STATEMENT OF BETTER MARKETS

IN SUPPORT OF THE DEPARTMENT OF LABOR'S

PROPOSED CONFLICTS OF INTEREST RULE

DELIVERED AT THE

PUBLIC HEARING SESSION

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BETTER MARKETS

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Good afternoon, my name is Stephen Hall and I'm testifying today on behalf of Better Markets. Better Markets is a non-profit, non-partisan, and independent organization established in the wake of the 2008 financial crisis to promote the public interest in the financial markets, to support the financial reform of Wall Street, and to make our financial system work for all Americans.

We appreciate the opportunity to address one of the most important regulatory initiatives in the past 40 years aimed at improving Americans' retirement security.

The DOL has developed an excellent rule that will provide retirement savers with much stronger protections against the damaging conflicts of interest that have been allowed to persist among financial advisers for decades. We commend the DOL for its proposal, and we strongly support it.

At this point in the debate, it is settled that gaps in the DOL's 40-year old rule have created a flawed system, one that allows advisers to put their own interests ahead of their clients. While not all advisers take advantage of this system, far too many do. It is also settled that workers and retirees are suffering terrible losses as a result. By conservative estimates, the damages add up to tens of billions of dollars a year. The focus now is on industry arguments designed to defeat or weaken the rule.

At this hearing, I'd like to address several misconceptions that industry opponents have disseminated about the rule. Then I'll close by highlighting one of the single most important ways the DOL can strengthen its proposal.

FIRST, opponents of the rule have fostered the misconception that the DOL's proposal is a radical new approach that deviates from the law.

In reality, however, the DOL's proposal is a measured and reasonable effort to close loopholes that never had any statutory basis and to bring its rule into better alignment with what Congress actually said and always intended in ERISA.

ERISA's definition is clear and simple: It provides that a person becomes a fiduciary by rendering investment advice for compensation with respect to retirement plan assets. Yet, in 1975, the DOL issued a rule that deviated substantially from this definition and added elements that had no statutory basis. For example, advice is subject to the fiduciary duty only if it is given regularly and only if it serves as the primary basis for an investor's decision. These elements have undermined the DOL's ability to protect retirement savers from conflicts of interest as Congress intended.

The DOL's new proposal eliminates these loopholes. In addition, it expressly covers recommendations to take a distribution of plan assets. That's a critical juncture in the life of most retirement savers, when the protections of the best interest standard are more important than ever.

With these basic modifications, the DOL has vastly improved upon its current rule not by stretching the boundaries of ERISA but by more faithfully implementing its letter and spirit.

SECOND, industry opponents have complained that the rule prohibits established compensation models unless advisers comply with an allegedly burdensome and complex exemption.

In fact, advisers have no entitlement to preserve their conflicted compensation models under the law, and the DOL's exemption is appropriately conditioned on reasonable and necessary safeguards.

There is no question that commission-based compensation creates impermissible conflicts of interest under ERISA. The DOL's decision to offer an exemption allowing those models to persist is an accommodation, not an entitlement. And while the Best Interest Contract exemption imposes a variety of conditions on the privilege of receiving commissions, that is what the law requires: Under ERISA, the DOL may not create prohibited transaction exemptions unless they protect the interests of plans and plan participants.

In short, advisers who currently receive commissions have three choices: They can comply with the reasonable conditions of the Best Interest Contract Exemption; they can change their fee structures to eliminate such conflicts of interest; or they can stop providing retirement investment advice altogether. Under any of these scenarios, investors and plan sponsors will be far better off, free from the conflicted advice that has victimized them for decades.

And we will see no advice gap whatsoever. Contrary to their alarmist predictions, brokers and insurance agents are almost certain to adjust to the new rule rather than withdraw their services. That's been the pattern with every major financial reform in the last century: dire warnings about upheaval in the financial sector followed by adaptation and ever-growing profits on Wall Street.

More importantly, if those advisers really do abandon their clients, an established and growing population of fiduciary advisers stands ready, willing, and able to serve all retirement savers regardless of account size. And they will do so under very affordable fee structures.

THIRD, industry opponents have argued that we should rely on the SEC to address the gaps in the standard of loyalty applicable to advisers.

This argument has no basis, and it's being advanced solely to defeat or delay the DOL's rule. The SEC has no legal authority to issue or update any rules implementing ERISA. Congress gave that responsibility to the DOL, recognizing the unique importance of tax-advantaged retirement assets and the need to protect them under a separate regime applying the highest possible standards of loyalty and care.

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

Nothing in Section 913 of the Dodd-Frank Act changes this assessment. Section 913 contains no suggestion that Congress intended the SEC's authority to take precedence over DOL's regulation of retirement investment advice. On the contrary, in Section 913, Congress could have taken the opportunity to subordinate the DOL's authority or link it in some way to the SEC's oversight, but it chose not to.

As a practical matter, forcing the DOL to wait for the SEC means indefinite delay, lasting years at a minimum. The SEC is just beginning to decide whether it should embark on a rulemaking to enhance adviser standards under the securities laws. The agency is still mired in indecision, even though five years ago, Congress expressly authorized it to act and the SEC's own staff strongly recommended that it move forward with a rule. Workers and retirees cannot afford to wait any longer, as their retirement savings are being depleted by conflicts of interest every day.

FINALLY, the DOL can make the rule even stronger by prohibiting the use of mandatory arbitration clauses.

Without meaningful private remedies, even the most powerful set of conduct standards cannot adequately protect investors.

However, under the proposed Best Interest Contract Exemption, advisers can insist that clients enter pre-dispute binding arbitration agreements, thus limiting an investor's right to seek remedies in court. This provision should be eliminated for two reasons.

First, it is not what Congress intended. In the ERISA Declaration of Policy, Congress expressly stated that its goal was not only to establish standards of conduct, but also to provide "**ready access to the Federal courts"** so that plan participants could seek appropriate remedies. In accordance with that policy, the statute gives plan participants the right to file actions in federal court for violations of the fiduciary duty.

Second, allowing advisers to insist on arbitration leaves investors with a terribly inadequate substitute for judicial remedies. As the DOL has noted, many arbitrations under the Best Interest Contract Exemption would be subject to FINRA's arbitration process. Unfortunately, that system is a grossly deficient dispute resolution mechanism. Consider just the most obvious defects:

1. It is not a fair process, as even the so-called "public" arbitrators are allowed to have had extensive careers in the financial industry;

2. It severely limits discovery, to the detriment of investors;

3. It does not require panels to actually apply the law or explain their awards;

4. It produces awards that typically fall well short of actual damages and the attorneys' fees necessary to bring a claim; and

5. It provides extremely limited avenues for appeal, even when significant unfairness or injustice has occurred.

By favoring arbitration and raising the specter of burdensome litigation in the courts, opponents of the proposed rule are in effect saying that they don't want to be accountable. That's no justification for weakening the rule.

In closing, I'll reiterate our view that the DOL rule is an extremely important reform that will benefit millions of Americans saving for retirement. It should be finalized as soon as possible.

That concludes my statement and I look forward to your questions.