs American retirement savers tens of billions of dollars a year.

This pattern of behavior is unacceptable on every level. It is shamelessly predatory as it takes unfair advantage of vulnerable investors, who generally lack expertise in finance and therefore must turn to advisers they trust to navigate the countless and growing investment options available in today's complex financial markets. It is also fundamentally at odds with what Congress said and intended in ERISA. After all, the statute categorically bars advisers from acting on their conflicts of interest or engaging in self-dealing of any kind, subject only to exemptions the DOL is authorized to create. And it is uniquely harmful given the sheer magnitude of the financial losses such conflicts cause and the special importance of retirement savings to Americans' quality of life in the later years of their lives.

During the 2016 rulemaking, the DOL compiled exhaustive evidence of ***the harm*** that conflicted advice inflicts on retirement savers.[20] The Council of Economic Advisers, for example, found that conflicted investment advice costs retirement savers at least $17 billion per year, a conservative estimate that captures the damage only in relation to one type of retirement account (IRAs) and one type of investment (mutual funds).[21] Similarly, the DOL's Regulatory Impact Analysis released in conjunction with the 2016 rule found that "the underperformance associated with conflicts of interest in the mutual funds segment alone could have cost IRA investors between $95 billion and $189 billion over the following 10 years and between $202 billion and $404 billion over the following 20 years. While these projected losses were substantial, they represented only a portion of what IRA investors stood to lose as a result of conflicted investment advice."[22] Ultimately, as the DOL previously found, "the balance of research and evidence indicates that the aggregate harm from cases in which consumers receive bad advice based on conflicts of interest is large."[23]

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[20] *See generally* Regulating Advice Markets, Definition of the Term "Fiduciary," Conflicts of Interest - Retirement Investment Advice, Regulatory Impact Analysis for Final Rule and Exemptions (Apr. 2016), https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf; Definition of the Term "Fiduciary"; Conflict of Interest Rule-Retirement Investment Advice, 80 Fed. Reg. 21,927 (Apr. 20, 2015); Council of Economic Advisers, The Effects of Conflicted Investment Advice on Retirement Savings (Feb. 2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_coi_report_final.pdf; Definition of the Term Fiduciary, 75 Fed. Reg. 65,263 (Oct. 22, 2010).

[21] Council of Economic Advisers, The Effects of Conflicted Investment Advice on Retirement Savings 2-3 (Feb. 2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_coi_report_final.pdf.

[22] Revised Definition Release at 75917.

[23] Regulating Advice Markets, Definition of the Term "Fiduciary," Conflicts of Interest - Retirement Investment Advice, Regulatory Impact Analysis for Final Rule and Exemptions 5

And that damage is especially acute in ***rollover transactions***. As the DOL has repeatedly observed, decisions to take a benefit distribution or engage in rollover transactions are among the most, if not the most, important financial decisions that plan participants and beneficiaries and IRA owners and beneficiaries are called upon to make. As President Biden explained in October when he announced the Proposals, "[i]n 2022 alone, Americans rolled over approximately $779 billion from defined contribution plans, such as 401(k)s, into IRAs."[24] And retirement investors are projected to move $4.5 trillion from defined contribution plans to IRAs from 2022 through 2027.[25] The damage is also magnified in other ways as well. The current definition of investment advice fiduciary has excluded many recommendations to the ***sponsors*** of 401(k) plans as to the menu of investment options available to employees. When that advice is corrupted by conflicts of interest, employees are left with investment choices marked by high costs and low performance, which erode employees' hard-earned savings and returns over time.

All of this data establishes the magnitude of the harm caused by conflicted advice and the need for reform. And we know that the damage is ***ongoing***. First, the gaps in the current definition of an investment advice fiduciary continue to allow advisers to evade the ERISA requirements entirely, commonly through claims and fine-print client contracts stipulating that the adviser is not rendering advice on a regular basis or that the advice provided is not the primary basis for the client's investment decisions. Therefore, to this day, a huge amount of advice has been left unaffected by the safeguards in PTE 2020-02, and the corrosive effect of conflicted advice on Americans' retirement savings has continued. As the Release summarizes the point, "the limitations of the existing five-part test for fiduciary status still result in significant portions of the retirement investment market operating outside of the PTE's protections."[26]

Second, the evidence indicates that ***other regulatory initiatives*** have done little to mitigate the ongoing harm to investors from conflicted advice. For example, the SEC's Reg BI was finalized in 2019 and effective in June 2020. Yet evidence gathered by the state securities regulators, as well as FINRA, shows that the rule has had a limited impact on adviser behavior. In November 2021, the North American Securities Administrators Association ("NASAA") announced the results of a nationwide survey conducted by state securities regulators that assessed broker-dealer policies and practices following the implementation of Reg BI.[27] NASAA found that

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(Apr. 2016), https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.

24 FACT SHEET: President Biden to Announce New Actions to Protect Retirement Security by Cracking Down on Junk Fees in Retirement Investment Advice (Oct. 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/#:~:text=In%202022%20alone%2C%20Americans%20rolled,in%20the%20saver's%20best%20interest.

25 Revised Definition Release at 75915.

26 Revised Definition Release at 75920.

27 Report and Findings of NASAA's Regulation Best Interest Implementation Committee National Examination Initiative Phase II (A) (Nov. 2021), NASAA-Reg-BI-Phase-II-A-Report-November-2021_FINAL.pdf.

a full year after the rule's compliance deadline of June 30, 2020, little had changed when it comes to the powerful influence that adviser conflicts of interest exert on investment advice. It concluded that Reg BI firms had—

- steadily increased their participation in complex, costly, and risky products;
- continued to rely on financial incentives that Reg BI was intended to curb; and
- still placed their financial interests ahead of their retail customers in violation of the rule's chief directive.

NASAA's more recent 2023 exam results revealed some important compliance progress but also found that "some firms are still ignoring common lower-cost and lower-risk products as part of the reasonably available alternative comparison and that there is little uniformity in effective conflict mitigation. Additionally, the report found continued improper use of the 'advisor' or 'adviser' title."[28] These findings are consistent with FINRA's February 2022 exam results and its January 2023 exam results,[29] which identify a wide range of compliance failures under Reg BI. While these reports also indicate some implementation progress, they indicate continuing failure to comply as well. As to state insurance regulation, there is no evidence to suggest that the states' adoption of the 2020 NAIC model rule on annuity sales has mitigated the damage done to retirement savers by advisers peddling lucrative annuities to their clients that exact huge commissions, offer poor returns, and lock up retirement savings for years.

The failure of Reg BI and the NAIC model rule to adequately protect retirement savers can be attributed to a number of factors. They suffer from inherent weaknesses on their face and they are limited in scope. As explained more fully below, Reg BI only applies to securities recommendations and the NAIC model only applies to annuity sales, while retirement assets recommended by advisers take many forms. The NAIC's so-called best interest standard is so weak that it is essentially meaningless. And neither set of rules is being adequately enforced. It should come as no surprise then, that the demonstrable financial losses to retirement savers arising from conflicted advice have not abated and collectively continue to total tens of billions of dollars a year.

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[28] NASAA Publishes Regulation Best Interest Examination Initiative Update and Issues Proposed Revisions to Its Broker-Dealer Conduct Model Rule (Sept. 23, 2023), https://www.nasaa.org/69493/nasaa-publishes-regulation-best-interest-examination-initiative-update-and-issues-proposed-revisions-to-its-broker-dealer-conduct-model-rule/.

[29] 2022 Report on FINRA's Examination and Risk Monitoring Program (Feb. 2022), 2022-report-finras-examination-risk-monitoring-program.pdf; 2023 Report on FINRA's Examination and Risk Monitoring Program (Jan. 2023), https://www.finra.org/rules-guidance/guidance/reports/2023-finras-examination-and-risk-monitoring-program#:~:text=The%202023%20Report%20on%20FINRA's,collectively%2C%20regulatory%20operations%20programs).

II. The proposed Revised Definition of an investment advice fiduciary is essential for the protection of retirement savers and the fulfillment of Congress's goals in ERISA, and it is well-designed to achieve those goals while providing advisers with flexibility in their preferred business models.

The need for a new definitional rule is abundantly clear. Since 1975, the rule defining investment advice fiduciaries has included huge loopholes that have allowed advisers to avoid the duties imposed by ERISA, exacting a huge financial cost as explained above. For example, the rule requires that advice be given on a regular basis, thus carving out many rollover recommendations, no matter how much money is at stake. Second, the rule provides that advice must be rendered pursuant to a mutual agreement or understanding that the advice will serve as a primary basis for the client's investment decision. Advisers have often exploited this senseless requirement by disavowing it in fine-print contracts, thus avoiding entirely the obligations that ERISA would otherwise impose. Neither of these elements in the current five-part test is found anywhere in ERISA, which defines an investment advice fiduciary simply and broadly as a person who ***"renders investment advice for a fee or other compensation direct or indirect, with respect to any moneys or other property of such plan***, or has any authority or responsibility to do so."[30] Moreover, these narrow tests clearly conflict with the Congressional purposes underlying ERISA: to expand, not constrict, protections for retirement savers and their retirement assets.[31]

The Revised Definition will effectively close these loopholes, ensure that rollover recommendations will be covered, and preclude the use of contract clauses that rob investors of the protections to which they are entitled under ERISA. As described in the Revised Definition Release, the ***core provisions*** in the rule are as follows:

> The Department proposes that a person would be an investment advice fiduciary under Title I and Title II of ERISA if they provide investment advice or make an investment recommendation to a retirement investor (i.e., a plan, plan fiduciary, plan participant or beneficiary, IRA, IRA owner or beneficiary or IRA fiduciary); the advice or recommendation is provided "for a fee or other compensation, direct or indirect," as defined in the proposed rule; and the person makes the recommendation in one of the following contexts:
>
> - The person either directly or indirectly (e.g., through or together with any affiliate) has discretionary authority or control, whether or not pursuant to an agreement, arrangement, or understanding, with respect to purchasing or selling securities or other investment property for the retirement investor;

[30] 29 U.S.C. § 1002(21)(A) (emphasis added).

[31] *See* 120 Cong. Rec. 3977, 3983 (1974) (Rep. Perkins) ("The Committee has adopted the view that the definition of fiduciary is of necessity broad. . . . This is a departure from current judicial precedents but is necessary to the proper protection of these plans.").

- The person either directly or indirectly (e.g., through or together with any affiliate) ***makes investment recommendations to investors on a regular basis as part of their business and the recommendation is provided under circumstances indicating that the recommendation is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest***; or

- The person making the recommendation represents or acknowledges that they are acting as a fiduciary when making investment recommendations.[32]

Most importantly, this revised definition ***closes loopholes*** by removing the nonsensical requirements from the 1975 rule that advice must be provided to the client on a regular basis and that there must be a mutual understanding that the advice will serve as the primary basis for the client's investment decisions. At the same time, it establishes new criteria to ensure advice is covered only if it is provided under circumstances indicating that the investor could reasonably place their ***trust and confidence*** in the advice provider. It does so by ensuring two elements: first that the adviser is generally in the business of providing recommendations to clients i.e. that the adviser makes recommendations to investors on a regular basis as part of their business, and second, that under the specific circumstances, the recommendations are individualized and may be relied upon as the basis for decisions in the best interest of the investor.

This approach ***addresses the Fifth Circuit's*** staunchly held albeit erroneous view that any definition of an investment advice fiduciary under ERISA must incorporate the elements of trust and confidence, a common law concept that Congress actually expanded upon when defining the modern statutory fiduciary duty in 1974. Thus, the Revised Definition broadly protects retirement savers by ensuring that the investment advice they receive is subject to the protections under ERISA, as embodied in PTE 2020-02, but all in accordance with the Fifth Circuit's views.

To address a particularly important and common practice among advisers, the Revised Definition Release appropriately explains that the use by advisers of ***titles*** used to engender a sense of trust and confidence among clients will support the application of the "trust and confidence" prong of the definition above:

> For example, some stakeholders have previously expressed concern that investment advice providers that adopt titles such as financial consultant, financial planner, and wealth manager, are holding themselves out as acting in positions of trust and confidence while simultaneously disclaiming status as an ERISA fiduciary. In the Department's view, an investment advice provider's use of such titles routinely involves holding themselves out as making investment recommendations that will be based on the particular needs or individual

[32] Revised Definition Release at 75890.

> circumstances of the retirement investor and may be relied upon as a basis for investment decisions that are in the retirement investor's best interest.[33]

This approach is appropriate and necessary since the ways in which advisers portray themselves have a powerful impact on investors. Such titles, along with common advertising campaigns, clearly are intended to engender the sense among investors that they can place their trust and confidence in their advisers—even though when fighting against the DOL's reforms or defending themselves in court, advisers hypocritically insist they are mere salespeople, peddling a product and nothing more.

The rule is appropriately broad and protective in other respects. For example, it defines the concept of ***recommendations*** to include a wide range of advisory activities relating to the purchase or sale of investments, investment strategies, the management of securities or other assets, and the selection of other persons to provide investment advice. And it expressly encompasses in that definition recommendations as to "***rolling over***, transferring, or distributing assets from a plan or IRA."[34] The Release further explains that the core meaning of recommendation is a communication that based on its content, context, and presentation, would reasonably be viewed as a suggestion that the retirement investors engage in or refrain from engage in or refrain from taking a particular course of action.[35]

It similarly defines **"*compensation*"** broadly to include compensation that is direct or indirect, from any source, and paid for the advice or "in connection with or as a result of the recommended transaction."[36] And it appropriately includes numerous forms of compensation, including fees, commissions, revenue sharing payments, marketing fees, payments in return for shelf space, and other items of value.[37] These broad formulations in the rule are essential given the wide range of recommendations that advisers make to their clients and the many forms of compensation they receive, directly and indirectly, that can create conflicts of interest.

The rule also expressly limits the use of ***disclaimers***, thus neutralizing the ability of advisers to continue the common practice of inserting language in contracts with clients that in effect waives the applicability of the ERISA standards to the advisory relationship. It stipulates that:

> Written statements by a person disclaiming status as a fiduciary under the Act, the Code, or this section, or disclaiming the conditions set forth in paragraph (c)(1)(ii) of this section, will not control to the extent they are inconsistent with the person's oral communications, marketing materials, applicable State or Federal law, or other interactions with the retirement investor.[38]

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[33] Revised Definition Release at 75903.
[34] Revised Definition Release at 75979.
[35] Revised Definition Release at 75904.
[36] Revised Definition Release at 75978.
[37] Revised Definition Release at 75978.
[38] Revised Definition Release at 75977.

And the Revised Definition contains no carve-outs for recommendations to supposedly ***sophisticated investors***. The very notion of the sophisticated investor is largely a myth, as even investors with considerable expertise in finance and considerable wealth require not only the disclosure of material information to make investment decisions but also protections from fraud and abuse, including conflicts of interest. In any case, as the Release points out, there is no currently reliable test for investor sophistication, as wealth and income have not been established as strong proxies for financial sophistication or inconsistent with a relationship of trust and confidence.[39] "Moreover, and independently, nothing in the statute's text suggests that Congress intended to categorically deny fiduciary protection to "sophisticated investors."[40]

While the new definition is appropriately broad, it also establishes appropriate limits, carve-outs, and flexible allowances. For example, it leaves all ***business models*** intact, as the Release repeatedly explains, including commission-based compensation, limited menus of investments, and proprietary products, subject to compliance with the PTE. It also imposes no continuing obligation on advisers to monitor recommendations to ensure they remain appropriate for a plan or IRA; such a duty is left to "the reasonable expectations, understandings, arrangements, or agreements of the parties."[41]

Importantly, the DOL intends the Revised Definition to apply "broadly to recommendations to ***plan and IRA fiduciaries*** acting on behalf of plans and IRAs," thus affording protections against adviser conflicts of interest to employers seeking to establish a high-quality retirement plan for the benefit of their employees.[42] But at the same time, it makes reasonable allowances for certain activities that do not involve recommendations tailored to the specific needs of plan participants or IRA investors. For example, with respect to "***wholesaling***" activity, "which involves communications by product manufacturers or other financial service providers to financial intermediaries who then directly advise plans, participants, beneficiaries, and IRA owners and beneficiaries, the Department believes that communications to financial intermediaries would typically fall outside the scope of proposed paragraph (c)(1)(ii) because they would not involve recommendations based on the particular needs or individual circumstances of the plan or IRA serviced by the intermediary."[43] Similarly, ***platform providers*** "who merely identify investment alternatives using objective third-party criteria (e.g., expense ratios, fund size, or asset type specified by the plan fiduciary) to assist in selecting and monitoring investment alternatives, without additional screening or recommendations based on the interests of plan or IRA investors, would not be considered under the proposal to be making a recommendation."[44]

The Revised Definition also leaves undisturbed a separate allowance for investment ***education***, which is addressed in the DOL's Investor Bulletin 96–1, reinstated in 2020. That Bulletin identifies examples of four categories of information and materials regarding participant-directed individual account plans—plan information, general financial and investment

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[39] Revised Definition Release at 75907.
[40] Revised Definition Release at 75907.
[41] Revised Definition Release at 75910.
[42] Revised Definition Release at 75907.
[43] Revised Definition Release at 75907.
[44] Revised Definition Release at 75907-08.

information, asset allocation models, and interactive investment materials—that do not constitute investment advice. And that carve-out applies irrespective of who provides the information (e.g., plan sponsor, fiduciary, or service provider).

The DOL has also sought to ***harmonize*** the elements—including specifically the definition of a "recommendation"[45]—with those found in the SEC's Reg BI and the standards under the Investment Advisers Act, with an eye to minimizing compliance costs:

> In crafting this proposal, the Department has worked to align its proposed definition with Regulation Best Interest and the Advisers Act where it can. ERISA has a functional fiduciary test and imposes fiduciary status only to the extent the functional test is satisfied. The Department intends for the compliance obligations under this proposal to broadly align with the standards set by the SEC where practicable and has tried to accomplish such alignment in this proposal. The Department believes that by harmonizing the application of fiduciary duty for retirement investment advisers across regulatory regimes, retirement investors will benefit from more uniform protections from conflicted advice. While extending fiduciary duty to more entities will generate costs, the Department believes any new compliance costs will not be unduly burdensome as the proposal broadly aligns with those compliance obligations imposed under the Investment Advisers Act and the SEC's Regulation Best Interest on investment advisers and broker-dealers, respectively, and simply expands them to larger portions of the retirement market.[46]

Thus, the DOL has developed a new definition of an investment advice fiduciary that will effectively close the existing loopholes and appropriately subject far more investment advice to the requirements in ERISA and the applicable PTEs. And as explained in the Revised Definition Release, this in turn will enable the enforcement mechanisms established in ERISA—for the DOL as well as Title I plan participants and beneficiaries—to serve more broadly as deterrents against conflicted advice and as remedies for those who suffer harm from that advice.

> Under the proposal, the full range of covered investment advice interactions with Title I plans would be subject to the Department's robust enforcement program as well as to a private right of action. In general, participants and beneficiaries have the right to bring suit under ERISA 502(a) against fiduciaries who breach their duties and obligations to the plan, including engaging in nonexempt prohibited transactions. This private right of action, which ensures participants and beneficiaries have ready access to the Federal courts, provides critical protection of tax advantaged retirement plans. For advice interactions not currently covered by relevant standards of conduct, such as much advice provided to plan fiduciaries, these enforcement measures will help to ensure the proposal is implemented

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[45] Revised Definition Release at 75904 (noting that "the Department would consider a recommendation for purposes of the SEC's Regulation Best Interest as a recommendation for purposes of this proposed regulation").

[46] Revised Definition Release at 75913.

effectively. For advice interactions that are subject to state regulation, under the proposal they will likely have stronger oversight, which will provide greater protections to investors.[47]

III. <u>The proposed changes to PTE 2022-02 are appropriate, although the DOL should further strengthen it.</u>

PTE 2020-02 adopted in 2020 established conditions under which fiduciaries could lawfully accept compensation and engage in certain principal transactions with plans and IRAs that would otherwise be prohibited. The Revised PTE will leave all of the core provisions in PTE 2020-02 intact while making modest but important changes to provide more clarity for the advisers relying on the exemption and more disclosure for the benefit of investors. As amended, the PTE will provide that financial institutions and investment professionals[48] must:

- adhere to Impartial Conduct Standards requiring them to:
  - provide advice in the best interest of the retirement investor, i.e., advice that is prudent and does not place the interests of the adviser ahead of the interests of the investor;
  - receive no more than reasonable compensation and comply with Federal securities laws regarding "best execution" of investment transactions; and
  - avoid making materially misleading statements about investment transactions and other relevant matters;
- acknowledge they are providing fiduciary advice and are fiduciaries;
- provide a written statement of the best interest standard of care;
- provide a written description of their services and material conflicts of interest;
- provide a written statement that the investor has the right to obtain specific information about costs, fees, and compensation;
- document and disclose the specific reasons that any rollover recommendations are in the retirement investor's best interest;
- adopt policies and procedures designed to ensure compliance with the Impartial Conduct Standards and mitigate conflicts of interest;
- conduct an annual retrospective compliance review; and
- maintain records for a period of six years demonstrating compliance with the PTE.[49]

In addition, the Revised PTE 2020-02 continues to include "***self-correction***" and "***eligibility***" provisions. The self-correction provision essentially excuses violations if the adviser remediates any harm and makes timely reports:

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[47] Revised Definition Release at 75942.

[48] The Revised PTE generally covers "Financial Institutions" and "Investment Professionals," along with "Affiliates" and "Related Entities." In this comment letter on the subject of the Revised PTE, we generally use the term "adviser" to encompass all of these entities.

[49] *See generally* Revised PTE Release at 75999-76003.

> A non-exempt prohibited transaction will not occur due to a violation of the exemption's conditions with respect to a transaction, provided:
>
> (1) Either the violation did not result in investment losses to the Retirement Investor or the Financial Institution made the Retirement Investor whole for any resulting losses;
>
> (2) The Financial Institution corrects the violation and notifies the Department of Labor of the violation and the correction via email to IIAWR@ dol.gov within 30 days of correction;
>
> (3) The correction occurs no later than 90 days after the Financial Institution learned of the violation or reasonably should have learned of the violation; and
>
> (4) The Financial Institution notifies the person(s) responsible for conducting the retrospective review during the applicable review cycle and the violation and correction is specifically set forth in the written report of the retrospective review required under subsection II(d)(2).[50]

The eligibility provision is more extensive. It essentially prohibits reliance on the exemption for a period of ten years if the adviser is subject to a variety of criminal convictions or receives a notice of ineligibility from the DOL for a systemic pattern of violating the conditions of the exemption, providing materially misleading information to the DOL, or engaging in other misconduct. It also includes a six-month wind-down period before the ineligibility becomes effective, opportunities to be heard, and opportunities to cure.[51]

Finally, the PTE will require the retention of ***records*** demonstrating compliance with the exemption for six years.

The proposed amendments to the current PTE are important and beneficial. They include the following elements in the proposed Revised PTE:[52]

- The Revised PTE will add a definition of ***riskless principal transaction*** to highlight the distinction between covered principal transactions and riskless principal transactions. This is an important addition, as it will help reinforce the limited types of assets that may be the subject of a covered principal transaction. The release also rightly cautions that the definitions are intentionally narrow in light of the acute conflicts of interest created by principal transactions.

- The Revised PTE will clarify that among those who can rely on the exemption are fiduciaries ***acting on behalf*** of a Plan or an IRA, to ensure that under the exemption, the advice given to a plan or IRA fiduciary is in the best interest of the plan or IRA, not the fiduciary.

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50 Revised PTE Release at 76001.
51 Revised PTE Release at 76001-02.
52 *See generally* Revised PTE Release at 75979-90 and 75999-76004.

- The Revised PTE will narrow some current exclusions, to help ensure that the exemption is applied more broadly, with the result that a broader array of high-quality advice will be provided to retirement investors. Thus, it will specifically provide that the exemption will be available to financial institutions providing investment advice through computer models, i.e., ***robo advice***.

- The Revised PTE will clarify that advisers may not rely on the exemption if they are acting in a fiduciary capacity ***other than*** as an investment advice fiduciary.

- The Revised PTE will add an example to the formulation of the best interest standard, which will make clear that under that standard, it is impermissible for the adviser to recommend a product that is ***worse*** for the investor because it is better for the adviser's bottom line.

- The Revised PTE will clarify that "materially misleading" includes ***omitting*** information that is necessary to prevent the statement from being misleading to the investor under the circumstances.

- The Revised PTE will ensure written ***disclosure*** of the best interest standard.

- The Revised PTE will consolidate the requirement that, before making a rollover recommendation, the adviser must consider and ***document their conclusion*** that a rollover is in the investor's best interest. This is a critically important requirement, given the magnitude and importance of most rollover transactions and the potential for conflicts of interest to induce recommendations that inflict long-term financial harm on investors.

- The Revised PTE makes appropriate changes that will strengthen the requirements governing ***retrospective review*** designed to detect violations of the PTE and ensure compliance.

- The Revised PTE strengthens the duty to maintain policies and procedures by including examples of some actions advisers may not take because a reasonable person could conclude they are likely to encourage advisers to make recommendations that are not in the best interest of the investor. Included among them is a prohibition against the use of ***quotas, appraisals, performance or personnel actions***, bonuses, contests, special awards, differential compensation, or other similar actions or incentives that are intended or likely to result in recommendations not in the investor's best interest. This is a positive addition to the PTE. The Release also makes clear that the policies and procedures must be designed to protect investors from recommendations to make excessive trades, to buy products such as annuities that are not in the investor's best interest, or to allocate excessive amounts to illiquid or risky investments.

- The Revised PTE strengthens the provisions surrounding the policies and procedures by requiring advisers to provide their complete policies and procedures to the DOL ***within 10*** business days of a request.

In a number of other respects, the proposed changes are beneficial as far as they go but should be strengthened to better protect retirement investors. For example:

- The Revised PTE will make wording changes to the definition of a "***covered principal transaction.***" The Release explains that the DOL is *also* considering a change making clear that a covered principal transaction is a transaction *for cash*, thus preventing in-kind transactions from being treated as covered principal transactions. This change should be made, as it will, as explained in the Release, reduce the complexity and the conflicts of interest that otherwise would attend such transactions.[53]

- The Revised PTE seeks to strengthen the disclosure of fiduciary status currently required under the PTE. It explains the DOL's concern that some parties evade this requirement with artful or conditional acknowledgments to the effect that they ***may*** be fiduciaries or that they are fiduciaries ***to the extent*** they meet definitions under ERISA or the Code. The DOL proposes to address this problem by requiring the written acknowledgment to provide that the adviser is providing fiduciary investment advice to the investor and is a fiduciary under Title I, the Code, or both when making an investment recommendation. While the need to address this form of evasion is clear, it is not clear that the proposed amendment will cure the problem, as it appears to be essentially the same as the current requirement. The DOL should therefore also provide that the acknowledgement must be "***unconditional***." In addition, the DOL should include a general ***anti-evasion clause*** in the PTE to curb this form of evasion and any other conduct designed to avoid the substance of the PTE's requirements.

- The Revised PTE will require the disclosure of material conflicts of interest to include, in plain English, whether the investor will pay for services directly or indirectly, including through third-party payments. This is a positive enhancement, but the ***plain English*** requirement should apply to all of the disclosures required under the PTE.

- The Revised PTE will require advisers to inform investors of their right to obtain specific information regarding costs, fees, and compensation that is described in dollar amounts, percentages, formulas, or other means. This is beneficial but it falls short. The final PTE should require this type of ***cost and compensation information***, preferably in dollar amounts, to be disclosed to every investor prior to the advisory service to the extent possible. It is clearly material, and the opportunity to acquire it later will not be meaningful for many if not most investors.

- The Revised PTE Release indicates that the DOL seeks comment on whether it should require advisers to maintain a ***public website*** containing the pre-transaction disclosures,

[53] Revised PTE Release at 75981.

including a description of the adviser's business model, associated conflicts of interest, and a schedule of typical fees. This should be required in the Revised PTE, as it will facilitate meaningful and timely disclosure to investors, especially younger investors who rely heavily on website-based interactions.

In addition, the ***self-correction*** provision raises significant concerns. It provides that a non-exempt prohibited transaction will not be deemed to occur as a result of a violation of the conditions in the Exemption provided a number of conditions are satisfied: 1) the violation caused no retirement investor losses or did cause losses but the financial institution made the retirement investor whole; 2) the financial institution corrects the violation within 30 days; (3) the correction occurs no later than 90 days after the adviser learns of the violation or reasonably should have learned of the violation; and 4) the violation and correction are set forth in the retrospective review required elsewhere under the Exemption.

In the adopting release for the 2020 version of PTE 2020-02, the DOL expressed the view that the self-correction provision would increase incentives among investment professionals to identify and correct violations.[54] In the current Release, the DOL simply notes that it will retain the provision, and that since the initial adoption, it has received "several" self-correction emails under this provision.[55]

We believe that on balance, retaining this provision is more likely to have undesirable effects. In fact, some firms will be inclined to relax their approach to compliance based on the knowledge that, if violations occur and are detected, they can likely invoke the self-correction process and avoid sanctions. Fueling this attitude will be the knowledge that the detection of many violations will hinge on investor complaints, yet retirement investors are often unaware that their investment professionals have made investment recommendations contrary to their best interest. Thus, the self-correction provision may encourage a lax approach to compliance by instilling the attitude that "violations may never surface in the first place, and even if they do, they can be neutralized under the self-correction provision."

Accordingly, this provision should be ***eliminated*** from the Exemption, as it will undermine accountability and compliance. Instead, the DOL should retain its general discretion to tailor its enforcement approach to situations where the violation is minor, unintentional, and quickly corrected. At most, the PTE should simply include a de minimis exemption. If the self-correction provision is retained, it should be limited to good faith or technical violations and it should specify the maximum number of times the self-correction provision may be invoked.

The Revised PTE also retains an extensive ***eligibility*** section imposing a 10-year ban on reliance upon the exemption by investment professionals or firms in the event of certain events, including certain criminal convictions and engaging in a pattern or practice of violating the conditions of the exemption. In the Release, the DOL explains that it is proposing to retain this provision and that it "continues to maintain that the eligibility provisions ensure that Financial

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54 Prohibited Transaction Exemption 2020–02, Improving Investment Advice for Workers & Retirees, 85 Fed. Reg. 82798, 82841 (Dec. 18, 2020).

55 Revised PTE Release at 75988.

institutions provide reasonable oversight of investment Professionals and that both adopt a culture of compliance."[56]

The Release also explains various amendments intended to improve the eligibility provisions. For example, it refines the scope of the provision to include ***affiliates***, to address potential evasion through mere changes in corporate form. It also broadens and enumerates the ***crimes*** that can trigger ineligibility. It adds to the ***predicate violations*** by including a systematic pattern or practice of failing to correct prohibited transactions, report them to the IRS, and pay the applicable excise tax. It reduces the ***"wind-down"*** period—the time between the conviction or other trigger for ineligibility and the actual ineligibility—from twelve months to six, appropriately explaining that the one-year wind-down period provides too much time in which noncompliance and inappropriate conduct could continue. And it eliminates the opportunity to be ***heard*** if the ineligibility arises from conviction by a U.S. federal or state court, since those courts will have provided sufficient due process.[57]

The eligibility provisions are important components of the Revised PTE, as they will help incentivize compliance. And the changes will improve upon the existing eligibility framework. However, the eligibility provisions, even as amended, are still overly encumbered with provisos and procedural requirements that will dilute their effectiveness. They should therefore be further ***strengthened***.

For example, the Revised PTE provides that, before issuing a written ineligibility notice to an investment professional or firm, the DOL must first issue a written warning identifying the misconduct supporting ineligibility and providing a ***six-month*** opportunity to cure. Further, if the DOL determines at the end of six months that the adviser has not taken appropriate action to prevent recurrence of the disqualifying misconduct, it must still provide the investment professional or firm with an opportunity to be ***heard*** in person, in writing, or in combination. Only after this process concludes may the DOL actually effectuate the ineligibility by issuing a formal notice.

This ***opportunity to cure*** should be eliminated from the Revised PTE. As with the self-correction provision, it will undermine compliance and accountability by reassuring investment professionals and firms that, even if they engage in a "systemic pattern or practice" of violating the conditions of the exemption, or even provide materially misleading information to the DOL related to their conduct under the exemption, they will have the opportunity to cure and continue to rely on the exemption. It is implausible that investment professionals and firms who have engaged in a "systematic pattern or practice" of violations will immediately and completely desist from such misconduct during the lengthy cure period. As a result, this provision threatens to expose retirement investors to continued harm while the half-year opportunity to cure unfolds.

Finally, we urge the DOL to eliminate the related provision allowing investment professionals who are found ineligible to rely on the exemption (based upon their criminal

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56 Revised PTE Release at 75988.

57 Revised PTE Release at 75988-90.

convictions or other serious misconduct) to nevertheless rely on ***other*** prohibited transaction exemptions or seek an individual transaction exemption from the DOL. This, too, conflicts with a proper regulatory approach that should seek to protect the public and deter misconduct by foreclosing exemptive relief to those investment professionals and firms who are demonstrably unfit to enjoy it.

Overall, and subject to our concerns set forth above, the Revised PTE, with its combination of conduct standards and disclosure and documentation obligations, in conjunction with the new definitional rule, will do an enormous amount to safeguard retirement savers from adviser conflicts of interest.

IV. The arguments tirelessly advanced by many in the financial services industry in opposition to these essential protections are meritless and in some cases disingenuous.

Opponents of the Proposals are launching every conceivable argument against them. They range from attacks on the need for these reforms, challenges to the DOL's authority to promulgate them, sky-is-falling predictions that they will actually harm investors, and even charges that the DOL has failed to comply with the procedural requirement governing rulemaking under the APA. We address each of these attacks in turn.

A. There is no other regulatory regime that can adequately protect retirement savers.

As a threshold matter, some industry opponents claim there is no need for these reforms in light of other regulatory provisions that have been recently adopted, including specifically the SEC's Reg BI and the NAIC's model rule governing annuity sales. Yet neither of those rules have either the scope or substantive strength to protect retirement assets from adviser conflicts of interest. In short, they cannot substitute for the strong and broad standards of care and loyalty that Congress mandated in ERISA and that the Proposals seek to implement. Nor did Congress intend alternative regulatory provisions to substitute for the stringent standards it chose to incorporate in ERISA.

1. Reg BI is limited to securities recommendations to individual investors.

While the SEC finalized Reg BI in 2019 to enhance the standard of conduct for broker-dealers, this standard does not apply to all investment professionals, all products, or all accounts. The SEC's Reg BI is strictly limited in scope to recommendations regarding ***securities***. Yet retirement savers are often advised to purchase a wide array of non-securities products, including fixed indexed annuities, real estate, cryptocurrencies, precious metals, CDs, and derivatives such as futures and options. To the extent an investment professional provides recommendations about any of these non-securities, Reg BI simply does not apply and offers no protection against advisers' conflicts of interest. In addition, Reg BI is limited to recommendations made to ***individual retail customers***. That means, for example, that advice to an employer seeking to create a menu of high-quality investment options for their employees remains vulnerable to conflicted investment advice under Reg BI.

2. The NAIC model rule is narrow and weak.

The NAIC adopted updates to its Annuity Transactions Model Regulation (#275) in 2020. Claims that the NAIC's model rule can somehow substitute for the Proposals are plainly false if not disingenuous. In reality, it cannot come close to filling the regulatory gaps in the current DOL rules.[58] Consider these undeniable weaknesses in the NAIC's model rule:

- In the first instance, ***only 43 states*** have actually adopted the model, so a huge swath of American retirement savers do not benefit at all from the feeble protections it offers.[59]

- It only applies to the sale of ***annuity products***, not the entire range of investments routinely pressed upon retirement savers. (Sec. 2)

- The model expressly ***disclaims*** that it creates "a fiduciary obligation or relationship," providing only that it creates a regulatory obligation. (Sec. 6A(1)(d))

- It imposes a "best interest" standard in name only. It nowhere prohibits producers or insurers from placing their interests ahead of their customers' interests. Instead, it feebly provides that an insurance producer "has met" their best interest obligation if they simply have "a reasonable basis to believe the recommended option effectively ***addresses*** the consumer's financial situation and ***insurance needs***." (Sec. 6A(1)(a)(iii))

- The provision regarding conflicts of interest are doubly weak, in substance and in scope. First, as to substance, the model essentially only requires that a producer ''avoid or reasonably ***manage and disclose*** material conflicts of interest." (Sec. 6A(3)) And it thoroughly guts this provision by excluding entirely from the scope of the definition of "material conflict of interest" any "***cash compensation or noncash compensation***"—even though such forms of compensation obviously create the most intense conflicts of interest. (Sec. 5I(2)) Thus, huge commissions, all-expense paid vacations, sporting and theatre tickets, and any other form of cash or noncash compensation can be used to encourage and reward recommendations that put the insurance professional's financial interest ahead of the individual trying to save for retirement. As a result, the NAIC model rule essentially imposes no meaningful duty to address producers' conflicts of interest.

- The model rule also does not cover annuity recommendations ***inside 401(k)s or 403(b)s***. Plan sponsors, and thereby plan participants, do not receive even the standard's thin protections from recommendations to include sub-optimal annuities as an investment option. (Sec. 4B)

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58 For a thorough review of the features of the NAIC model rule—what it does and does not provide—*see* CFP Board of Standards, Comparing CFP Board of Standards Code of Ethics and Standards of Conduct to The NAIC's Suitability in Annuity Transactions Model Regulation (Nov. 13, 2023), https://www.cfp.net/ethics/compliance-resources/2023/11/comparing-cfp-boards-code-and-standards-to-the-naic-model-regulation-275.

59 Revised Definition Release at 75898.

- The model is further limited in scope in that it expressly does not require "analysis or consideration of any products ***outside*** the authority and license of the producer or other possible alternative products or strategies available in the market at the time of the recommendation." (Sec. 6A(1)(c))

- The model generally applies only to individual "producers," i.e., agents licensed to "sell, solicit, or negotiate" insurance, ***not to the insurers*** responsible for supervising the producer. (Sec. 5L)

- The model includes a safe harbor, providing that compliance with "***comparable standards***" will satisfy the requirements of the rule. (Sec. 6E)

The weaknesses in the NAIC model rule are especially damaging because the annuity products now widely offered to retirement savers are "notoriously complex" and investors are compelled to rely on their insurance agents for guidance.[60] Yet with such a weak state-level set of rules currently in place governing the sale of annuities, those investors are largely at the mercy of the conflicts of interest motivating those agents.

Overarching all of these weaknesses in Reg BI and the NAIC model rule is Congressional ***intent***: Nothing in ERISA states or implies that the standards governing advisers under the securities laws or state insurance laws can substitute for the requirements that Congress set forth in ERISA.

B. <u>Disclosures alone cannot adequately protect retirement savers.</u>

In a related vein, some insist that in place of the Proposals, the DOL should simply rely on disclosures to protect retirement savers from conflicts of interest. But to make the argument is to refute it, as simply providing more information to investors cannot, in theory or in practice, substitute for affirmative requirements and prohibitions governing adviser behavior. While disclosure is an essential component of financial regulation, it suffers from ***multiple limitations*** and it therefore cannot possibly substitute for the affirmative obligation to act in the best interest of a client.

Based on experience and expert studies, we know that disclosure is subject to numerous failings. Often, investors don't read them, don't receive them in a timely fashion, or don't understand them. Even when effective disclosures are imparted, investors often remain uncertain about what course of action to take in light of the disclosures. Moreover, disclosures can readily be overridden by assurances from advisers that the disclosures are merely technical boilerplate. Numerous studies confirm these shortcomings in regulatory disclosure, some even establishing that disclosures can have the perverse effect of instilling an unfounded sense of investor trust in advisers while also emboldening advisers to take advantage of their clients. Above all, it is clear that reliance on disclosure is the antithesis of what Congress intended in ERISA, which imposes

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60 Revised Definition Release at 75939.

the most stringent affirmative obligations and restrictions on those who provide investment recommendations to retirement savers.

C. The DOL has ample authority to promulgate the Proposals.

1. The DOL has explicit authority.

The DOL has all the authority it needs to promulgate the Revised Definition and the Revised PTE 2020-02. Since ERISA's enactment, the DOL has been expressly given the authority to issue ***regulations "necessary or appropriate*** to carry out the provisions" of the statutory provisions imposing fiduciary obligations on advisers and others who deal with retirement plans.[61] ERISA further provides that "among other things, such regulations may define accounting, technical and trade terms used in such provisions; may prescribe forms; and may provide for the keeping of books and records, and for the inspection of such books and records . . . ."[62]

ERISA also explicitly provides that the DOL may create ***exemptions***.[63] At the same time, the DOL is required to ensure that exemptions from the prohibited transactions are "in the interests of the plan and of its participants and beneficiaries," and "protective of the rights of participants and beneficiaries of such plan."[64]

In addition, pursuant to the President's Reorganization Plan No. 4 of 1978,89 which Congress ratified in 1984, the DOL's authority was expanded to include authority to issue regulations, rulings, and opinions on the definition of a fiduciary with respect to Title II plans under the Code (including IRAs) and to grant administrative prohibited transaction exemptions applicable to them.[65]

Thus, the DOL has clear and explicit statutory authority to promulgate the Revised Definition and the Revised PTE.

2. The major questions doctrine does not apply.

On this subject, some opponents of the Proposals appear to harken back once again to the Fifth Circuit's opinion, giving voice to the notion that these reforms will effect an upheaval in the advice marketplace, with profoundly disruptive social and economic consequences, on a scale that requires especially clear and specific Congressional authorization. Yet the so-called "major questions" doctrine is inapplicable here. Far from threatening the rare and extreme type of economic upheaval that can trigger the major questions doctrine, the Revised Definition merely ***closes loopholes and aligns the DOL's rules*** governing investment advice with what ERISA has

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61 29 U.S.C. § 1135.

62 *Id.*

63 29 U.S.C. § 1108(a) (the Secretary "may grant a conditional or unconditional exemption of any fiduciary or transaction, or class of fiduciaries or transactions, from all or part of the [prohibited transactions]").

64 29 U.S.C. § 1108(a)(2).

65 Revised Definition Release at 75900.

provided since 1974. The case for the major questions doctrine is even more strained with respect to the amendments to PTE 2022-02. They are by any account modest, essentially leaving intact the same requirements that have been applicable to retirement advisers for several years. And they align with the SEC's rule governing securities, which has been in effect since 2020. In any event, the DOL's authority to promulgate these rules is ***clear and unmistakable***; to the extent these reforms could possibly be perceived as revolutionary, it is nevertheless what Congress authorized the DOL to implement.

In *West Virginia v. EPA,*[66] the Supreme Court enunciated the principle that where an agency purports to exercise "'extravagant statutory power over the national economy,'" with vast "economic and political significance,"[67] and representing a "'transformative expansion in [its] regulatory authority,'" *id.* at 142 S. Ct. at 2609 (citation omitted), the agency must point to especially "clear congressional authorization" for the authority it has claimed.[68] But the DOL's Proposals do not involve an assertion of extravagant power over the national economy or even a transformative expansion of its regulatory authority under ERISA. Nor do they lack a clear statutory basis. In reality, the Proposals represent the reasonable exercise of clear statutory authority to regulate investment advice affecting retirement savers, something the DOL has been doing for decades.[69] Nor can the Proposals be characterized as extravagant or transformative. Rather, they seek only modest adjustments to the existing requirements governing advice to retirement savers already set forth in PTE 2020-02, and to ensure that the definition of an investment advice fiduciary actually aligns with what Congress said and intended in ERISA. And along the way, the DOL is taking great pains to adhere to the parameters set forth in the Fifth Circuit's 2018 decision—no matter how misguided they may be.

To the extent the Proposals expand the application of the fiduciary standard to members of the industry heretofore exempt, that is largely the result of the major ***evolution*** of the retirement landscape over the past 50 years—including the disappearance of traditional defined benefit plans, the growing complexity of the financial markets, and retirement savers' need for trustworthy, unbiased advice to manage their own savings. The major questions doctrine does not prevent agencies from addressing new threats to the public interest that come with such changes.[70]

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[66] 142 S. Ct. 2587 (2022).

[67] *Id.* at 2608 (internal quotation marks omitted).

[68] *Id.* at 2609 (internal quotation marks omitted).

[69] *See Loper Bright Enterprises, Inc. v. Raimondo*, 45 F.4th 359, 365 (D.C. Cir. 2022) (explaining that the doctrine does not apply where Congress "delegated broad authority to an agency with expertise and experience within a specific industry, and the agency action is so confined, claiming no broader power to regulate the national economy").

[70] *See* J. Robert Brown, Jr., *Mother Nature on the Run: The SEC, Climate Disclosure, and the Major Questions Doctrine*, 60 San Diego L. Rev. 321, 369 (2023) (arguing that the major questions doctrine must not be invoked to prevent agencies from modernizing rules and responding to changing markets); *see also* Daniel T. Deacon and Leah M. Littman, *The New Major Questions Doctrine*, 109 Va. L. Rev. 1009, 1081 (2023) (arguing against applying the major questions doctrine simply when "the agency's considered expertise, perhaps in conjunction with unanticipated changes or new information, counsels a previously untried regulatory approach").

In ERISA, Congress delegated the authority to adopt rules protecting retirement assets to the DOL, the agency with expertise and experience regulating employee benefit plans and those who deal with them. Certainly, the DOL here claims no broader power to regulate the national economy. The major questions doctrine does not apply.

D. The Proposals respect and reflect the core—albeit erroneous—holdings of the Fifth Circuit's 2018 decision vacating the DOL's 2016 rule.

The DOL has carefully designed the Revised Definition to avoid any conflict with the Fifth Circuit's decision. The Court held in relevant part that (1) in ERISA, Congress adhered to the common law conception of a fiduciary and thus required a ***relationship of trust and confidence*** as a condition of fiduciary status, and (2) that the DOL, therefore, violated the statute when it sought to expand that definition beyond those common law contours in a new rule that dispensed with the five-part test.[71] Even though the Fifth Circuit's decision is widely regarded as erroneous on this and its other holdings, the Revised Definition responds to the decision by incorporating conditions to ensure that recommendations are covered only where it is reasonable to conclude that a relationship of trust and confidence between adviser and client is present.

Moreover, in another accommodation to the Fifth Circuit's decision, the Proposals nowhere impose ***contractual or warranty obligations*** that could give rise to a private action for violations of the Proposals. The 2016 fiduciary rule required firms to execute best interest contracts with warranties guaranteeing that they and their investment professionals would comply with certain protective conditions. The contract laid the foundation for a private enforcement mechanism for harmed IRA investors, allowing them to sue for a firm's breach of the warranties. The Fifth Circuit viewed these provisions as impermissibly creating a private right of action, beyond the DOL's authority. In light of this holding, the new Proposals neither include a contract requirement nor require firms to warrant that they will comply with certain protective conditions. The only enforcement mechanism for violating the rule with regard to IRA investment recommendations, consistent with already-existing law, is an IRS imposition of an excise tax.

It is nevertheless important to bear in mind the ***fundamentally flawed*** nature of the Fifth Circuit's holding, as Chief Judge Stewart of the Fifth Circuit made clear in his dissent. To arrive at its holdings, the panel had to ignore the plain language of ERISA; misread numerous Supreme Court precedents; and resort to wholly irrelevant extra-statutory sources, such as the provisions in the securities laws governing the distinctions between brokers and investment advisers.[72] Specifically, as explained by Chief Judge Stewart citing Supreme Court precedent, in ERISA, Congress actually intended to expand upon the common law concept of a fiduciary because "the common law of trust did not offer completely satisfactory protections" for retirement savers.[73]

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[71] *Chamber*, 885 F.3d at 368-79.

[72] *Chamber*, 885 F.3d at 388-395 (Stewart, J. dissenting).

[73] *Chamber*, 885 F.3d at 391 (Stewart, J. dissenting) (citing *Varity Corp. v. Howe*, 516 U.S. 489, 496, (1996)).

Moreover, numerous other courts have explicitly and implicitly rejected the core finding of the Fifth Circuit that the ERISA fiduciary duty is rigidly limited to common law notions of trust and confidence and therefore necessarily incorporates the elements of the five-part test, including the regular basis prong. Two federal courts have expressly found that the 2016 rule, which removed the offending elements of the five-part test, more closely adheres to ERISA than does the old rule. Specifically, in *Nat'l Ass'n for Fixed Annuities v. Perez*, the federal district court in D.C. firmly rejected the claim that the 2016 rule exceeded the DOL's authority under ERISA when it removed the five-part test and replaced it with a more expansive interpretation as to when a person becomes an investment advice fiduciary. The court explained that the 2016 rule was actually more in line with ERISA than the old rule:

> ***Indeed, if anything, it is the five-part test—and not the current rule—that is difficult to reconcile with the statutory text.*** Nothing in the [statutory] phrase 'renders investment advice' suggests that the statute applies only to advice provided on a regular basis.[74]

As the court noted, controlling Supreme Court authority provides that "ERISA does not define 'fiduciary' 'in terms of formal trusteeship, but in functional terms of control and authority over the plan, ... thus expanding the universe of persons subject to fiduciary duties . . . . '"[75]

The federal district court in Texas was equally emphatic in ruling that the 2016 rule "better comports with the text, history, and purposes of ERISA." Specifically, in a thorough and well-reasoned decision on all counts, the court rejected the plaintiffs' claim that ERISA requires regular contact between an investor and an adviser to trigger the fiduciary duty:

> Plaintiffs argue the DOL's interpretation of what it means to render investment advice is entitled to no deference, because ERISA requires regular contact between an investor and a financial professional to trigger a fiduciary duty. ***If anything, however, the five-part test is the more difficult interpretation to reconcile with who is a fiduciary under ERISA.*** The broad and disjunctive language of ERISA's three prong fiduciary definition suggests that significant one-time transactions, such as rollovers, would be subject to a fiduciary duty. Under the five-part test, however, such a transaction would not trigger a fiduciary duty. This outcome is seemingly at odds with the statute's text and broad remedial purpose . . . . An interpretation covering such transactions better comports with the text, history, and purposes of ERISA.[76]

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[74] *NAFA,* 217 F. Supp. 3d at 23 (D.D.C. 2016).

[75] *NAFA*, 217 F. Supp. 3d at 25 (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993)).

[76] *Chamber of Commerce of United States of Am. v. Hugler,* 231 F. Supp. 152, 173 (N.D. Tex. 2017) (emphasis added), *rev'd, Chamber of Commerce of United States of Am. v. U.S. Dep't of Labor,* 885 F.3d 360 (5th Cir. 2018); *see also id.* at 173 (explaining that the DOL has decided that

The upshot is that the Fifth Circuit's decision is an outlier among courts that have addressed the DOL's authority to broaden the definition of an investment advice fiduciary under ERISA. It is not legally sound. Yet, the Revised Definition and the Revised PTE each scrupulously abide by the holdings of the case by incorporating a trust and confidence requirement in the rule and by dispensing with any provisions that could be read as creating an impermissible private cause of action.

E. Retirement savers with small nest eggs will not lose access to advice once these important rules are in place.

Small account savers won't lose access to advice once the Proposals are finalized. Claims to the contrary are scare tactics that find no credible support in theory or in practice. In the first instance, the Proposals are designed to leave current advisory ***models intact***, from fee-based and commission-based accounts to firms offering limited menus and proprietary products. Firms of all types are essentially free to continue operating as they have been, provided they act in their clients' best interest when dispensing advice. Firms that are unwilling to abide by the standards of care and loyalty set forth in the Proposals should not be permitted to give investment advice to retirement savers, especially those with limited means.

Real-world facts belie fears about loss of access to advice. As reflected in testimony delivered at the hearings on the Proposals on December 12 and 13, some financial professionals, including the certified financial planners, already ***successfully operate*** under a fiduciary standard while serving clients all along the income spectrum. In addition, the Proposals broadly align with the SEC's ***Reg BI***, and there is no evidence that it has reduced small savers' access to investment recommendations. And in those ***states*** where broker-dealers are subject to a fiduciary duty under state law, no evidence has emerged that lower-income retirement savers have been denied access to quality advice. The experience in the ***United Kingdom*** also negates concerns about small savers. The United Kingdom took a far more aggressive stance with respect to commissions and conflicts of interest among financial advisers, yet the evidence indicates that following a transitional period,

its new interpretation "is more suitable given the text and purpose of ERISA"); *id.* at 173 ("An interpretation covering such [one-time] transactions better comports with the text, history, and purposes of ERISA"). Even the Fifth Circuit (albeit a panel different from the panel that heard the case on the merits) could be said to have implicitly rejected the notion that the DOL exceeded its authority by promulgating the 2016 rule, as it summarily dismissed emergency motions for injunctive relief pending appeal of the decision of the Texas district court. Thus at least one panel of the Fifth Circuit apparently implicitly found that the plaintiffs had not demonstrated a likelihood of success on the merits of that claim and others. *Chamber of Commerce v. U.S. Dep't of Labor,* No. 17-10238 (5th Cir. Apr. 5, 2017). Similarly, the D.C. Circuit summarily rejected attempts by the industry plaintiff in the *NAFA* case to win an injunction pending appeal of the D.C. district court's decision flatly rejecting the interpretation of ERISA embraced by the Fifth Circuit. *See* Order Denying Injunction Pending Appeal, *Nat'l Ass'n for Fixed Annuities v. U.S. States Dept. of Labor*, No. 16-5345 (2016)*; see also Mkt. Synergy Grp., Inc. v. U.S. Dep't of Labor*, No. 16-CV-4083-DDC-KGS, 2016 WL 6948061 (D. Kan. Nov. 28, 2016) (rejecting all challenges to the 2016 Rule), *aff'd, Mkt. Synergy Grp., Inc. v. U.S. Dep't of Labor,* 885 F. 3d 676 (8th Cir. 2018).

more and better-quality investment advice is now available in the U.K.[77] It is also expected that with market ***innovations*** spurred by the Proposals here in the U.S., affordable and quality advice will continue to become more widely available, including through target date funds and robo-advisers.[78]

As explained in the Release, some studies were offered in connection with the 2016 rule, purporting to show that those regulatory changes could erode small savers' access to affordable advice. But the Proposals are markedly different from the 2016 rule. More importantly, the DOL closely scrutinized those studies, even retaining an outside consultant, and concluded that those studies were ***unreliable***, relying largely on surveys conducted by the industry and its members and containing significant analytical flaws.[79]

Far from harming small savers, the Proposals will actually provide them with important protections, as they are most vulnerable to the losses attributable to adviser conflicts of interest. With fewer economic resources, they can ***least afford*** to lose any of their retirement savings to bad advice that burdens them with unnecessary fees or low returns. Contrary to the opponents' assertions, small savers, in fact, have the most to gain from the DOL's Proposals by ensuring that the advice they receive will not be driven by conflicts of interest among their advisers. This benefit will accrue largely because the majority of small savers ***rely on pension plans*** for their retirement planning rather than brokerage accounts, and the Proposals will require advice given to the fiduciaries of those plans to meet a fiduciary standard.[80]

F. The Proposals satisfy all of the rulemaking requirements under the APA and applicable executive orders requiring cost-benefit analysis.

Substantive and procedural attacks on the Proposals based on the Administrative Procedure Act ("APA") are equally unfounded. The Proposals are the result of reasoned decision-making, based on an ample record that considers all the relevant factors, draws rational conclusions, and clearly explains the approach taken. And they are supported by rigorous economic analysis. Procedurally, the DOL has provided a more than sufficient comment period and has even convened two full days of public hearings at which all perspectives on the rules were encouraged and received, especially from representatives of the regulated industry.

The ***Regulatory Impact Analysis*** ("RIA") is especially thorough, canvassing all the relevant factors bearing on the Proposals. It analyzes the continued harm to retirement savers from adviser conflicts of interest, the principal benefits from the Proposals, and the reasons why the regulatory alternatives such as enhanced disclosures are not viable. In terms of the principal benefits, the Release exhaustively reviews them, summarized as follows:

77 Revised Definition Release at 75948.
78 Revised Definition Release at 75945, 75947.
79 Revised Definition Release at 75945.
80 Revised Definition Release at 75945.

> The most significant benefits of the proposal are expected to result from (1) changing the definition of a fiduciary by amending the five-part test, (2) requiring advice given to a broader range of advice recipients, including plan fiduciaries and non-retail investors, to meet fiduciary standards under ERISA, (3) extending the application of the fiduciary best interest standard in the market for non-security annuities, creating a uniform standard across different retirement products, and (4) requiring that more rollover recommendations be in the retirement investor's best interest.

The RIA also reviews the costs of the Proposals (as well as the costs associated with the changes to the other PTEs) and quantifies those costs where possible. Thus, in this rulemaking, the DOL has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made,'"[81] and it has complied with its duty to analyze the economic impact of the Proposals.

From the standpoint of process and procedure, the Proposals fully comply with the requirements of the APA governing agency rulemaking. Under the APA, agencies must "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments."[82] The DOL has done so here, affording a ***60-day comment period***. That is twice the comment period generally required under the APA, and it aligns exactly with the comment period considered reasonable under the applicable executive orders governing the rulemaking process at Executive Branch agencies.[83]

The Proposals are substantively and procedurally unassailable, and they promise enormous benefits to the millions of Americans struggling to save for a decent and dignified retirement.

<u>CONCLUSION</u>

We hope these comments are helpful as the DOL finalizes the Proposals.

Sincerely,

Stephen W. Hall
Legal Director and Securities Specialist

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81 *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 103 S. Ct. 2856, 2866 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

82 5 U.S.C. § 553(c).

83 For example, Executive Order 12866 directs federal agencies to "afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days." Executive Order 12866, Regulatory Planning and Review, § 6(a) (Sept. 30, 1993). Likewise, Executive Order 13563 affirms that comment periods for proposed agency rules "should generally be at least 60 days." Executive Order 13563, Improving Regulation and Regulatory Review, § 2(b) (Jan. 18, 2011).

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