



January 2, 2024

The Honorable Julie Su
Acting Secretary
U.S. Department of Labor
200 Constitution Ave.
Washington, D.C. 20210

**Re: Comments on Retirement Security Rule: Definition of an Investment Advice
Fiduciary – RIN 1210-AC02**

Dear Acting Secretary Su,

We write today to express strong support for the recently proposed Department of Labor (the Department or DOL) Retirement Security Rule (Proposed Rule).

The Proposed Rule levels the playing field for consumers by applying a uniform advice standard to retirement investments. It also closes loopholes around rollover recommendations and advice to employers sponsoring 401(k) plans. The Proposed Rule prohibits unscrupulous financial professionals from steering retirement savers into expensive or poorly performing products that provide an incentive for the advisor—even if it is not the best choice for the client. In basic parlance, this is known as providing “conflicted advice” and it is significantly harming America’s retirement savers.

The Proposed Rule is critical for American workers who have been asked to bear the burden of saving for retirement and take on the risk of investing in an ever more complex and volatile market. Since the passage of Employee Retirement Income Security Act of 1974 (ERISA), the retirement savings landscape has transformed into an “you’re-on-your own” model. In practice, this means that workers now have to figure out how to manage their own retirement savings during their careers. And when they’re approaching retirement, workers have to ensure they do not outlive what they worked so hard to save.

Americans often turn to financial professionals for help, particularly when it comes to rolling over assets from their workplace retirement plan into an Individual Retirement Account (IRA). For many, this is among the biggest financial decisions of their lives, so they understandably place their trust in a professional. Many professionals do right by their retirement clients, but others do not and provide conflicted advice. Conflicted advice by investment professionals continue to have real consequences—costing retirement savers an estimated 20 percent, or three to five years of their retirement income.ⁱ

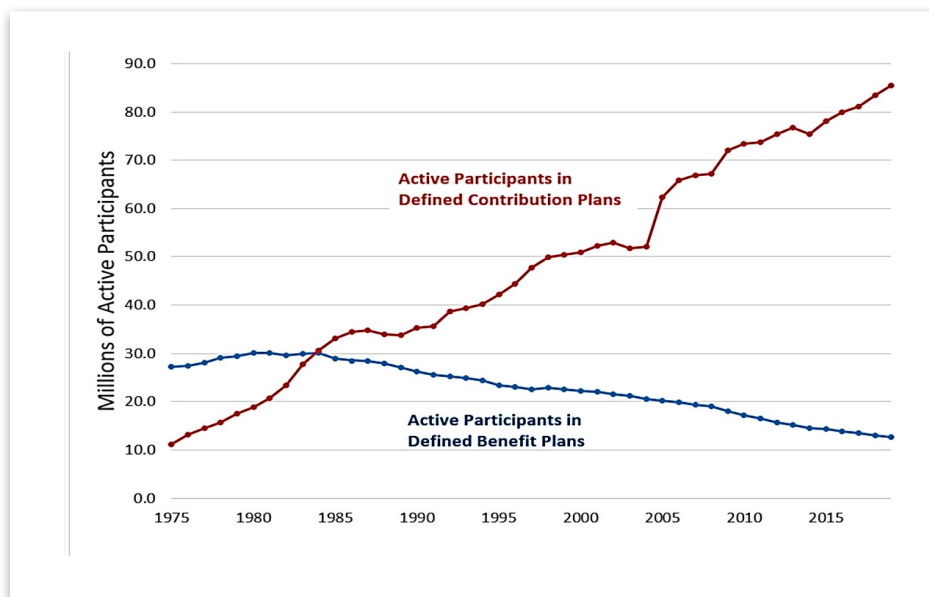
We greatly appreciate your leadership on this imperative effort to ensure that American workers receive retirement advice that is in their best interest. We value the Department’s thoughtful, iterative approach, particularly as it relates to changes made to the proposal in light of recent court decisions. We also applaud DOL for working diligently with Congress, Treasury, the Securities and Exchange Commission (SEC), consumer groups, and other key stakeholders in proposing the rule.

I. The Shift from Defined Benefit Plans to Defined Contribution Plans Put the Onus and Risk of Saving for Retirement on Individual Workers.

At the time of ERISA’s passage in 1974, individual retirement accounts were newly created and 401(k) plans were not yet in existence. Defined benefit (DB) plans were the primary means of providing retirement security. Also known as traditional pensions, DB plans provide guaranteed income in retirement that generally cannot be outlived. DB plans not only pool assets and risk, but utilize professional, fiduciary investment advice, which leads to cost savings.

Over the past several decades, there was a great shift from DB to defined contribution (DC) plans. According to the Congressional Research Service (CRS), 27.2 million workers participated in DB plans in 1975 and 11.2 million workers participated in DC plans.ⁱⁱ In 2019, 85.5 million workers participated in DC plans and 12.6 million participated in DB plans.

Figure 1: Active Participants in Private Sector Pension Plans 1975-2019 ⁱⁱⁱ



The Congressional Budget Office (CBO) estimates that,

[I]n 2019 the total amount of DB and DC wealth was about equal—\$15.8 trillion for DB and \$16.6 trillion for DC, making up 14 and 15 percent of total augmented family wealth, respectively. In contrast, in 1989, total DB wealth was 2.6 times that of total DC wealth.^{iv}

Further, the CBO noted that DB wealth is more evenly distributed amongst socioeconomic groups, whereas the concentration of wealth in DC plans accounted for about one-fifth of the increase in the share of wealth held by families in the top ten percent of wealth distribution scale. In 2021, workers held roughly \$9.4 trillion in DC plans and \$13.2 trillion in IRAs.^v

While the causes of this phenomenon are well documented, the implications for individual retirement savers are not often articulated. The shift from traditional DB plans to DC plans has made American workers responsible for planning, funding, and hedging against longevity, inflation, and market risk on their own, despite many not being appropriately knowledgeable or equipped to manage those risks. DC plans and IRAs require individuals to choose how much to save and where to invest, often without the benefit of fiduciary advice.

If we are going to put the onus and risk of saving for retirement on individual workers, we must at least give them the tools they need to be successful. The Proposed Rule allows workers to access the quality advice they need and hopefully puts an end to conflicted advice, two crucial outcomes in this new retirement landscape.

II. Conflicted Advice Is Immensely Costly to Retirement Savers.

The cost to consumers of conflicted advice cannot be overstated:

Requiring advisers to make recommendations in the savers' best interest can increase retirement savers' returns by between 0.2% and 1.20% per year. Over a lifetime, that can add up to 20% more retirement savings—potentially tens or even hundreds of thousands of dollars per impacted middle-class saver...^{vi}

It is estimated that the cost of conflicted advice in the sale of just one product—fixed index annuities—may cost Americans as much as \$5 billion in retirement savings per year.^{vii}

The state of affairs for rollovers is even more stark, as Americans rolled over \$779 billion from DC plans into IRAs in 2022 alone.^{viii} Roughly 5 million American workers rollover funds from their workplace retirement plan each year.^{ix} A 2015 estimate found that as much as \$1.7 trillion of IRA assets are invested in products that may have conflicts of interest, making the cost savings of conflicted advice to consumers roughly \$17 billion annually.^x

The Department's Proposed Rule will apply a fiduciary standard to recommendations to rollovers from a workplace retirement plan to an IRA, if certain reasonable criteria are met. Given the aforementioned shift to DC plans, employer-sponsored workplace retirement plans are frequently the largest savings amassed by workers. Consumers are often vulnerable to high fees, inappropriate investment options, and conflicted advice when rolling over their savings out of a DC plan and into an IRA. Savers need fiduciary advice at the point of rollover perhaps more than any other time in their career, even if that decision is made over the course of a single conversation with a financial professional.

Assertions have been made that middle-income savers and savers of color will be harmed by the Proposed Rule. Yet, when looking at the implementation of a similar regulation, there is no

evidence that such assertions will become a reality. As you know, the Department’s Proposed Rule aligns with the SEC’s 2019 Regulation Best Interest, which applied to retail customers receiving recommendations on securities and clarified the fiduciary duties of investment advisors in order to better “align the standard of conduct with retail customers’ reasonable expectations.”^{xi} Since the SEC began implementing Regulation Best Interest, there is evidence to suggest that investment professionals are more than capable of offering advice in clients’ best interest *and* remaining profitable. Additionally, there appears to be no evidence showing that people of color or moderate-income savers lost access to financial advice in the wake of the SEC’s Regulation Best Interest; and we fully expect the same to be true with regard to the implementation of the DOL’s Proposed Rule. The Proposed Rule does not ban any particular fee structures. Further, small dollar savers will greatly benefit from the Proposed Rule, as they are the ones who can least afford to lose any of their hard-earned retirement savings to costly, conflicted advice.

III. Consumers have a Reasonable Belief They Are Getting Advice in Their Best Interest.

Retirement savings advice providers often hold themselves out as a financial consultants, financial planners, or wealth managers, leading savers to reasonably assume that they are receiving advice that is in their best interest. The Proposed Rule seeks to correct this disconnect by tailoring the fiduciary standard to “advice providers in whom retirement investors may ‘reasonably place their trust and confidence.’”^{xii} This prudent and narrowly tailored focus is directly responsive to the concern of the Fifth Circuit Court of Appeals, which held that the 2016 fiduciary rule was overbroad.^{xiii} The Department strikes a careful balance in the Proposed Rule, avoiding the aforementioned breadth of concerns while improving upon the rigid, outdated five-part test, which the District Court of the District of Columbia said was more “difficult to reconcile” than the 2016 proposal.^{xiv}

Just as important, in the Proposed Rule, the Department has considered the needs and experiences of consumers. Savers frequently receive retirement advice from investment professionals that are not required to adhere to a fiduciary or best interest standard, which often “serves to undermine the reasonable expectations of retirement investors in today’s marketplace.”^{xv} Consumers do not believe they are receiving a different standard of advice based on the type of product under discussion. Several surveys have found that consumers mistakenly assume the advice they receive from investment professionals is required to be in a consumer’s best interest:

- A 2019 poll found that nearly half of investors believed that all financial advisors are required by law to always act in consumers’ best interest and 65% of consumers using an advisor believed that “all financial advisors recommend only what is in a client’s best interest, up from 46% who said this in 2017.”^{xvi}
- A 2015 LIMRA study found that “[n]ine in ten consumers who work with a paid financial advisor believe their advisor always puts their interests first...” The study defined “advisor” as “a paid financial professional (e.g. insurance agent, lawyer, accountant, broker, financial planner or advisor) used to make at least some of the household’s investment decisions.”^{xvii}

- A 2010 Consumer Federation of America, AARP, and North American Securities Administrators Association poll (CFA Poll) found that more than seven out of ten respondents thought that financial planners and investment advisers were held to a fiduciary standard, and six in ten thought insurance agents were subject to a fiduciary standard.

Unsurprisingly given the above, consumers want a uniform fiduciary standard. The aforementioned CFA Poll found that:

Nearly all investors (97 percent) agree that ‘when you receive investment advice from a financial professional, the person providing the advice should put your interests ahead of theirs and should have to tell you upfront about any fees or commissions they earn and any conflicts of interest that potentially could influence that advice.’^{xviii}

Likewise, 96 percent of respondents agreed that insurance agents should be held to a fiduciary standard.^{xix}

IV. DOL Has the Authority to Promulgate this Rule.

In crafting the Proposed Rule as it did, the Department remained faithful to both the intent of and authority authorized by ERISA upon its enactment in 1974. The following statement by the Chair of the Senate Committee on Labor and Public Welfare upon introduction of the Conference Report on ERISA makes it abundantly clear that DOL is acting according to congressional intent:

Despite the value of full reporting and disclosure, it has become clear that such provisions are not in themselves sufficient to safeguard employee benefit plan assets from such abuses as self-dealing, imprudent investing, and misappropriation of plan funds. Neither existing State nor Federal law has been effective in preventing or correcting many of these abuses. Accordingly, the legislation imposes strict fiduciary obligations on those who have discretion or responsibility respecting the management, handling, or disposition of pension or welfare plan assets. The objectives of these provisions are to...*establish uniform fiduciary standards* to prevent transactions which dissipate or endanger plan assets...(emphasis added)^{xx}

As previously noted, there is a myriad of evidence that conflicted advice leads to the dissipation and endangerment of plan assets—the bar set by our predecessors.

DOL’s authority to take this action is also clear in ERISA’s statute, as Congress gave the Secretary of Labor extensive statutory authority to “prescribe such regulations as he finds necessary or appropriate to carry out the provisions of this subchapter. Among other things, such regulations may define accounting, technical and trade terms used in such provisions...”^{xxxi}

V. The Department has Coordinated Appropriately with other Existing Standards and Agencies.

As noted in the Proposed Rule, “ERISA’s regulation of advice has failed to keep up with changes in the marketplace, in marked contrast with other regulatory regimes.”^{xxii} After nearly 50-years it is in desperate need of updating. In promulgating this rule, the DOL intends to create a narrowly tailored, uniform standard across agencies and products, which corresponds to the reasonable expectations of consumers.

In order to effectuate that goal, and as mentioned above, the Department’s Proposed Rule aligns with the SEC’s 2019 Regulation Best Interest. Notably, the Proposed Rule applies a fiduciary standard to the sale of some products and situations not covered by Regulation Best Interest. It does not apply to non-securities (such as real estate, some insurance products, cryptocurrency, futures, or options), which are frequently part of consumer’s retirement savings. Regulation Best Interest also does not apply to advice to retirement plans. DOL’s Proposed Rule is a laudable step towards a unified advice standard that applies regardless of product offering.

Technical assistance requested by Senate Health, Education, Labor, and Pensions (HELP) Committee of the Office of the Investor Advocate (OIA) of the SEC reiterated the gaps in Best Interest standard coverage:

Recommendations to retail customers regarding retirement accounts are subject to Regulation Best Interest (Reg BI) when they involve securities transactions or investment strategies involving securities (including account recommendations). (*Regulation Best Interest: The Broker-Dealer Standard of Conduct*, 84 FR 33318 (July 12, 2019)). However, recommendations fall outside of the scope of Reg BI when they do not involve securities. For example, recommendations to transact in fixed annuities, traditional commodities, and certain types of real estate investments, among other investments, are not subject to Reg BI.^{xxiii}

Further, OIA noted that consumers themselves have pointed out these gaps in roundtables and events held by that office:

Commission staff regularly participate in investor outreach programs, however, and often hear anecdotal accounts of investors transacting in non-securities for their retirement accounts. In July 2023, for example, the Commission, the North American Securities Administrators Association (NASAA), and the Wisconsin Department of Financial Institutions hosted a public roundtable in Madison, Wisconsin. At the roundtable, retirement plan participants, older investors, investigators, and regulators shared their experiences related to a variety of issues, including retirement account transactions that did not involve securities.^{xxiv}

In the aforementioned technical assistance, data was requested by the Senate HELP Committee regarding the claim that investment professionals would stop providing financial advice to consumers if they were required to meet the Best Interest standard. OIA pointed out that in fact

the number of registered investment advisors (RIAs) has increased during the implementation of Regulation Best Interest:

The Commission publishes comprehensive data regarding investment advisers who are registered with the SEC...The number of registered investment advisers as of December of each year beginning in 2017 is listed below...

- December 2017 – 12,693
- December 2018 – 13,266
- December 2019 – 13,506
- December 2020 – 13,903
- December 2021 – 14,835
- December 2022 – 15,444
- December 2023 – 15,573^{xxv}

Similarly, OIA points to FINRA data showing that although there was a dip in FINRA registered individuals several years ago, that number has since rebounded:

The number of financial professionals who help retail investors make investment decisions changes over time. FINRA publishes the FINRA Industry Snapshot yearly which provides a high-level overview of the industry, including the number of FINRA-registered individuals. FINRA's 2023 Industry Snapshot provided the total number of FINRA-Registered Representatives from 2018-2022 as of year-end:

- 2018 – 629,475
- 2019 – 624,620
- 2020 – 617,507
- 2021 – 612,435
- 2022 – 620,882^{xxvi}

It is also worth noting that roughly 40 states have adopted the National Association of Insurance Commissioners (NAIC) model regulation establishing conduct standards for insurance agents and companies. Although the widespread adoption of this model standard serves to underscore the changed regulatory environment, this state level standard is insufficient to protect consumers. Aside from failing to provide a uniform, nationwide consumer protection standard as was intended under ERISA, the model regulation does not require insurance agents and companies to give advice in retirement savers' best interest and allows the continued use of non-cash compensation to incentivize the sale of expensive and underperforming profits.^{xxvii} Instead, the model regulation is a repackaged suitability standard, which we believe is wholly insufficient to protect consumers.

VI. Conclusion

For all the reasons mentioned above, retirement savers remain at risk of being harmed and losing income due to conflicted advice. The Proposed Rule responsibly closes loopholes and provides a

narrowly tailored, uniform approach that reflects the reasonable expectations of America's workers that they will receive financial retirement investment advice that is in their best interest.

We commend the Department for engaging in such a deliberative process with stakeholders and look forward to the Department finalizing this important consumer protection.

Respectfully submitted,



Bernard Sanders
United States Senator
Chairman, Committee on
Health, Education, Labor, and
Pensions



Robert C. "Bobby" Scott
Member of Congress
Ranking Member, Committee
on Education and the
Workforce

- ⁱ The White House, Fact Sheet: President Biden to Announce New Actions to Protect Retirement Security by Cracking Down on Junk Fees in Retirement Advice (Oct. 31, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/31/fact-sheet-president-biden-to-announce-new-actions-to-protect-retirement-security-by-cracking-down-on-junk-fees-in-retirement-investment-advice/>. See also: Carol Brooks Ball, *Close the Conflict of Interest Loophole: The Time is Now!*, AARP (Apr. 7, 2015, 1:30 PM), <https://states.aarp.org/close-the-conflict-of-interest-loophole-the-time-is-now-sc-ma-wp-advocacy>; Joe Valenti, *A Secure Retirement Demands Limiting Conflicts of Interest*, CAP (Apr. 6, 2016), <https://www.americanprogress.org/article/a-secure-retirement-demands-limiting-conflicts-of-interest/>.
- ⁱⁱ Cong. Research Serv., IF12007, A Visual Depiction of the Shift from Defined Benefit (DB) to Defined Contribution (DC) Pension Plans in the Private Sector (Dec. 27, 2021), <https://crsreports.congress.gov/product/pdf/IF/IF12007> (citing: U.S. Department of Labor, Employee Benefits Security Administration (EBSA), Private Pension Plan Bulletin Historical Tables and Graphs: 1975-2019 (September 2021) Table E7, <https://www.dol.gov/sites/dolgov/files/EBSA/researchers/statistics/retirement-bulletins/private-pensionplan-bulletin-historical-tables-and-graphs.pdf>).
- ⁱⁱⁱ *Id.*
- ^{iv} Karamcheva, Nadia and Victoria Perez-Zetune, Congressional Budget Office, Working Paper 2023-02, Defined Benefit and Defined Contribution Plans and the Distribution of Family Wealth, (Feb. 2023), <https://www.cbo.gov/system/files/2023-02/58305-Wealth.pdf>.
- ^v Cong. Research Serv., IF12117, U.S. Retirement Assets: Amount in Pensions and IRAs (May 23, 2022), <https://crsreports.congress.gov/product/pdf/IF/IF12117/2>.
- ^{vi} The White House, Fact Sheet: President Biden to Announce New Actions to Protect Retirement Security by Cracking Down on Junk Fees in Retirement Advice (Oct. 31, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/31/fact-sheet-president-biden-to-announce-new-actions-to-protect-retirement-security-by-cracking-down-on-junk-fees-in-retirement-investment-advice/>.
- ^{vii} The White House, Fact Sheet: President Biden to Announce New Actions to Protect Retirement Security by Cracking Down on Junk Fees in Retirement Advice (Oct. 31, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/31/fact-sheet-president-biden-to-announce-new-actions-to-protect-retirement-security-by-cracking-down-on-junk-fees-in-retirement-investment-advice/>.
- ^{viii} The White House, The Retirement Security Rule- Strengthening Protections for Americans Saving for Retirement (Oct. 31, 2023), https://www.whitehouse.gov/cea/written-materials/2023/10/31/retirement-rule/#_ftnref1.
- ^{ix} The White House, Fact Sheet: President Biden to Announce New Actions to Protect Retirement Security by Cracking Down on Junk Fees in Retirement Advice (Oct. 31, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/31/fact-sheet-president-biden-to-announce-new-actions-to-protect-retirement-security-by-cracking-down-on-junk-fees-in-retirement-investment-advice/>.
- ^x The White House, Fact Sheet: Middle Class Economics: Strengthening Retirement Security by Cracking Down on Backdoor Payments and Hidden Fees (Feb. 23, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/02/23/fact-sheet-middle-class-economics-strengthening-retirement-security-crac>.
- ^{xi} Reg. Best Interest 84 Fed. Reg. 33318, 33400 (July 12, 2019) (to be codified as 17 C.F.R pt. 240).
- ^{xii} Retirement Security Rule, 88 Fed. Reg. 75890, 75902 (proposed Oct. 31, 2023).
- ^{xiii} *Chamber of Com. of United States of Am. v. United States Dep't of Lab.*, 885 F.3d 360 (5th Cir. June 21, 2018).
- ^{xiv} *National Association for Fixed Annuities v. Perez*, 217 F.Supp.3d 1, 6, 7 (D.D.C., 2016).
- ^{xv} Retirement Security Rule, 88 Fed. Reg. 75890, 75892 (Oct. 31, 2023).
- ^{xvi} Michael S. Fischer, *Many Investors Are Confused About Financial Advice: Personal Capital*, Think Advisor (Mar. 13, 2019, 11:18 AM), <https://www.thinkadvisor.com/2019/03/13/many-investors-are-confused-about-financial-advice-personal-capital/>.
- ^{xvii} LIMRA, *Nine in Ten Consumers Believe their Financial Advisor Puts Their Interests First* (June 10, 2015), <https://www.limra.com/en/newsroom/news-releases/2015/nine-in-ten-consumers-believe-their-financial-advisor-puts-their-interests-first/>.
- ^{xviii} Consumer Federation of America, *Survey: Vast Majority of U.S. Investors Support Clear “Fiduciary Standard” for Financial Professionals, Widespread Confusion Seen Linked to Current SEC Rules* (Sept. 15, 2010) https://consumerfed.org/press_release/survey-vast-majority-of-u-s-investors-support-clear-fiduciary-standard-for-financial-professionals-widespread-confusion-seen-linked-to-current-sec-rules/.
- ^{xix} *Id.*; see also CFP BOARD, *Survey: Americans’ Use Of Financial Advisors, CFP Professionals Rises; Agree Advice Should Be In Their Best Interest* (Sept. 23, 2015), [Survey Americans Use of Financial Advisors CFP Professionals Rises Agree Advice Should Be in CFP Board](https://www.cfpboard.org/newsroom/press-releases/2015/09/23/survey-americans-use-of-financial-advisors-cfp-professionals-rises-agree-advice-should-be-in-their-best-interest) (finding “9 out of 10 Americans agree (with 76 percent strongly agreeing) that when they receive investment advice from a financial advisor, the person providing the advice should put the consumers’ interests ahead of theirs and should have to tell consumers up front about any conflicts of interest that could potentially influence that

advice.).

^{xx} Statement by Hon. Harrison A. Williams, Jr., Chairman, Senate Committee on Labor and Public Welfare, introducing the Conference Report on HR 2, 120 Congressional Record S 15737 at 11 (Aug. 22, 1974).

^{xxi} 29 U.S.C. § 1135 (1974).

^{xxii} Retirement Security Rule, 88 Fed. Reg. 75890, 75900 (Oct. 31, 2023).

^{xxiii} Technical assistance provided to HELP Committee by the OIA on December 21, 2023.

^{xxiv} *Id.*

^{xxv} *Id.* citing data from OIA: [IAPD - Investment Adviser Public Disclosure - Homepage \(sec.gov\)](#).

^{xxvi} *Id.* citing data from OIA: [2023-industry-snapshot.pdf \(finra.org\)](#).

^{xxvii} NAIC Annuity Transactions Model Regulation (#275).