



July 21, 2015

Submitted via: e-ORI@dol.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Proposed Conflict of Interest Rule [RIN-1210-AB32]

Ladies and Gentlemen:

AARP appreciates the opportunity to respond to the Department of Labor's (the Department) request for comments on the proposed regulation relating to the definition of a fiduciary under 29 CFR §2510.3-21. To better reflect changes in our retirement system, the proposed regulation updates the definition of who is a fiduciary as a result of providing investment advice for a fee to retirement investors. According to the Investment Company Institute, over 82 million households are counting on employer-sponsored plans, Individual Retirement Accounts (IRAs), or both, for their retirement security. In order to better ensure these families will have adequate income in retirement, investors need to know that the retirement advice provided by financial service professionals is in their sole interests.

AARP is the largest nonprofit, nonpartisan organization representing the interests of Americans age 50 and older and their families. Nearly half of our members are employed full or part-time, with many of their employers providing retirement plans. A major priority for AARP is to assist Americans in accumulating and effectively managing adequate retirement assets to supplement Social Security. The shift from defined benefit plans to defined contribution plans has transferred

significant responsibility to individuals for investment decisions that will directly impact the adequacy of the assets available to fund future retirement needs.

I. IT IS LONG OVERDUE FOR THE DEPARTMENT OF LABOR TO RECONSIDER ITS 1975 REGULATION.

AARP supports the Department's determination to reconsider its 1975 regulation. ERISA section 3(21) provides that anyone who provides investment advice for a fee or other compensation, direct or indirect, shall be considered a fiduciary under the Act. A fiduciary, under ERISA, is required to act prudently, solely in the interests of participants and beneficiaries, and generally without conflicts of interest. Fiduciary status and its corollary standards and prohibitions are at the core of ERISA's protections. See Sections 3(21), 404 & 406, 29 U.S.C. § 1002(21), 1104 & 1106.

The Department's initial 1975 interpretation of fiduciary does not derive from ERISA's statutory language, Section 3(21), 29 U.S.C. § 1002(21a); that text categorically designates any person who provides investment advice for a fee a fiduciary. Moreover, the Department's initial interpretation now falls short of ERISA's main purpose of protecting participants and beneficiaries, primarily because the current interpretation would not apply to many modern advice transactions. Section 2, 29 U.S.C. § 1001. The changed environment demands a different interpretation that better follows ERISA's text and purposes.

A. THERE HAS BEEN A WELL-DOCUMENTED SHIFT FROM DEFINED BENEFIT TO RETIREMENT SAVINGS VEHICLES.

Since ERISA's enactment and the Department's issuance of regulations in 1975 defining fiduciary investment advice, retirement plans and investments have so significantly changed that there is no longer any justification, if there ever was one, for the current regulation's narrowing of the scope of the statutory definition of fiduciary investment advice.

Since 1975, there has been a dramatic decline in defined benefits plans--where advice was generally provided to more sophisticated employer fiduciaries--and a tremendous growth in participant directed defined contribution plans, where

advice and investment offerings often are provided to less sophisticated and busy individuals. At the time of the initial regulation, IRAs had just been created, and today's most popular retirement vehicle--the 401(k) plan--was not created until years later, in 1978. Today, most Americans with retirement savings are in 401(k) or other individual type plans, and are therefore solely responsible for investing the plan assets in their individual accounts. In addition, as account holders change jobs or approach retirement age, we have seen a significant movement of assets from employer-sponsored plans to IRAs. Indeed, the amount of assets in IRAs now exceeds that of defined contribution plans, and recent data shows a steady increase of those assets, with most of the money coming from rollover distributions from 401(k) plans. Investment Company Institute, Retirement Assets Total \$24.9 Trillion in First Quarter 2015, https://www.ici.org/research/stats/retirement/ret_15_q1, (June 24, 2015). This growth of IRA assets from pension plans also demands a regulatory response. As participants retire or terminate employment and are encouraged to move their 401(k) assets into IRAs, they are moving from a heavily regulated system with fiduciary protection to one without similar protections. This same money, with similar tax subsidies and a similar national interest to ensure retirement security, should enjoy similar regulatory protections. It is no wonder that the public is in favor of a sole interest standard.

AARP recognizes that, when the Department issued the fiduciary investment advice regulation in 1975, professional managers were generally responsible for managing plan assets and served as fiduciaries to the plan. While larger employers have the knowledge and resources to actively design their plans and provide a layer of fiduciary protection for their employees, smaller employers usually do not have the time, resources, or financial leverage. Many small employers rely to a much greater extent on plans sold by financial service firms and others. In order to help employers and employees make appropriate investment decisions, it is important to ensure access to qualified investment advice that is free of conflicts of interest. To that end, AARP believes that the proposed rule would appropriately subject more advice relationships to ERISA's fiduciary and conflict of interest rules while the related proposed exemptions, published on the same date as the proposal, would preserve established business models and minimize conflicts of interest that affect the quality of the advice.

In many instances, the individual retirement plan investor may not have the academic or financial background to properly evaluate the recommendations made by a financial adviser. In some cases, the investor is not seeking advice or investments, but is solicited by the adviser, so has not conducted any research or considered other investment options. Most financial advisers hold themselves out as trusted advisers, and investors in the market currently expect and believe that all financial advisers are already acting in their sole interest. AARP, *Fiduciary Duty and Investment Advice: Attitudes of 401(k) and 403(b) Participants*, <http://www.aarp.org/research/topics/economics/info-2014/fiduciary-duty-and-investment-advice---attitudes-of-401-k--and-4.html>, (September 2013). AARP does not believe that holding such advisers to a lesser standard, based in large part on disclosures alone, will address the problems of knowledge differential, advice need, and the national interest of ensuring adequate retirement income. Given the confusion and lack of understanding in the financial marketplace, it is clear to AARP that disclosure alone is not enough--a fiduciary interest standard is needed. AARP believes that if a financial adviser recommends to a plan fiduciary or participant the purchase of a certain investment (e.g., XYZ Stock), and the adviser receives payment, directly or indirectly, for providing that advice or investment (e.g., a fee or commission), the financial adviser should be a fiduciary subject to ERISA's fiduciary responsibility provisions.

Finally, it should be noted that while an IRA is subject to the prohibited transaction provisions in Section 4975 of the Internal Revenue Code, subsequent to the issuance of the 1975 fiduciary regulation, the Department was given the responsibility to interpret the prohibited transaction provisions for purposes of both the Code and ERISA. Executive Order: Reorganization Plan No. 4 of 1978, 43 FR 47713 (Oct. 17, 1978).¹ This change in authority from the Treasury Department to the Labor Department concerning prohibited transaction interpretations is yet another overdue reason to review the 1975 fiduciary regulation.

¹ The Department's application of the prohibited transaction rules to IRAs is not novel. Department guidance has previously stated that cross-collateralization and indemnification provisions in brokerage and other account agreements related to IRAs result in non-exempt prohibited transactions.

B. IN 1975, SOME NOW COMMON INVESTMENT VEHICLES DID NOT EXIST.

Since 1975, the variety and complexity of investments have dramatically changed. For example, in 1975, Wall Street had not yet created collateralized debt obligations or contemplated the creation and tremendous growth of target date funds. This constantly evolving investment marketplace--along with the evolution of the retirement landscape--demonstrates a need for a rule that better protects the interests of plans, and their participants and beneficiaries who shoulder greater responsibility for the investment of their individual plan accounts or IRAs. Maintaining the status quo is not an option. Indeed, we are pleased that the financial services industry has largely recognized this--and nearly all groups and industry players have embraced the need for a fiduciary standard.

C. TAX INCENTIVES ENCOURAGE THE FORMATION AND CONTINUATION OF RETIREMENT PLANS.

Significant tax incentives encourage the offering of and participation in retirement plans in order to achieve the important national goal of improved income security in retirement. These tax incentives have been successful in encouraging the growth of the private retirement system, which now comprises nearly \$25 trillion in assets.² AARP has consistently asserted that retirement plan money--which receives substantial tax incentives and must meet a long list of tax qualification requirements--deserves a higher level of protection than other types of investments or purchases.

ERISA plays a crucial role in ensuring the protection of retirement funds subsidized by taxpayers so that participants have sufficient assets for a secure and adequate retirement. Safeguarding these monies was among the main reasons for ERISA's enactment, and the fiduciary and conflict of interest rules are the main enforcement tools under ERISA. Specifically, ERISA requires fiduciaries to act solely in the interest of participants and adhere to its prohibited transaction rules and general fiduciary responsibility provisions, which are designed to ameliorate conflicts of interest. Because the Department of Labor must conform its

² These assets total more than the GDP of China, Japan, Germany, United Kingdom and France combined. *World GDP rankings for 2015*, <http://knoema.com/nwnfkne/world-gdp-ranking-2015-data-and-charts>.

regulatory activities to the statutory framework contained in ERISA and promote ERISA's purposes, financial advisers to ERISA protected plans are not necessarily governed by the same rules adopted by the SEC under the securities laws--indeed, the rules, while complementary, can be stronger. To that end, AARP believes that advice provided to retirement plan investors must be subject to ERISA's fiduciary rules, based on sound investment principles and protected from conflicts of interest. Various scandals, such as those involving the manipulation of LIBOR interest rates and foreign currency markets, underscore the imperative that such advice is independent and free from conflicts of interest, and that the standards governing industry practices involving the provision of investment advice are fair, clear and easy to understand.

AARP's comments, unless specifically directed to the impact of the proposal on participants and beneficiaries and IRA owners, should be read to be similarly applicable to fiduciaries of plans who have the authority to make investment decisions on behalf of the plan. This is especially important for small employers and their fiduciaries who may not have the resources to obtain independent advice on plan investment matters. The effect of imprudent or biased advice to a plan fiduciary with investment discretion over plan assets will trickle down and negatively impact the retirement security of the plan's participants and beneficiaries.

II. AARP SUPPORTS THE PROPOSED REGULATION TO REVISE THE DEFINITION OF INVESTMENT ADVICE.

AARP submits the following specific comments on the proposed regulation:

- A. AARP, ALONG WITH THE PUBLIC AND THE FINANCIAL SERVICES INDUSTRY, AGREES THAT ANYONE WHO PROVIDES INVESTMENT ADVICE FOR A FEE SHOULD BE HELD TO ERISA'S FIDUCIARY STANDARD.**

The public--including both those saving for retirement and those providing workplace retirement savings plans--strongly supports requiring financial advice that is solely in the interest of those saving for retirement. In an AARP 2013 survey of over 1,400 adults who had money saved in either a 401(k) or a 403(b)

plan, more than nine in ten (93%) respondents favored requiring retirement advice to be in their sole interest, and fewer than four in ten (36%) respondents indicated they would trust the advice from an adviser who is not required by law to provide advice that is in their best interest. AARP, Fiduciary Duty and Investment Advice: Attitudes of 401(k) and 403(b) Participants, <http://www.aarp.org/research/topics/economics/info-2014/fiduciary-duty-and-investment-advice---attitudes-of-401-k--and-4.html>, (September, 2013). In a companion survey of over 3,000 plan sponsors of all sizes, nearly nine in ten (89%) plan sponsors said that they would favor requiring giving advice that is in the sole interest of plan participants. AARP, Fiduciary Duty and Investment Advice: Attitudes of Plan Sponsors, <http://www.aarp.org/research/topics/economics/info-2014/fiduciary-duty-and-investment-advice---attitudes-of-plan-sponsor.html>, (March, 2014). Moreover, given that the financial services industry has broadly agreed to a fiduciary standard, the remainder of the rule-making process should be focused on the process for documenting and implementing this standard.

AARP strongly urges that anyone who provides investment advice for a fee should be held to ERISA's fiduciary standard and protections, to ensure that participants and investors receive qualified advice in a cost effective manner for themselves and the financial services industry. AARP strongly advocates for the elimination of the loopholes in the current definition of investment advice.

B. FREQUENCY OF REGULARITY OF INVESTMENT ADVICE IS IMMATERIAL TO WHETHER IT SHOULD BE COVERED BY ERISA'S FIDUCIARY STANDARDS.

AARP supports the Department's determination not to require investment advice to be provided with any particular frequency in order to subject the adviser to ERISA's fiduciary standards. The 1975 regulation permitted advisers to play a significant role in connection with a one-time transaction and avoid any potential liability for the provision of conflicted advice. AARP believes that the requirement, under the current regulation, that advice must be provided "on a regular basis," enables an adviser to make an important investment recommendation to a plan, participant or investor and avoid any fiduciary responsibility for his or her actions, notwithstanding the potential impact of such advice on the plan. For example, advice to take a retirement distribution or to rollover retirement assets upon

termination of employment or retirement may be a one-time transaction for the individual, but may be the largest, most significant--and potentially irreversible--decision that will be made in their lifetime. It makes little sense that advice provided on such a monumental decision is effectively exempt under current law. The proposed rule would close this loophole. The Department's proposed approach is consistent with the definition of fiduciary found in ERISA and ERISA's overall aim to protect plans, participants and beneficiaries, and IRA owners from self-interested biased advice.

AARP also believes that the proposal correctly omits any requirement that the parties have a mutual agreement, arrangement or understanding that the advice would serve as a primary basis for investment decisions. Under the current regulation, financial advisers who play a significant role in the development of the investment portfolio of the plan or IRA can disavow fiduciary status and avoid liability for imprudent or conflicted advice. It is extremely difficult, under the current rules, for largely unsophisticated investors to prove both parties accepted the same mutual agreement. Without clear proof, the investor has no claim against even the most fraudulent of advisers. The proposed rule attaches fiduciary status to an adviser with respect to whom it is understood by the parties that the adviser's advice is individualized to, or that such advice is specifically directed to, the advice recipient for consideration in making investment decisions. AARP endorses this straightforward approach for determining fiduciary conduct.

C. AN ADVISER'S RECOMMENDATIONS TO TAKE A DISTRIBUTION OF ANY KIND SHOULD BE CONSIDERED INVESTMENT ADVICE.

AARP supports the inclusion of advice related to a recommendation to take a distribution of benefits or as to the investment of securities or other property to be rolled over or otherwise distributed from the plan or IRA, and a recommendation as to the management of securities or other property to be rolled over or otherwise distributed from the plan or IRA. AARP believes that the added benefits of broadening the scope of activities under the definition of fiduciary investment advice to include recommendations regarding the rollover or distribution of assets from a plan or IRA are substantial. The preamble to the proposed regulation noted that "such 'rollovers' will total more than \$2 trillion over the next 5 years." Conflict of Interest Rule—Retirement Investment Advice,

Proposed Rule, 80 Fed. Reg. 21928, 21932 (Apr. 20, 2015) (to be codified 29 C.F.R. pts 2509 and 2510). Print.

AARP notes that, for many people, the account balance in their Plan or IRA represents the bulk of their personal savings. As a result, AARP believes that the distribution stage and process are a critical part of the cycle of participant events because decisions made with respect to the timing and manner of plan distributions will often determine the value and effectiveness of a working lifetime of retirement savings. In effect, the plan participant is in an extremely critical position in determining the timing and manner in which to take a distribution from his or her retirement plan or IRA. Decisions made at that time are often effectively irreversible, at least in a practical sense, because tax consequences and transaction costs generally make it impractical to reverse the distribution decision. AARP believes that these distribution decisions will have a major impact on the assets accumulated by a plan participant over a lifetime of retirement savings. Accordingly, it is essential that the adviser providing guidance at this critical juncture to a participant be subject to ERISA's fiduciary duties. This expansion of fiduciary advice should result in greater protections for plan participants who may not appreciate that encouragement to take a distribution or invest the assets to be rolled over may be driven by factors (e.g., fees or commissions) other than the sole interests of the participant.

A recommendation for the participant to take a distribution should constitute the provision of investment advice whether or not accompanied by a recommendation as to where the distribution should be invested. AARP believes that the distribution recommendation is essentially a recommendation that the participant sell the underlying assets in his or her individual account or IRA.

AARP recommends that the Department confirm in the final regulation that a recommendation to a participant by an adviser to take a loan from a plan should also be considered the provision of investment advice. In essence, the participant is foregoing other investment opportunities in exchange for a fixed income investment. Over the long term, AARP believes that a low interest participant loan can have a negative impact on the accumulation of retirement assets. Similarly, AARP also urges that the Department confirm in the final rule that the scope of activities under the definition of investment advice includes a recommendation to

a participant to keep his or her assets in the plan, as well as advice to maintain current plan investments.

AARP also urges the Department to clarify the remedies available to a participant under ERISA who receives investment advice related to a recommendation to take a distribution or roll over assets from an account in an ERISA-covered plan. If a participant in an ERISA covered plan receives investment advice from an employer-selected adviser, the Department should clearly provide that whenever the participant is the recipient of the advice, s/he is the covered retirement investor and the participant retains all of their ERISA rights and remedies. AARP believes that ERISA's remedies apply to the recommendations made with respect to assets held in an ERISA plan, notwithstanding the subsequent distribution or roll over of such assets. AARP encourages the Department's clarification of its views on this important issue in the preamble to the final regulation.

D. THE SELLER'S CARVE-OUT IS APPROPRIATE FOR LARGE AND SOPHISTICATED PLANS.

AARP supports a seller's carve-out for large plans. Large plans are more likely to have dedicated staff and in-house or outside expertise necessary to prudently evaluate all transactions and contracts. Conversely, AARP believes that the retirement investor may not have the requisite financial expertise to independently evaluate the merits of the transaction and the potential conflicts of interest. The disclaimers required by this carve-out may not be effective in alerting the retirement investor that the advice provided in connection with the transaction is not intended to be subject to ERISA's fiduciary protections. Similarly, small business owners, preoccupied with running a business, may not have the time and expertise to evaluate all transactions. For these reasons, it is appropriate to exclude small plans--as well as IRA owners, and plan participants and beneficiaries--from the scope of the seller's carve-out. The Department's 100 or more participant limitation is consistent with the filing requirements under the Form 5500 and other existing rules and practices. AARP believes that the proposed class exemptions and amendments to existing class exemptions and potentially other approaches are more appropriate vehicles for the provision of investment products and services to the small plan retail market.

Under the seller's carve-out, the counterparty must satisfy either of two sets of alternative conditions. Proposed section 2510.3-21(b)(1)(i)(B)(4), under the first alternative, requires the counterparty to know or reasonably believe that the independent fiduciary has sufficient expertise to prudently evaluate the transaction. Although the preamble to the proposed rule notes a similar requirement under the second alternative set of conditions, the proposed rule does not explicitly require compliance with that condition. AARP recommends the inclusion of that requirement in the final rule. AARP believes that the evaluation of the independent plan fiduciary's financial expertise should be a necessary step in the counterparty's ability to take advantage of this carve-out from fiduciary status. Several surveys, including by the Government Accountability Office (GAO), have found that many employers are not aware of their fiduciary status.³ AARP urges the Department to clarify for plans and advisers the needed documentation evidencing their compliance with the seller's carve-out under the proposal. The Department should also periodically monitor this standard to ensure it is working effectively.

Further, the Department should make clear that the large plan exemption is limited to advice provided from the adviser to the plan. Typically, employers negotiate a variety of services to be made available to their employees. Investment advice is one such service. Whether separately negotiated or as one of a variety of bundled services, the protections of this rule should be fully applicable to the participants of large and small employers. The large plan exemption should in no way be interpreted to deny any of the rights that participants would otherwise receive under ERISA or this rule.

E. ADVISERS CAN MARKET INVESTMENT PLATFORMS BUT THE SELECTORS OF SUCH PLATFORMS STILL MUST MEET THEIR FIDUCIARY RESPONSIBILITY.

AARP supports the Department's authorization for advisers to market and make available specially selected investment platforms to employee benefit plans provided the adviser does not undertake to individualize the platform or provide advice about the platform. As the Department knows, small employers often are

³ See *Private Pensions: Fulfilling Fiduciary Obligations Can Present Challenges for 401(k) Plan Sponsors*, GAO-08-774: Published: Jul 16, 2008. Publicly Released: Aug 15, 2008.

sold such platforms with representations that the platform will satisfy the employer's fiduciary obligations. While AARP encourages small employers to create retirement plans for their employees, they must undertake a reasonable level of due diligence to ascertain the appropriateness of the plan and its investments. For example, it is not unreasonable for a small employer to contact at least three plan providers and compare their fees and performance. If the employer does not feel competent to engage in such a process, there are independent advisers available in the market, or advisers can accept fiduciary status and provide the services as well. The Department also has provided many helpful materials to assist small employers with operating retirement plans. It will be a helpful improvement in the market if advisers no longer represent that platforms *per se* satisfy ERISA or the small employer's fiduciary responsibilities.

AARP also favors the Department's exclusion of IRA account owners from the platform providers' carve-out. AARP believes that the disclosure requirements of this carve-out may not be sufficient to protect the interests of the account owner. In this regard, AARP recognizes the significance of the investment selection and monitoring process and believes that IRA account holders would be better protected by the fiduciary status of the platform provider under the Best Interest Contract exemption.

F. THE DEPARTMENT HAS APTLY BALANCED THE PROVISION OF INVESTMENT EDUCATION AS COMPARED TO INVESTMENT ADVICE.

AARP supports the expansion of the carve-out for investment education to include plan fiduciaries, non-participant directed plans, as well as participants and beneficiaries of participant-directed plans. The provision of the types of information described in the proposal will assist the recipients of the information in making decisions both during his or her working life and during post-retirement. The proposed rule's specific inclusion of general information relating to retirement-related risks and general methods and strategies for managing assets in retirement will remove uncertainty about whether such information would constitute the rendering of investment advice.

AARP favors the proposed rule's exclusion of advice or recommendations as to specific investment products or specific investment managers from the general

information that can be provided under this carve-out. IB 96-1 currently permits the use of asset allocation models that refer to specific investments available under the plan as long as those specific references are accompanied by a statement that other investment alternatives having similar risk and return characteristics may be available. AARP believes that participants may rely on the identification of specific funds or investments under the plan notwithstanding the accompanying disclosure regarding the availability of other appropriate investment alternatives. The additional disclosures about alternative investments, in practice, may be insufficient for the participant to effectively distinguish what appears to be specific investment recommendations from general investment education. As a result, AARP does not believe that the current language in IB 96-1 effectively prevents participants from being inappropriately “steered” to specific investments by service providers.

However, AARP supports a carve-out for investment education, which permits the asset allocation model to identify all investments available under a plan for each asset category (e.g., midcap equity, large cap equities and foreign equities). The identification of all plan investments satisfying a particular asset class would help participants by educating them about the available options already selected by a plan fiduciary.

G. THE CURRENT COORDINATION BETWEEN GOVERNMENT AGENCIES SHOULD CONTINUE.

AARP commends the Department for its coordination with related governmental agencies, particularly the SEC and the CFTC. The carve-out for swap and security-based swap transactions clearly reflects the Department’s coordination with those Agencies. AARP encourages the Department to continue to coordinate its efforts with the SEC and the CFTC. However, AARP does not believe that the Department should delay its regulatory proceedings in order to allow the SEC to complete its deliberations on a uniform fiduciary standard. Quite simply, the Department and the SEC are dealing with overlapping but different statutory regimes and issues. The Department is charged with protecting retirement plans, and given their importance to individuals, the national goal of retirement income security, and changes in the retirement plan landscape, action is already long overdue.

H. THE DEPARTMENT'S REGULATORY ANALYSIS DEMONSTRATES THE IMPORTANCE OF AN UPDATED RULE.

AARP welcomes the Department's expanded and more robust regulatory analysis, which provides the underlying rationale and support for the proposed regulation.

Of particular concern to AARP is the potential negative impact of conflicts on the retirement security of our members and other older Americans. For example, the Government Accountability Office (GAO) estimated that \$20,000 in a 401(k) account that had a one percentage point higher fee for 20 years would result in an over 17% reduction--over \$10,000--in the account balance. U.S. Gen. Accounting Office, GAO-07-21, *Private Pensions: Changes Needed to Provide 401(k) Plan Participants and the Department of Labor Better Information on Fees* 7 (2006). We estimate that over a 30-year period, the account would be about 25 percent less. Even a difference of only half a percentage point-- 50 basis points-- would reduce the value of the account by 13 percent over 30 years. In short, conflicted advice resulting in higher fees and expenses can have a huge impact on retirement income security levels.

The Department found that generally risks caused by conflicted investment advice are increasing as the baby boomers retire and they move their money from protected ERISA plans to IRAs. Indeed, the Department found that advice from conflicted investment advisers could cost these retirees between 12 to 24% of their retirement savings over thirty years. Department of Labor, *Fiduciary Investment Advice: Regulatory Impact Analysis* 3-4 (2015). The Department found that IRA investors tend to be older as they are close to or at retirement. These IRA investors are more vulnerable to the negative impact of conflicted advice because the amount of assets available for rollover are large, many older investors do not have strong financial literacy skills, and they are making significant and often one-time decisions to move their retirement savings from more protected employer based plans into significantly less protected IRAs. *Id.* at 59-60.

The Department also found that following conflicted advice results in costs and losses other than direct higher fees and expenses. For example, investors may choose poorer and/or riskier performing investments, they may trade too much

and incur excessive transaction costs, or they may inappropriately chase higher returns. *Id.* at 13, 91.

Moreover, the Department found that not only does conflicted advice give rise to additional costs to investors, but also the advice frequently leads to the purchase of investments that underperform the market. *Id.* at 13, 75, (“underperformance of broker-sold mutual funds” alone may be more than “100 basis points” so total cost adding other investment products will be significantly more). As the Department points out, there is a significant cost to the individual--as well as the national economy--because the investor has less money to spend. *Id.* at 102, 132.

The Department also stated that “small savers” (that is, those with low balances or those with modest means) are most negatively impacted by the detrimental effects of conflicted advice. Those with small accounts have fewer economic resources--any additional costs or losses diminish what little savings they have worked so hard to amass. *Id.* at 218.

Significantly, the Department cites studies finding that disclosures alone are ineffective at best, and may be meaningless. *Id.* at 194. Even where investors read the disclosures, they may not understand them. *Id.* at 80 (citing study where even the judges at oral argument admit they had problems understanding the contracts).

Finally, many participants will be indirectly impacted where conflicted advice is provided to the plan fiduciary. Smaller plans are more likely to receive conflicted advice because they often receive that advice from those who may be subject to conflicts of interest. The negative impact of such conflicted advice to the plan will ultimately adversely impact the retirement security of all plan participants. *Id.* at 137.

These findings clearly demonstrate both the importance and need for an updated rule that implements a fiduciary standard for anyone who provides investment advice for a fee. Those who spend a lifetime working to save and invest for a secure retirement need to be able to count on advice that is in their sole interest.

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AARP appreciates this opportunity to provide its views on the proposed rule defining who is a fiduciary as a result of providing investment advice to a plan or its participants or beneficiaries. We have separately submitted comments on the Best Interest Contract Exemption, as well as separately submitted our request to testify. If you have any questions, please feel free to contact me or Michele Varnhagen of our Government Affairs office at 202-434-3829.

Sincerely,

A handwritten signature in black ink, appearing to read "David Certner", with a long horizontal flourish extending to the right.

David Certner
Legislative Counsel and
Legislative Policy Director
Government Affairs