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Via Electronic Submission

Lisa M. Gomez  
Assistant Secretary for Employee Benefits Security  
Office of Regulations and Interpretations  
Employee Benefits Security Administration  
U.S. Department of Labor  
200 Constitution Ave. NW, Room N-5655  
Washington, DC, 20210

*Re: Definition of Fiduciary – RIN 1210-AC02 Retirement Security and related exemptions*

Assistant Secretary Gomez:

CFP Board supports the U.S. Department of Labor’s proposed Retirement Security Rule and related Prohibited Transaction Exemptions (together, the “proposed rule”). Thank you for considering CFP Board’s comments.

**CFP Board Supports Fiduciary Standards That Apply to All Financial Advice**

CFP Board operates the CFP® certification program, which sets high standards of competency and ethics for financial planning and is accredited by the National Commission for Certifying Agencies. Today, more than 98,000 CFP® professionals (or approximately one-third of retail financial advisors) voluntarily commit as a part of their certification to act as a fiduciary, and therefore, act in the best interests of the client at all times when providing financial advice.<sup>1</sup> The CFP® professionals who make this commitment to CFP Board operate under different business and compensation models and provide professional services on behalf of investment advisers, broker-dealers, insurance companies, banks, and trust companies.

**The Proposed Rule Adapts to the Changing Retirement Landscape and Protects the Retirement Security of Hardworking Americans Who Deserve Fiduciary Advice**

Congress enacted ERISA to protect assets held in tax-preferred retirement savings vehicles from market abuses. Congress recognized that retirement assets are important to workers and the U.S. economy, and intentionally established high standards for retirement investment advice under ERISA and conditional prohibitions of conflicts of interest under ERISA and the Internal Revenue Code.<sup>2</sup>

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<sup>1</sup> There are two financial planning membership organizations: The Financial Planning Association (FPA) and the National Association of Personal Financial Advisors (NAPFA). Approximately 14,800 CFP® professionals were FPA members as of November 2022, and approximately 3,600 were NAPFA members as of December 2023.

<sup>2</sup> See, e.g., ERISA §§404(a)(1) and 406(b) and Internal Revenue Code §4975(c)(1)(E) and (F).

*Americans Reasonably Expect Best Interest (Fiduciary) Retirement Investment Advice Because the Stakes are High, Many Investment Products Are Complex, and Retirees Typically Do Not Have Experience with Retirement Investment Issues*

The investment landscape has changed dramatically since Congress enacted ERISA in 1974 and the Department promulgated the regulation defining fiduciary advice. Due to the advent of 401(k) plans, the popularity of IRAs (*i.e.*, individual retirement accounts and individual retirement annuities), and the shift away from defined benefit pension plans, most workers today are personally responsible for managing their own retirement savings.<sup>3</sup> With so much at stake, investors now overwhelmingly expect that financial professionals will provide them with financial advice in their best interests:

- A 2018 Center for Capital Markets Competitiveness survey revealed that 97% of U.S. investors *already believed* that their financial professionals had their best interest in mind.<sup>4</sup>
- A 2022 CFA Institute study showed that retail investors value financial professionals who will be “trusted to act in my best interest” more than any other attribute when looking to hire a financial professional.<sup>5</sup>
- A December 2023 AARP survey revealed that 89% of investors age 50 and older who have used a financial professional expect them to provide advice in their best interest.<sup>6</sup>

The complexity of product options today (as compared to when Congress passed ERISA) makes it even more challenging for investors to manage their retirement savings.<sup>7</sup> While complex products can provide benefits,<sup>8</sup> most retirement investors don’t understand them.

The asymmetry of information and knowledge increases a financial professional’s opportunity to maximize their own compensation at the expense of the retirement investor.<sup>9</sup> Mere disclosure of this conflict of interest is insufficient. The Securities and Exchange Commission’s (SEC or Commission) Office of the Investor Advocate tested disclosures for Registered Index-Linked Annuities (RILAs) and found that retail investors have trouble comprehending these complex products even when they have experience with financial products generally and are provided

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<sup>3</sup> This shift has been well-documented, *See, e.g.*, Government Accountability Office (GAO), *Older Workers, Retirement Account Disparities Have Increased by Income and Persisted by Race Over Time*, GAO-23-105342 (July 2023) (2023 GAO Report); and GAO, *The Nation’s Retirement System: A Comprehensive Re-evaluation Needed to Better Promote Future Retirement Security*, Testimony before the Special Committee on Aging, U.S. Senate, GAO-19-342T (February 6, 2019)

<sup>4</sup> Working with Financial Professionals: Opinions of American Investors, Center for Capital Markets Competitiveness (2018), *avail. at* [https://www.centerforcapitalmarkets.com/wp-content/uploads/2018/04/CCMC\\_InvestorPolling\\_v5-1.pdf](https://www.centerforcapitalmarkets.com/wp-content/uploads/2018/04/CCMC_InvestorPolling_v5-1.pdf).

<sup>5</sup> CFA Institute, *Investor Trust Study, Enhancing Investors’ Trust* (2022), *avail. at* [https://www.cfainstitute.org/-/media/documents/article/Enhancing-Investors-Trust-Report\\_2022\\_Online.pdf](https://www.cfainstitute.org/-/media/documents/article/Enhancing-Investors-Trust-Report_2022_Online.pdf) (reporting that 34% of retail investors chose “trusted to act in my best interest” as the most important attribute when deciding to hire a financial adviser).

<sup>6</sup> AARP Research, “Unbiased Financial Advice about Retirement: Importance to Adults 50+,” January 2024, <https://www.aarp.org/pri/topics/work-finances-retirement/financial-security-retirement/fiduciary-duty-retirement/>.

<sup>7</sup> FINRA describes complex products as any product with features that may make it difficult for a retail investor to understand the essential characteristics of the product and its risks. This includes, for example, leveraged ETFs, cryptocurrencies, asset-backed securities, annuities, and structured notes. FINRA Regulatory Notice 22-08, published March 8, 2022, *avail. at* <https://www.finra.org/rules-guidance/notices/22-08#notice>; *see also* FINRA Notice 12-03, published January 17, 2012, *avail. at* <https://www.finra.org/rules-guidance/notices/12-03>.

<sup>8</sup> FINRA Regulatory Notice 22-08 (noting that complex products, properly understood, can enhance returns, limit losses, or improve diversification).

<sup>9</sup> For a discussion of information asymmetry and how it affects conflicts of interest, *see* Regulation Best Interest: The Broker-Dealer Standard of Conduct (Regulation Best Interest), 84 FR 33318 at 33427 (July 12, 2019).

with a Key Information Table explaining the RILA's features. As the Commission stated: "Overall investor testing successfully identified a range of barriers to investor understanding of RILAs and associated disclosures. However, [with few exceptions,] variations in disclosures did not result in significant improvements in investor comprehension in the investor testing."<sup>10</sup>

Retirees also must consider retirement plan benefit options without knowing how their future will unfold. For example, retirees do not know how long they will live, how long their spouse or other family members will live, what cost of living increases (including with respect to health care) will occur, what the return on their retirement investments will be, or how much they may withdraw from retirement accounts each year without running out of money before they die. Most retirees have little, if any, experience in dealing with those issues, and need best interest advice from knowledgeable professionals.

With increased product complexity, poorly presented disclosures, and greater numbers of workers reaching retirement age each year (without the education or experience to address retirement investment issues), the Department must require financial professionals to adhere to a higher standard of care and loyalty (i.e., a fiduciary standard) when providing retirement advice.

#### *Other Regulators and CFP Board Have Adapted to the Changed Investment Landscape*

Today, securities and insurance regulators require financial professionals to act in an investor's best interest when providing financial advice, regardless of how the financial professional is paid. In 2019, in recognition of the expansion of the number of retail investors and the complexity of many products, the SEC reaffirmed the fiduciary standard for investment advisers (the SEC Fiduciary Interpretation) and adopted Regulation Best Interest for broker-dealers, which is drawn from "key fiduciary principles."<sup>11</sup> Similarly, the National Association of Insurance Commissioners (NAIC) adopted a Model Regulation (which most states have adopted) that claims to require a "best interest" standard in the sale of annuities.

CFP Board is a professional body that also adopted a fiduciary obligation in response to changes in investor needs and expectations.

- In 2007, CFP Board adopted *Standards of Professional Conduct* that required a CFP® professional to make a commitment to CFP Board, as part of their certification, to act as a fiduciary when providing *financial planning* or material elements of financial planning to a client.
- In 2018, CFP Board adopted the [\*Code of Ethics and Standards of Conduct\*](#) (the "*Code and Standards*"), which expanded the fiduciary obligation to *all financial advice*. CFP Board recognized that clients reasonably expect financial advice provided in their best interests, regardless of the CFP® professional's business model.<sup>12</sup>

CFP Board agrees with the Department that regulations governing retirement investment advice must likewise evolve to fulfill ERISA's statutory mandate to protect retirement assets. The

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<sup>10</sup> Registration for Index-Linked Annuities; Amendments to Form N-4 for Index-Linked and Variable Annuities, 88 FR 71088 at 71094-71095 (October 13, 2023); see also SEC Office of Investor Advocate, Investor Testing Report on Registered Index-Linked Annuities, *avail. at* <https://www.sec.gov/files/rila-report-092023.pdf>.

<sup>11</sup> Regulation Best Interest at 33331.

<sup>12</sup> See Commentary on New Code of Ethics and Standards of Conduct at 5 (November 27, 2018). <https://www.cfp.net/ethics/compliance-resources/2018/11/commentary-on-new-code-of-ethics-and-standards-of-conduct>.

proposed Retirement Security Rule updates “the laws governing retirement investment advice to be more consistent with the landscape today, to be more consistent with a retirement landscape where people must make their own individual decisions and are turning to advisors for advice. This is something that people didn’t have to do 50 years ago when ERISA was passed ... and its literally a lifetime of savings on the line here.”<sup>13</sup> Just as most retirement savings are protected from creditors, they must also be protected from the dangers of conflicted retirement investment advice.

*Retirement Investment Advice That is Not in the Client’s Best Interests Significantly Decreases the Length and Quality of Americans’ Retirement*

The Department’s proposed rule properly closes regulatory gaps that allow financial professionals to provide retirement investors with advice that is not in their best interests. The Department should not permit financial professionals and their firms to recommend products, services, or account types that maximize their own revenues but come with excessively high costs, unnecessary risks, or illiquidity to the disadvantage of the investor. Workers and retirees seek a financially secure and dignified retirement and deserve to have financial professionals delivering financial advice in their best interests.

The collective amount of retirement assets at stake – particularly assets subject to rollovers – is significant. In 2019, investors rolled over \$536 billion from employer-sponsored defined benefit plans or defined contribution plans to traditional IRAs.<sup>14</sup> In mid-2022, the value of IRAs was \$11.7 trillion, which represented 34 percent of total U.S. retirement market assets.<sup>15</sup>

The impact on retirement assets of financial advice that is not delivered in the client’s best interests can be significant. Investors might experience small differences in fees each year. Over time, however, these small differences can lead to enormous losses of retirement balances, with significant consequence for an investor’s retirement security. For example, increased mutual fund fees resulting from a single year of rollovers of 401(k) assets into IRAs could reduce retirement savings by \$45.5 billion over a hypothetical 25-year period.<sup>16</sup>

These numbers are stark. Even more stark is the negative effect on the length and quality of retirement that results from financial advice that is not in best interests of retired workers. For some, a decrease in financial assets resulting from financial advice that is not in an investor’s best interest may mean having to retire much later than they desire. For others, this may mean not having much money to spend in retirement, including on discretionary expenses. As this graphic shows, retirement investors who start in the same situation may have very different retirements, depending on whether they received best interest retirement investment advice:

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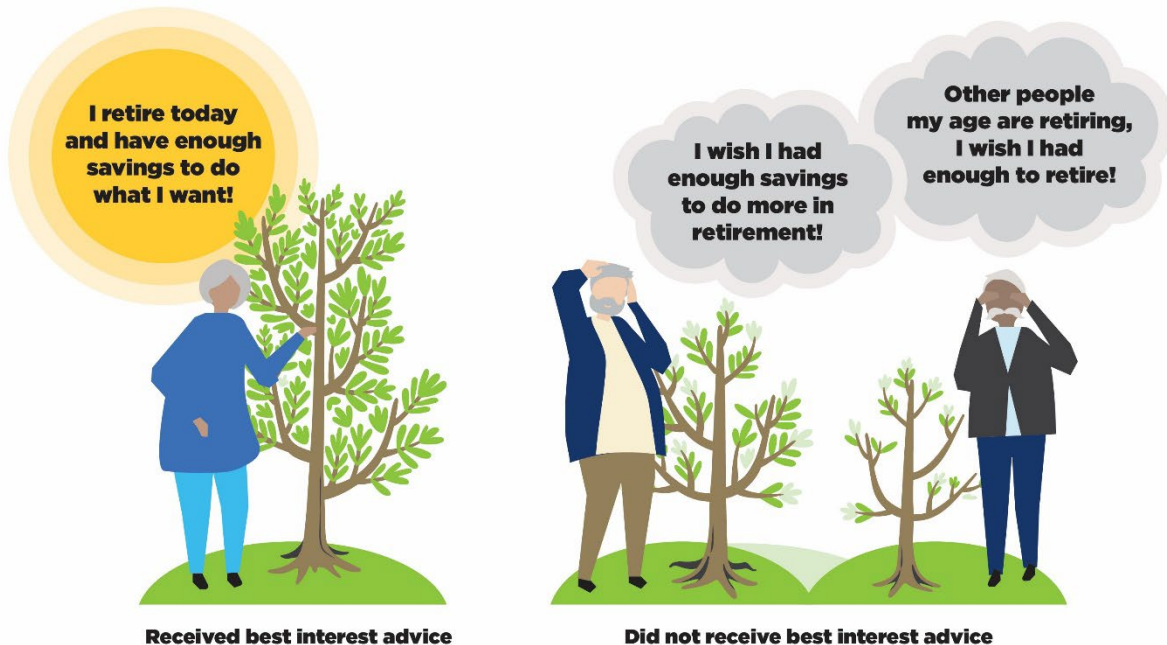
<sup>13</sup> Ben Harris and Adrianna Pita, “What Does a New Rule on Financial Advice Mean for Retirement Security?” *The Current Podcast*, Brookings, November 2, 2023, transcript avail. at <https://www.brookings.edu/articles/what-does-new-rule-on-investment-advice-mean-for-retirement-security/>.

<sup>14</sup> *The Role of IRAs in US Households’ Saving for Retirement 2022*, Investment Company Institute Research Perspectives, (February 2023), p. 6.

<sup>15</sup> *Id.* at 3.

<sup>16</sup> See Pew Research Issue Brief: [Small Differences in Mutual Fund Fees Can Cut Billions From Americans’ Retirement Savings | The Pew Charitable Trusts \(pewtrusts.org\)](https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2022/06/small-differences-in-mutual-fund-fees-can-cut-billions-from-americans-retirement-savings), June 30, 2022.

## The Cumulative Negative Effect of Retirement Advice That Is Not in the Investor's Best Interests



**They started in the same situation. The length and quality of their retirement is not the same.**

In contrast, financial professionals and their firms stand to prosper from financial advice that is not in the investor's best interests. For example, if a financial professional recommends a rollover of 401(k) plan account assets to 10 clients who collectively have \$2 million in account value, *in circumstances where the rollover is not in their best interests*, and the financial professional earns a 7% commission on the sales, then the financial professional (or their firm) will receive a sales commission of \$140,000. If the financial professional recommends that the investor keep their money in the plan *because it is in the client's best interests to do so*, then the financial professional will receive no compensation. Depending on the facts and circumstances, the benefit to the financial professional from financial advice that is not in the investor's best interests may be substantial.

*All Financial Professionals Can Provide Fiduciary Advice, Regardless of Business Model*

CFP® professionals have shown that any financial professional who wants to act in their client's best interest is able to do so, regardless of what products they offer or how they are compensated. CFP Board's fiduciary duty applies to a wide variety of financial assets, including mutual funds, insurance products, and real estate investments. CFP® professionals also work in a variety of business models:

- 67% are registered representatives of broker-dealers;
- 88% are investment adviser representatives of registered investment advisers; and
- 64% hold insurance licenses.



The compensation models that financial professionals offer are diverse and continue to evolve, with choices that extend beyond commissions and assets under management fees.<sup>17</sup> For example, some financial professionals charge hourly rates, subscription fees, or point in time advice for a set fee. The Department properly recognizes these new and different forms of compensation in the proposed rule.

### **Best Interest Advice Can Increase Access to Financial Advice for Retirement Investors**

Some moderate-income Americans do not access retirement financial advice because they do not believe that a financial professional will work in their best interests. *Who can blame them?* The existing five-part regulatory test has enormous gaps that permit financial professionals to provide retirement financial advice that is NOT in investors' best interests. In other words, the *status quo decreases* access to retirement financial advice by moderate income Americans.

According to the GAO, in 2016, almost a third of American households aged 55 and over had neither retirement account balances nor defined benefit pension plans.<sup>18</sup> Even more concerning, the retirement savings gap between low-income and high-income Americans is growing, with the percentage of low-income older households with a retirement account balance dropping from 21% in 2007 to 10% in 2019, while the percentage for high-income households remained largely unchanged.<sup>19</sup> High-income households had greater growth of income balances than low-income households, which the GAO noted might be due to, among other things, better financial advice.<sup>20</sup>

Studies show that increasing trust in financial professionals is key to improving access to advice. According to a 2018 SEI study, the most important expectations for retail investors were disclosing fees and costs (84%) and forthrightly disclosing and managing conflicts of interest (80%).<sup>21</sup> Likewise, as noted above, a 2022 CFA Institute study found that the most important factor to retail investors in working with a financial professional is whether the retail investor trusts the financial professional to act in their best interest.<sup>22</sup>

After CFP Board adopted a broad fiduciary standard, CFP Board saw no evidence that CFP® professionals stopped providing advice to moderate-income clients. CFP Board also has seen no evidence to suggest that the proposed rule would restrict access to advice, particularly for moderate-income Americans.<sup>23</sup> To the extent opponents to the proposed rule make such arguments, the Department should require specific and detailed evidence that this is likely to occur, because the existing evidence – or lack of evidence – is precisely to the contrary:

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<sup>17</sup> See generally Matthew Jackson, Wei Ke, PhD, *The Future of Fees, Real Life Pricing Innovations in Wealth Management* (Simon-Kucher 2018).

<sup>18</sup> 2023 GAO Report, *supra* note 3, p. 5.

<sup>19</sup> *Id.* at 10.

<sup>20</sup> *Id.* at 24.

<sup>21</sup> SEI, *Fees at a Crossroads Revisited, Closing the Gap Between Price and Value*, p. 11, *avail. at* <https://www.modelwealth.com/wp-content/uploads/2022/08/SEI-ADV-Fees-at-a-Crossroads-Revisited-1.pdf>.

<sup>22</sup> CFA Institute Investor Trust Study, *supra* note 5.

<sup>23</sup> The Securities Industry and Financial Markets Association (SIFMA) examined the response of broker-dealers to the Department's 2016 rule (the "SIFMA Report") and concluded that retirement savers would lose access to advice because of the rule. However, several factors cast doubt on the relevance of the SIFMA Report findings to the 2023 proposed rule. First, the Department could not evaluate the SIFMA Report that Deloitte published because the SIFMA Report did not provide the methodology that SIFMA used or the assumptions that SIFMA made. Second, the SIFMA Report does not account for changes in the marketplace since the Department's 2016 rule, notably the resources many firms already invested in complying with Regulation Best Interest. Third, the SIFMA Report (at page 10) stated that "almost all study participants indicated that *litigation risk* has been a primary concern throughout their process to prepare for the Rule." Unlike the 2016 rule, however, the proposed rule does not include a Best Interest Contract Exemption, which was a key source of that prior assumed litigation risk.

- There is no evidence that Regulation Best Interest, which is based upon fiduciary principles, has reduced moderate-income investors' access to investment recommendations. The Department has aligned the proposed rule with the requirements of Regulation Best Interest.
- There is no evidence that broker-dealers have not provided financial advice to moderate-income investors in those states where they are subject to a state law fiduciary duty.
- There is no evidence that annuity sales declined in states that adopted the NAIC Model Regulation. To the contrary, annuity sales appear to have increased significantly.<sup>24</sup>
- In March 2018, CFP Board adopted a fiduciary duty that applies to all financial advice. This did not decrease the number of CFP® professionals. Quite the opposite. The number of CFP® professionals grew from 79,878 in March 2018 to 98,873 in December 2023, a 23.8% increase.<sup>25</sup> The demand for CFP® professionals from firms across business models continues to be strong, notwithstanding this heightened standard.
- Even if there were some financial professionals who would not provide financial advice to moderate-income clients because of the proposed rule (and CFP Board has seen no evidence of this), there is every reason to believe that other financial professionals would step in to meet the financial advice needs of this population.

There is an even more salient reason for the Department to reject the suggestion that the proposed rule will decrease access to retirement investment advice: a consumer who loses access to a financial professional who is merely engaged in an arms-length commercial sales transaction *cannot be deemed to have lost access to investment advice*. On the other hand, requiring financial professionals to provide retirement sales recommendations under a fiduciary standard will result in millions of Americans gaining access to retirement investment advice that is in their best interests.

CFP Board is not aware of any evidence that a fiduciary standard has increased costs to investors. Instead, heightened standards of conduct appear to have stabilized or reduced costs. Indeed, while the implementation of the proposed rule may require some additional initial training costs, there is no reason to believe that the expanded fiduciary definition otherwise will materially increase costs. Further, although the proposed prohibited transaction exemptions likely would add one-time transition costs for the development of compliance policies, procedures, and disclosures, the transition costs will be insignificant for those who already comply with existing fiduciary standards and PTE 2020-02. On the other hand, the benefits to retirement investors will significantly offset these costs because higher quality recommendations will lower costs and the disclosure requirements' increased transparency will increase competition and reduce costs.

Limiting access to "sales recommendations" that are not in the retirement investor's best interest is a good outcome for retirement savers. This is particularly true for less wealthy investors, who have much to lose from retirement investment recommendations that are not in an investor's best interests.

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<sup>24</sup> LIMRA Annual Annuity Sales Estimates 2013-2022, *avail. at* <https://www.limra.com/siteassets/newsroom/fact-tank/sales-data/2023/q1/2013-2022-annuity-sales-final.pdf>.

<sup>25</sup> The number of CFP® professionals increased by 32% during the seven years after CFP Board announced in December 2015 that it would form a Commission on Standards to explore expanding the fiduciary obligation.

## **CFP Board Supports the Department’s Proposed Definition of Investment Advice Fiduciary**

CFP Board supports the Department’s proposed updated definition of “investment advice” for purposes of identifying investment advice fiduciaries. While CFP Board supports all three prongs of the definition in the proposed rule, this comment letter focuses on prong (ii).

### *The Proposed Definition Aligns with Congress’s Intent to Protect All Retirement Savings*

Congress enacted ERISA as a retirement asset protection law.<sup>26</sup> Congress gave the Department a mandate to protect retirement assets through effective regulation, including broad authority to define the term fiduciary. The regulatory definition of investment advice fiduciary that the Department promulgated in 1975, however, was narrower than the statutory definition of investment advice fiduciary, which provides that an investment professional is a fiduciary if the investment professional “renders investment advice for a fee or other compensation, direct or indirect.” Specifically, the regulatory definition added requirements that investment advice be provided to the plan on a *regular basis*, pursuant to a mutual agreement, arrangement or understanding between the plan and the fiduciary that the advice would form a primary basis for the investment decision. Even if the 1975 regulatory definition encompassed most retirement investment advice in 1975, the regulatory definition now obstructs Congressional intent to protect retirement investments today by unduly excluding a sizable portion of modern retirement investment advice.

In the proposed rule, the Department accurately analyzed the changed financial and retirement landscape, including the shift from defined benefit to defined contribution plans and the growth of participant-directed plans and IRAs, which, as noted above, has made millions of Americans responsible for their own retirement savings. These changed circumstances have rendered the existing regulatory definition incompatible with the statute. The proposed rule comports with the ERISA statutory text, is necessary to achieve Congress’s original intent, and is consistent with other investment advice regulations.

### *The Department Tailored the Proposed Definition to Relationships of Trust and Confidence*

The Department narrowly tailored the scope of the definition in the proposed rule to relationships of trust and confidence by limiting the definition’s application only to those recommendations that (1) are based on the particular needs or individual circumstances of the retirement investor and (2) may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor’s best interest.<sup>27</sup> CFP Board supports this objective standard.

The Department should not exclude “sales recommendations” from retirement investment recommendations that are subject to investment advice fiduciary requirements. How a financial

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<sup>26</sup> Senate Report No. 93-127, April 18, 1974.

<sup>27</sup> The Department thus addressed the main concern that Judges Jones and Clement raised in the 2-1 decision of the Fifth Circuit Court of Appeals, namely, that the 2016 fiduciary rule was overbroad because it applied where an investor might not have placed their trust and confidence in the investment professional. The proposed rule also does not require firms to execute contracts warranting compliance. This responds to Judge Jones’ and Clement’s concern that 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, and thereby created an enforcement mechanism for harmed IRA investors, allowing them to sue for a firm’s breach of the warranties.



professional is paid should not determine whether they must act in their client's best interests when providing retirement investment advice. CFP Board does not agree that compensation that results from one-time retirement investment advice provided in connection with a sale of a product should be treated any differently than compensation that results from ongoing retirement investment advice provided in connection with the sale of a service. In either circumstance, it is the delivery of retirement investment advice, and not the method of compensation or term of the advice, that is relevant in determining the standard of conduct that should apply. Those providing retirement investment advice invite the recipient to trust the giver of the advice.

As CFP Board's 2023 Board Chair Dan Moisand, CFP® testified before the Department on December 13, 2023, the American public should not need a glossary to know whether they should have trust and confidence in recommendations that their financial professional makes about their retirement savings. CFP Board is not aware of any financial professional who, in making a sales recommendation, has communicated clearly to a retirement investor that there is no relationship of trust and confidence by using language similar to that which opponents of the 2016 DOL rule used in challenging that regulation before the Fifth Circuit or opponents of this proposed rule used during the public hearing:

- I am acting as a salesperson in describing the benefits of this investment to you.<sup>28</sup>
- We do not have a relationship of trust.<sup>29</sup> This means you should make your own determination and not place trust in me.
- You are not paying me to provide my expertise or independent judgment.<sup>30</sup>
- This is an arm's length sales transaction, which means I am acting in my own self-interest.<sup>31</sup>
- Working with me is like buying a car. I am inviting you to buy an investment product in the same way that a car dealer invites you to buy a car.<sup>32</sup>
- The fact that I am urging you to buy a product does not mean that the product is in your best interests.<sup>33</sup>

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<sup>28</sup> See Brief for Chamber of Commerce Plaintiffs-Appellants, *Chamber of Commerce et al v. Department of Labor*, 885 F.3d 360 (5<sup>th</sup> Cir. 2018) ("Chamber Brief"), p. 34 ("To conclude that someone is a salesperson is to conclude that she *is not* a fiduciary") (emphasis in original).

<sup>29</sup> Chamber Brief, p. 22 ("a 'fiduciary' relationship arises only where there is a special relationship of trust"). See also Brief for Indexed Annuity Leadership Council Plaintiffs-Appellants, *Chamber v. Department of Labor* ("IALC Brief"), p. 32 ("DOL had no basis for concluding that one-time annuity sales involve 'relationships of trust.'")

<sup>30</sup> Chamber Brief, p. 31 ("The essence [of the definition of fiduciary] is that a fee is being paid to procure the 'advice' of someone with expertise and independent judgement about the best course to pursue, as opposed to a commission being paid for consummating a transaction....")

<sup>31</sup> Chamber Brief, p. 32 ("At the time ERISA was enacted, it was well recognized that an arms-length sales transaction did not give rise to a fiduciary relationship of trust and confidence."); IALC Brief, p. 1 ("insurance products are sold in arm's-length transactions"); see also Arm's Length Transaction Definition, Legal Information Institute Wex definitions Team, *avail. at*

[https://www.law.cornell.edu/wex/arm%27s\\_length#:~:text=%E2%80%9CArm's%20length%E2%80%9D%20is%20an%20expression.and%20in%20their%20self%2Dinterest](https://www.law.cornell.edu/wex/arm%27s_length#:~:text=%E2%80%9CArm's%20length%E2%80%9D%20is%20an%20expression.and%20in%20their%20self%2Dinterest). (last updated May 2022).

<sup>32</sup> Chamber Brief, p. 41, citing *Farm King Supply, Inc. Integrated Profit Sharing Plan & Trust v. Edward D. Jones & Co.*, 884 F.2d 288, 294 (7<sup>th</sup> Cir. 1989) ("A broker, insurance agent, or other financial-sales professional may make 'individualized solicitations much the same way a car dealer solicits particularized interest in its inventory'").

<sup>33</sup> Chamber Brief, p. 33, citing *Am. Fed'n of Unions Local 102 Health & Welfare Fund v. Equitable Life Assurance Soc'y of the U.S.*, 841 F.2d 658, 664 (5<sup>th</sup> Cir. 1988) ("Simply urging the purchase of [the company's] products does not make an insurance company an ERISA fiduciary with respect to those products").

In fact, the marketing materials that accompany sales recommendations often imply a relationship of trust and confidence,<sup>34</sup> and financial professionals often portray themselves as knowledgeable experts. Most importantly, financial professionals providing individualized retirement advice have a relationship of trust and confidence with the retirement investor *because that is what a retirement investor reasonably expects.*<sup>35</sup>

### *Investors Place Trust and Confidence in One-Time Advice*

CFP Board supports the Department removing the improperly and overly restrictive ERISA regulatory requirement that a person provide advice to the plan (or retirement investor) “on a regular basis.” Regulation Best Interest, the SEC Fiduciary Interpretation, and the amended NAIC Model Regulation all encompass one-time recommendations. CFP Board’s *Code and Standards* also applies the fiduciary duty to one-time financial advice.

The complete exclusion of one-time advice from the current regulatory definition of fiduciary is a flawed standard because it excludes a significant portion of retirement investment advice that financial professionals provide for a fee or other compensation, direct or indirect. The exclusion also downplays the significant and often irreversible consequences of one-time advice. CFP Board’s most recent public awareness campaign advertisements demonstrate the significance of one-time advice. The advertisements present an inexperienced bungee jumper who is about to take their first leap:



In the advertisement, a bungee jumper contemplates the irreversible decision to jump from the ledge, and the importance of having trust and confidence in the person assisting them. The bungee jumper didn’t jump because he could see the frayed rope. It is not so obvious to a retirement investor that the one-time advice the financial professional is providing is not in their best interest. Watch the video here: <https://www.cfp.net/initiatives/increasing-awareness/public-awareness-campaign-and-toolkit>.

A one-time and irrevocable decision as to whether and how to roll over employer-sponsored retirement assets may be the single most important financial decision a retirement investor ever

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<sup>34</sup> See PIABA, Major Investor Losses due to Conflicted Advice: Brokerage Industry Advertising Creates the Illusion of a Fiduciary Duty; Misleading Ads Fuel Confusion, Underscore Need for Fiduciary Standard (Mar. 25, 2015), *avail. at* <https://piaba.org/sites/default/files/newsroom/2015-03/PIABA%20Conflicted%20Advice%20Report.pdf> (showing marketing campaigns of financial firms implying a relationship of trust and confidence even when disclaiming that relationship in arbitration). See also Consumer Federation of America, Financial Advisor or Investment Salesperson, *avail. at* [https://consumerfed.org/wp-content/uploads/2017/01/1-18-17-Advisor-or-Salesperson\\_Report.pdf](https://consumerfed.org/wp-content/uploads/2017/01/1-18-17-Advisor-or-Salesperson_Report.pdf).

<sup>35</sup> See CFA Investor Trust Study, *supra* note 5 and accompanying text.

will make, with the potential to have a significant negative effect on the length or quality of the investor's retirement. The proposed rule properly closes the existing ERISA regulatory "regular basis" loophole.

### *No Other Regulation Comprehensively Protects Retirement Investors*

There should be one standard of conduct for advice on retirement savings that benefit from the Internal Revenue Code's tax advantages for qualified retirement plans and IRAs. Regulatory requirements should not vary by advice market or investment product. Financial professionals making recommendations to private sector retirement plans, participants, and IRA owners should have to do so in their clients' best interest, subject to a duty of care and duty of loyalty, regardless of whether the recommendations are about securities, insurance, real estate, commodities, cryptocurrencies, or other investment property.

Existing best interest advice regulations do not cover other significant retirement investment recommendations. More specifically, the SEC's Regulation Best Interest and the NAIC's Model Regulation have serious limitations:

- The scope of both Regulation Best Interest and the NAIC Model Regulation is limited to recommendations to retail customers, and thus they do not apply to recommendations to employers who sponsor 401(k) plans. Thus, retirement investors need the Department's proposed rule for a best interest requirement to extend to advice from broker-dealers and insurance producers to retirement plan fiduciaries.<sup>36</sup>
- There are jurisdictional limitations to both Regulation Best Interest and the NAIC Model Regulation. Specifically, neither cover real estate, many insurance products, commodities, certificates of deposit, other bank products, and certain cryptocurrencies.<sup>37</sup>

The proposed rule would apply to each of these categories of retirement investment advice.

### *Advice to Retirement Investors About Annuity Products Must Be Subject to Consistent, Strong Standards of Conduct*

Retiring investors need access to investment products that protect against longevity risk, including annuity products. The significant increase in annuity product investment sales demonstrates the increased importance of this market. Total annuity sales have grown from \$230 billion in 2013 to \$313 billion in 2022.<sup>38</sup> Additionally, fixed annuities have become increasingly popular, with sales in 2022 totaling \$210 billion, well surpassing sales of variable annuities.<sup>39</sup> Given the increased importance of annuities, and the complexity of these products (as discussed above), advice about annuities should be subject to a consistent and protective standard of conduct.

Unfortunately, the current regulatory patchwork applies a much lower standard of conduct to advice about fixed annuities. While variable annuities are securities and thus advice relating to

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<sup>36</sup> See Regulation Best Interest n. 253 and accompanying text for its discussion of the SEC's decision not to extend Regulation Best Interest to recommendations to plan fiduciaries.

<sup>37</sup> The Advisers Act fiduciary duty applies to advice to all clients, including plans, as well as to the entire advice relationship, not just securities transactions. Commission Interpretation Regarding Standards of Conduct for Investment Advisers, Investment Advisers Act Release No. 5248, 84 Fed. Reg. 33669 (July 12, 2019).

<sup>38</sup> LIMRA Annual Annuity Sales Estimates 2013, *avail. at* <https://www.limra.com/siteassets/newsroom/fact-tank/sales-data/2023/q1/2013-2022-annuity-sales-final.pdf>.

<sup>39</sup> *Id.*

them is subject to the SEC's Regulation Best Interest, fixed annuities generally are not securities and are subject to state insurance regulation. Most states have adopted an NAIC Model Regulation that has significant shortcomings.<sup>40</sup> For example, unlike Regulation Best Interest, which would apply to variable annuities (as securities), the NAIC Model Regulation excludes both cash and non-cash compensation from its definition of "material conflict of interest."<sup>41</sup> As a result, there is no NAIC Model Regulation requirement to identify or reasonably manage material conflicts of interest arising from fixed annuity sales compensation. The proposed rule would eliminate this disparity by requiring mitigation of fixed annuity conflicts of interest, including by managing conflicts arising from differences in the total commission a professional would receive for different annuities, which can incentivize a professional to recommend annuities with more features than an investor needs to earn a higher commission.

### **CFP Board Supports the Application of PTE 2020-02 to a Broader Scope of Fiduciary Advice**

The consequence of a properly structured ERISA fiduciary definition is that a broader scope of financial advice to retirement investors will be required to comply with a prohibited transaction exemption, most commonly PTE 2020-02, including the Impartial Conduct Standards, compliance policies and procedures, required documentation of any rollover recommendation, and a retrospective review. CFP Board supports this result. PTE 2020-02 provides an appropriate path to provide fiduciary advice under a variety of business models and compensation methods – including commissions – so long as the fiduciaries provide prudent and loyal advice at a reasonable fee and their firms take meaningful steps to mitigate conflicts arising from the compensation through policies, procedures, and periodic review.

CFP Board also agrees that PTE 2020-02 is consistent with the requirements of Regulation Best Interest and the fiduciary obligations of investment advisers under the Advisers Act. The Department determined that broker-dealers and investment advisers that have adopted meaningful compliance mechanisms for Regulation Best Interest and the SEC Fiduciary Interpretation, respectively, should be able to adapt "relatively easily" to comply with the PTE, although there remain gaps the proposed rule appropriately would fill. For certain insurance products not registered as securities and, in turn, not covered by Regulation Best Interest or the SEC's Fiduciary Interpretation, particularly fixed annuities, the gap is larger. The ERISA protections set forth in PTE 2020-02 should apply to these assets when used in retirement plans.

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<sup>40</sup> CFP Board's first comment letter to the Department, filed on November 14, 2023, attaches a guide that addresses the shortcomings of the NAIC Model Regulation, which also is available here: <https://www.cfp.net/-/media/files/cfp-board/standards-and-ethics/compliance-resources/naic-comparison-guide.pdf?la=en&hash=6BB8B19F88D0BA582E55DAB195F9BED1>.

<sup>41</sup> NAIC Model Regulation #275 FAQ.10 ("in light of these robust disclosures [required about cash and non-cash compensation], and the fact most consumers recognize producers will be compensated for their work, the NAIC determined that compensation is not a material conflict of interest."). However, a consumer's awareness that a financial professional has a compensation interest does not eliminate that conflict, or even mean that the nature of the conflict has been completely disclosed. The retirement investor might not know that they will pay a higher commission on certain annuities than others (differential compensation), with the result that the person recommending the annuity has an incentive to recommend and sell a product that is *suboptimal* for the investor but will result in more compensation to the professional. Indeed, a representative of the National Association for Fixed Annuities (NAFA) testified that the NAIC Model Regulation's best interest standard does not contain a duty of loyalty. See Transcript of December 13, 2023 Public Comment Hearing, p. 36. Another NAFA representative testified that a producer who is compensated on a transaction basis does not seek to set aside his or her compensation interests. *Id.* at 45.

## Other Comments and Suggestions for Improvement

CFP Board supports the following:

- The Department's conclusion that information (even when individualized to a participant or IRA owner) to increase contributions or deferrals to reach reasonable benchmark levels for retirement adequacy should be considered education and not investment advice.
- DOL Interpretive Bulletin 96-1's exception for investment education and guidance regarding when an investor communication is considered educational and when it is considered a recommendation.
- Each prong of the proposed definition of "recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property." Consistent with CFP Board's *Code and Standards*, the definition should encompass all financial assets such as securities, fixed income annuities, commodities, and others.<sup>42</sup> Retirement assets represent retirees' hard-earned savings. All retirement investors should be secure in knowing that they always are receiving advice in their best interests.
- The Department's recognition that there are many ways to compensate a financial professional (including hourly engagement and subscriptions, which sometimes are referred to as retainers) and for using language that does not limit future, innovative ways of paying for financial advice that facilitates greater access to financial advice for the American public. As noted above, CFP® professionals have many business models and compensation methods.
- The Department's determination that firms should be obligated to mitigate firm-level conflicts, including limited menus of investment options that generate third-party payments and creating a model for firm conflict mitigation, which would provide a strong threshold foundation for the formulation of best interest retirement investment recommendations. Neither Regulation Best Interest nor the NAIC Model Regulation requires firms to mitigate or manage all material conflicts of interest. Regulation Best Interest requires mitigation of conflicts that create incentives for professionals, such as compensation arrangements, but, with some exceptions, not conflicts of the firm. The NAIC Model Regulation states that producers must mitigate conflicts but does not require the insurance company to do so and, more importantly, excludes compensation from the definition of conflict of interest altogether. The proposed rule would fill this gap and provide appropriate protection to retirement assets.

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<sup>42</sup> "Financial Advice" under CFP Board's *Code and Standards* includes communications that, based on their content, context, and presentation, would reasonably be viewed as a recommendation to take or refrain from taking a particular course of action with respect to the advisability of investing in, purchasing, holding, gifting, or selling Financial Assets ... Financial Assets include securities, insurance products, real estate, bank instruments, commodities contracts, derivative contracts, collectibles, or other financial products. (*Code and Standards*, Glossary.)

CFP Board respectfully requests that the Department consider the following:

- Clarify that the term “recommendation” is consistent with how the term is interpreted in guidance from the SEC or FINRA.<sup>43</sup>
- More specifically define the “documentation” that PTE 2020-02 requires for rollover recommendations. The current version of PTE 2020-02 states that, with respect to rollovers, advisors must provide retirement investors in writing the specific reasons why the rollover recommendation is in their best interest. The new language requiring that the “Financial Institution and Investment Professional must consider and document the basis for their conclusions as to whether a rollover is in the Retirement Investor’s Best Interest and must provide that documentation to the Retirement Investor” is even less clear.
- Require plans to provide a 404a-5 participant fee disclosure with cost details, as with their annual reports on Form 5500. CFP Board supports the requirement that financial professionals and insurance producers analyze the retirement investor’s plan options to determine if their recommendation, whether a rollover, transfer, or distribution, is superior to those provided by the investor’s present options. Access to this disclosure will better enable financial professionals to analyze the retirement investor’s plan options to determine if their recommendation (a rollover, transfer, or distribution) is better than what they already have.
- Exempt firms that make a limited number of covered recommendations from the annual review and reporting requirement, so long as the firm otherwise complies with the proposed rule’s requirements and a qualified person reviews each covered recommendation. This would reduce compliance burdens for advisors in small firms.
- Clarify that a person who advertises that they hold a particular certification or designation does not claim fiduciary status in a specific engagement under prong (c)(iii) of the investment advice fiduciary definition simply by virtue of the general advertisement.
- Confirm that a firm offering robo-advice (or other similar kinds of advice) is a fiduciary and is subject to both the adviser and firm Impartial Conduct obligations set forth in PTE 2020-02.
- Refine the language that states: “*for investment decisions that are in the retirement investor’s best interest.*” This language may be confusing as the investment decisions may not be in the retirement investor’s best interest. Consider language that states: “for investment decisions that are intended to advance the retirement investor’s best interests,” or some other similar language.

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<sup>43</sup> See Regulation Best Interest; NASD Notice to Members 01-23, Online Suitability – Suitability Rules and Online Communications (Apr. 2001).



## Conclusion

CFP Board commends the Department for taking steps to modernize the regulatory framework to account for changes in the retirement investment landscape and the reasonable expectations of retirement investors. A strengthened standard, meeting a retirement investor's reasonable expectation of a relationship of trust and confidence, is necessary and appropriate under ERISA. CFP Board urges the Department to move forward expeditiously with a final rule that is designed to protect retirement investors.

Thank you for the opportunity to comment on the proposed rule. If you have any questions or would like to discuss this issue, please contact me by phone at 202-379-2230 or by email at [lrydzewski@cfpboard.org](mailto:lrydzewski@cfpboard.org).

Sincerely,

A handwritten signature in blue ink that reads "Leo G. Rydzewski". The signature is written in a cursive style with a small flourish at the end.

Leo G. Rydzewski  
General Counsel  
Certified Financial Planner Board of Standards, Inc.  
Certified Financial Planner Board of Standards Center for Financial Planning, Inc.