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Concerns about the Proposed Fiduciary Regulation

The Department of Labor's (DOL) proposed fiduciary regulation elicited extensive comments from Congress, organizations and individuals expressing concern about the proposal's consequences for small business and people saving for retirement.

Following are notable comments excerpted from letters and studies submitted to the DOL from Members of Congress, numerous organizations and individuals including:

- **Senator Claire McCaskill (D-Mo.):**

  "…the proposed rule reverses what has been a recent trend to increase coverage, reduce leakage and enhance savings vehicles."

- **Senators Jon Tester (D-Mont.), Joe Donnelly (D-Ind.), Heidi Heitkamp (D-N.D.) and Angus King (I-Maine):**

  "As currently proposed, we remain concerned that the Department's proposal could eliminate a number of products that currently exist in the marketplace today, such as annuities…we do not believe eliminating access to products is an appropriate solution."

- **Eight Senate Finance Committee Democrats, including Ranking Member Ron Wyden(D-Ore.):**

  "…it is critical that any guidance not restrict access by small businesses to advisers who promote access to retirement plans."

- **Bipartisan Members of Congress, including Reps Ann Wagner (R-Mo.) and David Scott (D-Ga.) (and signed by 19 other Members of Congress)**

  "…we feel it is in the interest of our constituents that the DOL re-propose this fiduciary regulation to ensure adequate stakeholder involvement in the notice and comment period during a new formal rulemaking process…The current proposal would bi-furcate the industry into those who can afford an advisor and those who cannot. The result will be less choice for consumers and a lack of access for retail investors to sound financial advice."

- **National Federation of Independent Business**

  "…likely to have a substantial impact on small businesses…it is the employees of these small businesses – the very individuals these rules purport to benefit—that stand to lose access to retirement benefits."

- **The U.S. Small Business Administration Office of Advocacy**

  "…small business stakeholders advise Advocacy that the proposed rule would likely increase the costs associated with servicing smaller plans sponsored by small business employers. They observe that the proposed rule could even limit their ability to offer savings and investment advice to clients."

- **Small Business Council of America**

  "…the structure of these proposed rules are likely to have a significant negative impact on the small business retirement plan system and could result in a decline in small business plan formation."

- **National Black Chamber of Commerce**

  "The new regulations…will make it difficult for our members—as small business owners—to sponsor retirement savings plans for themselves and for the benefit of their employees."

- **Wisconsin Farm Bureau Federation**

  "If the rule is enacted as written, we believe that farmers, workers and retirees are at risk of losing valuable advice from knowledgeable, local professionals about investment options and how to plan for retirement."

- **Business Roundtable**

  "Important investment education that is currently being provided to retirement plan participants would be directly and unnecessarily limited by the proposal, and the overall impact of the complex new regime will have a chilling effect on the willingness of retirement plan sponsors to allow the delivery of investment education and investment advice…"

- **U.S. Chamber of Commerce**

  "…there is a substantial risk that at least some workers and retirees won't have access to advice at all, and the Proposal's additional restrictions on educational information serve to compound that risk."

- **Vanguard**

  "We are concerned that the Proposal, as written, could curtail access to important educational and advisory services for plans, participants and IRA investors."

- **Financial Industry Regulatory Authority (FINRA)**

  "The Proposal does not incorporate existing regulation and introduces new concepts that are fraught with ambiguity. We urge the Department to consider that these ambiguities will frustrate the ability of a financial institution and advisers to comply with the Proposal."

- **Makovsky Integrated Communications**

  "…the Department has taken an approach that is so exceptionally complicated that we fear it will create disincentives to providing the very financial advice it seeks to protect."

- **Martin Neil Baily and Sarah E. Holmes, The Brookings Institution**

  "The proposed rule will bring with it increased compliance costs. These costs, combined with a reluctance to assume more risk and a fear of litigation, may make some advisors less likely to offer retirement advice to households with modest savings. These households are the ones most in need of direction and education, but because their accounts will not turn profits for advisors, they may be abandoned."

- **Professor Jeffrey Brown, University of Illinois**

  "Americans are underutilizing lifetime income products and thus exposing themselves to excessive longevity risk. Overcoming these complex behavioral and psychological barriers to annuitization requires a multi-faceted approach…My concern with the details of the proposed regulations is that the new rules will make it very expensive and difficult for financial advisors and insurance companies to be able to overcome these behavioral and psychological biases."

- **Eugene Scalia, Gibson, Dunn & Crutcher LLP**

  "For at least two overarching reasons…the Department's expansive new regulatory program is legally flawed…First, the Department's proposed interpretation of 'fiduciary' is vastly overbroad and impermissible… Second, the Department lacks the authority to establish new standards and a regulatory and enforcement program for broker-dealers."

- **Hal Singer and Robert Litan, Economists Inc.**

  "A conservative assessment of the rule's actual economic impact…finds that the cost of depriving clients of human advice during a future market correction (just one of the costs not considered by DOL) could be as much as $80 billion, or twice the claimed ten year benefits that DOL claims for the rule."

- **Oliver Wyman**

  "…there is growing concern that the proposal would…result in unintended consequences, including limiting the ability of financial services firms and individual financial advisors to offer services to individual IRA holders and small businesses, as well as increasing investor costs due to new expenses associated with implementing the rule and transitioning many clients to a higher cost advisory model."

Members of Congress

Senator Claire McCaskill (D-Mo.) (Aug. 5):

"As drafted, the proposal risks forcing more investors away from the current brokerage model and toward an investment advisory account model. Investment advisory models are more expensive, and quite possibly unaffordable for holders of small accounts. Given a limited choice of only the more expensive advisory account model, more individuals may completely lose access to in-person investment advice…At a time when policy-makers and regulators should be preserving, protecting, and enhancing retirement savings policy, the proposed rule reverses what has been a recent trend to increase coverage, reduce leakage and enhance savings vehicles."

From Senators Jon Tester (D-Mont.), Joe Donnelly (D-Ind.), Heidi Heitkamp (D-N.D.) and Angus King (I-Maine) (Aug. 6):

"We support holding Broker-Dealers to a best-interest standard, and we support the DOL's overall goals. However, we are concerned that the rule in its current form could stifle access to meaningful investment advice for millions of Main Street investors…As currently proposed, we remain concerned that the Department's proposal could eliminate a number of products that currently exist in the marketplace today, such as annuities. While certain products, including annuities, may not be the right fit for every investor, we do not believe eliminating access to products is an appropriate solution."

From Senate Finance Committee Ranking Member Ron Wyden (D-Ore.) and Senators Debbie Stabenow (D-Mich.), Robert Menendez (D-N.J.), Thomas Carper (D-Del.), Benjamin Cardin (D-Md.), Michael Bennet (D-Colo.), Robert Casey, Jr. (D-Pa.) and Mark Warner (D-Va.) (Aug. 7):

"…we are hearing a number of thoughtful concerns from stakeholders about the re-proposed rules and we believe that the guidance can be improved and enhanced. For example, it is critical that any guidance not restrict access by small businesses to advisers who promote access to retirement plans. It also is important that the regulations not limit advisers from assisting plan participants and investors with rollover or investment education and that the new rule and its exceptions and exemptions take into account existing state regulations, the risk attributes of the products to be purchased, and the risk attributes of the industries potentially subject to the proposal."

From a July 29, 2015 letter signed by 21 Republicans and Democrats:

"Given the concerns from stakeholders and a bipartisan group in Congress on this issue, there is a strong possibility that a final rule may widely differ in its substance from the initial proposal or contain provisions that were not part of the proposed regulation. As a result, we feel it is in the interest of our constituents that the DOL re-propose this fiduciary regulation to ensure adequate stakeholder involvement in the notice and comment period during a new formal rulemaking process.

"We agree that financial advisors should act in the best interest of their clients. Heightened consumer protections in the investment space should apply broadly and should not create two classes of investors, especially at the expense of those saving for retirement. The current proposal would bi-furcate the industry into those who can afford an advisor and those who cannot. The result will be less choice for consumers and a lack of access for retail investors to sound financial advice."

Signed by Representatives Ann Wagner (R-Mo.), David Scott (D-Ga.), Andy Barr (R-Ky.), Lacy Clay (D-Mo.), Scott Garrett (R-N.J.), Robert Hurt (R-Va.), Ed Royce (R-Calif.), Steve Pearce (R-N.M.), Lynn Westmoreland (R-Ga.), Steve Stivers (R-Ohio), Randy Neugebauer (R-Texas), Marlin Stutzman (R-Ind.), Bruce Poliquin (R-Maine), Blaine Luetkemeyer (R-Mo.), Frank Lucas (R-Okla.), Mia Love (R-Utah), French Hill (R-Ark.), Peter King (R-N.Y.), Bill Huizenga (R-Mich.), Scott Tipton (R-Colo.), and Randy Hultgren (R-Ill.).

Comments from Organizations

National Federation of Independent Business:

"NFIB believes that these proposals are likely to have a substantial impact on small businesses. We are concerned that the changes to the definition of fiduciary could substantially transform the way in which financial service providers deliver services to small businesses and their employees. This could result in providers no longer being able to offer these services to small businesses in an affordable manner. Consequently, it is the employees of these small businesses – the very individuals these rules purport to benefit – that stand to lose access to retirement benefits. In addition, if small businesses cannot offer retirement benefits they will be less competitive with larger businesses, thus hurting innovation and job opportunities for everyone."

U.S. Small Business Administration Office of Advocacy (Advocacy):

"Based on input from small business stakeholders, Advocacy is concerned that the Initial Regulatory Flexibility Analysis (IRFA) contained in the proposed rule lacks essential information required under the Regulatory Flexibility Act (RFA). Specifically, the IRFA does not adequately estimate the costs of the proposal or the number of small entities that would be impacted by it. For example, small business stakeholders advise Advocacy that the proposed rule would likely increase the costs associated with servicing smaller plans sponsored by small business employers. They observe that the proposed rule could even limit their ability to offer savings and investment advice to clients. Based on this feedback, Advocacy encourages [the Employee Benefits Security Administration] to consider ways to decrease the potential small business burdens of the proposed rule, including expanding the scope of exemptions contained in the proposal. For these reasons, Advocacy recommends that EBSA republish for public comment the Supplemental IRFA before proceeding with this rulemaking."

Small Business Council of America (SBCA):

"The SBCA fully supports the DOL's goal of protecting private retirement plan participants and ensuring that plans and their participants and beneficiaries have access to, and receive, quality and unbiased financial guidance. However, the structure of these proposed rules are likely to have a significant negative impact on the small business retirement plan system and could result in a decline in small business plan formation."

National Black Chamber of Commerce:

"First and foremost, we continue to be very concerned that the DOL has proposed a rule that will severely restrict African Americans' and low- to moderate-income Americans' ability to save for retirement. The new regulations also will make it difficult for our members—as small business owners—to sponsor retirement savings plans for themselves and for the benefit of their employees."

Wisconsin Farm Bureau Federation:

"The Wisconsin Farm Bureau Federation's affiliated insurance company, Rural Mutual Insurance Company, provides insurance products and financial services to WFBF members through a contractual agreement with Farm Bureau Life Insurance Company. Our agents focus is making sure that these products and services are available to members and their families in rural Wisconsin. We believe the proposal will undermine our ability to serve our members.

"If the rule is enacted as written, we believe that farmers, workers and retirees are at risk of losing valuable advice from knowledgeable, local professionals about investment options and how to plan for retirement. With most pension plans organized around individual accounts that farmers, workers and retirees invest themselves (such as IRAs and 401k plans), these investors may struggle to decide the best investment options to secure their financial future. They want and should have access to professional investment advice."

Business Roundtable:

"As currently formulated, the proposed definitional changes are broad and subjective, and the proposed carve-outs and exemptions are narrow and complex.

"If finalized without changes, the proposed regulations could have negative consequences for employee benefit plans and their participants. For example, the proposed regulations' new investment advice fiduciary standard would apply to activities, interactions and relationships that should not be considered 'investment advice' under ERISA. Important investment education that is currently being provided to retirement plan participants would be directly and unnecessarily limited by the proposal, and the overall impact of the complex new regime will have a chilling effect on the willingness of retirement plan sponsors to allow the delivery of investment education and investment advice necessary for plan participants. In addition, the proposed requirements and prohibited transaction exemptions have the potential to sweep plan sponsors and their employees into unwarranted litigation alleging fiduciary or co-fiduciary liability under ERISA."

U.S. Chamber of Commerce:

"Unfortunately, rather than expanding access to quality advice and encouraging small plan formation, the Department's Proposal will make it more difficult for America's workers and retirees to access retirement plans, to receive quality investment advice, to receive useful educational information about their plans and investments, and to move their retirement assets freely between employer-provided plans and IRAs. Indeed, there is a substantial risk that at least some workers and retirees won't have access to advice at all, and the Proposal's additional restrictions on educational information serve to compound that risk."

Vanguard:

"Vanguard agrees that the Department should update the definition of an investment advice fiduciary to reflect the current retirement plan and IRA marketplace. Without question, those who provide investment advice should be required to act in the best interest of their clients. However, the fiduciary standard under ERISA brings with it extraordinary complexity due to ERISA's prohibited transaction rules and duties of prudence and loyalty and any changes must be carefully crafted to avoid detrimental outcomes. We are concerned that the Proposal, as written, could curtail access to important educational and advisory services for plans, participants and IRA investors (collectively 'Retirement Investors'). If the Department defines investment advice too broadly, the attendant costs of a fiduciary level of service are likely to result in increased costs to Retirement Investors for basic investment counseling or even the termination of important investor services."

Financial Industry Regulatory Authority (FINRA):

"The Department should be commended for its efforts to establish a best interest standard. The Proposal, however, does not meet some of the minimum criteria for such a standard. The Proposal does not sufficiently build upon the existing regulatory system under the federal securities laws. The Preamble makes passing reference to the comprehensive, well-established system of regulation that the federal securities laws impose upon broker-dealers under the oversight of the SEC and FINRA. The Proposal does not incorporate existing regulation and introduces new concepts that are fraught with ambiguity. We urge the Department to consider that these ambiguities will frustrate the ability of a financial institution and advisers to comply with the Proposal. These ambiguities will necessitate interpretive guidance on a wide array of issues, which the Preamble does not provide. In some respects the Proposal even conflicts with existing FINRA rules and securities market trading practices."

Makovsky Integrated Communications:

"Makovsky shares the Department's goal of ensuring ERISA plans, ERISA plan participants and beneficiaries, and Individual Retirement Account ('IRA') owners receive quality financial advice…"

"However, the Department has taken an approach that is so exceptionally complicated that we fear it will create disincentives to providing the very financial advice it seeks to protect. As a small business owner,… I look at every dollar that gets spent to support this business..."

Martin Neil Baily and Sarah E. Holmes, The Brookings Institution:

"The proposed rule will bring with it increased compliance costs. These costs, combined with a reluctance to assume more risk and a fear of litigation, may make some advisors less likely to offer retirement advice to households with modest savings. These households are the ones most in need of direction and education, but because their accounts will not turn profits for advisors, they may be abandoned. According to the Employee Benefits Security Administration (EBSA), the proposed rule will save families with IRAs more than $40 billion over the next decade. However, this benefit must be weighed against the attendant costs of implementing the rule. It is possible that the rule will leave low- and medium-income households without professional guidance, further widening the retirement savings gap. The Department of Labor should consider ways to minimize or manage these costs. Options include incentivizing advisors to continue guiding small-scale savers, perhaps through the tax code, and promoting increased financial literacy training for households with modest savings.

"Under the proposed rule advisors may be reluctant to assume additional risk and worry about litigation. In addition to pushing small-scale savers out of the market, we also worry that the rule may encourage excessive risk aversion in some advisors. General wisdom suggests that young savers should have relatively high-risk portfolios, de-risking as they age, and ending with a relatively low-risk portfolio at the end of the accumulation period. The proposed rule could cause advisors to discourage clients from taking on risk, even when the risk is generally appropriate and the investor has healthy expectations. Extreme risk aversion could decrease both market returns for investors and the 'value-add' of professional advisors. We ask that the Department of Labor think carefully about how it can discourage conflicted advice without encouraging overzealous risk reductions."

Professor Jeffrey Brown, University of Illinois:

"I have been very appreciative and supportive of the steps taken by the current Administration to remove barriers to including lifetime income options as part of qualified plans. My current research agenda is focused on the difficulties that individuals have in making optimal decisions around retirement planning, especially in understanding the role of annuities in guaranteeing lifetime income. This research suggests that millions of Americans are under-utilizing lifetime income products and thus exposing themselves to excessive longevity risk. Overcoming these complex behavioral and psychological barriers to annuitization requires a multi-faceted approach, including changes in the way retirement options are framed. An implication of these findings is that the typical consumer is unlikely to take advantage of guaranteed lifetime income options unless we structure the retirement planning space in a way to encourage it (via plan architecture, nudges, consumer education, and advice).

"My concern with the details of the proposed regulations is that the new rules will make it very expensive and difficult for financial advisors and insurance companies to be able to overcome these behavioral and psychological biases. The old adage that lifetime income products are 'sold, not bought' may be very true in this context. Overcoming these barriers does not come easily or free – it requires financial services companies, advisers, plan sponsors and others to spend time working with clients to help them understand the tremendous value that lifetime income products can create for them. Raising the cost of this activity and increasing the fiduciary burden of those involved in this process could hurt these efforts. It would be a shame if a policy intended to help improve retirement security ended up hurting it by driving advisers and others out of the business of promoting annuities and other guaranteed lifetime income products."

Eugene Scalia, Gibson, Dunn & Crutcher LLP:

"For at least two overarching reasons, therefore, the Department's expansive new regulatory program is legally flawed.

"First, the Department's proposed interpretation of 'fiduciary' is vastly overbroad and impermissible. In enacting ERISA's fiduciary definition, Congress drew upon principles of trust law and the law governing investment advisers and broker-dealers that must be considered in interpreting the statute today. *See Corning Glass Works v. Brennan, 417 U.S. 188, 201 (1974)*; *Blitz v. Donovan, 740 F.2d 1241, 1245 (D.C. Cir. 1984)*. Under trust law, a fiduciary relationship arises in the context of a relationship of special 'trust and confidence' between the parties. The DOL proposal, however, would deem persons to be fiduciaries where those hallmarks of a fiduciary relationship are absent, for example, when making a recommendation regarding a single transaction. *See 80 Fed. Reg. at 21,934*. Further, ERISA's reference to 'render[ing] investment advice for a fee or other compensation' incorporates terminology in the IAA, which—in accordance with the industry understanding and practice when the IAA was enacted—excludes broker-dealers executing sales from the definition of 'investment adviser.' That is because the payment to broker-dealers is principally for the product acquired or sold, not the advice. That limitation is incorporated in ERISA: The phrase 'render[ing] investment advice for a fee' by its terms means that the payment is principally made for the investment advice provided, and not for execution of a financial transaction or the sale of a financial product.

"Second, the Department lacks the authority to establish new standards and a regulatory and enforcement program for broker-dealers. In the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ('Dodd-Frank'), Congress committed the authority to establish uniform fiduciary duty standards for broker-dealers and investment advisers to the SEC—the agency that has long held principal regulatory responsibility in that area—and only after the Commission completed a study on the effects of any such standards. DOL may not front-run the Commission by crafting its own new standards and enforcement program, and certainly may not do so by bootstrapping its authority to interpret 'fiduciary' into a sweeping new regulatory program replete with private rights of action and mandatory class actions."

"Good Intentions Gone Wrong: The Yet-To-Be-Recognized Costs of the Department Of Labor's Proposed Fiduciary Rule," by Robert Litan and Hal Singer, Economists Inc.

"The Department of Labor (DOL) fiduciary rule has been justified based on economic analyses by the DOL and the Council of Economic Advisers (CEA) that are flawed and filled with internal contradictions. These flaws come mostly from 'cherry picking' and misreading the relevant economic literature, and from ignoring significant costs to millions of small savers that the rule would impose.

"These costs come largely from (1) small savers losing access to human financial advisors (because small accounts would become uneconomic to serve, and expose advisory firms to new liability risks), (2) small savers being forced into fee based advisory relationships that cost more than current commission based arrangements, and (3) small savers and firms not being encouraged to save more, take full advantage of employer matches, or create retirement plans in the first place.

"The DOL's Regulatory Impact Analysis (RIA) thus concludes erroneously that the net benefit of the rule would be roughly $4 billion per year (the CEA, making related errors, pegs the benefit at $17 billion). A conservative assessment of the rule's actual economic impact—taking into account the categories of harm noted above that are ignored by DOL and CEA—finds that the cost of depriving clients of human advice during a future market correction (just one of the costs not considered by DOL) could be as much as $80 billion, or twice the claimed ten year benefits that DOL claims for the rule."

"The Role of Financial Advisors in the U.S. Retirement Market" by Oliver Wyman

"The benefits financial advisors provide to their clients are now at risk. On April 14, 2015, the Department of Labor issued its Conflict of Interest rule proposal, a replacement for the Definition of the Term 'Fiduciary' rule proposal withdrawn in September 2011. In our 2011 study reviewing the impact of the previously proposed rule, we concluded that the Department of Labor's proposed rule change was motivated by a laudable objective: to ensure a high standard of care for retirement plan participants and account holders with regard to the receipt of services and investment guidance, amid an increasingly complex financial marketplace. However, we found the proposed rule proposal was likely to have serious negative and unintended effects on the very individuals the change was supposed to help.

"Many stakeholders are now analyzing the technical details of the newly proposed rule, and there is growing concern that the proposal would again result in unintended consequences, including limiting the ability of financial services firms and individual financial advisors to offer services to individual IRA holders and small businesses, as well as increasing investor costs due to new expenses associated with implementing the rule and transitioning many clients to a higher cost advisory model.

"With regard to the impact on individuals, regrettably we reach the same overall conclusion as in the prior study. The proposed rule change is likely to have significant consequences that will adversely impact individual investors saving for retirement. For example, because the rule as proposed will take away the assistance small businesses most value, fewer new plans will be established and more plans will likely close. This would directly impact the 19 MM individuals who work for small businesses with fewer than 50 employees, who do not currently have access to a workplace retirement plan and reduce the likelihood of their gaining access to a retirement plan in the future.

"In the case of IRAs, if the rule is implemented as proposed:

- Millions of existing small balance IRA owners are likely to lose access to the financial advisor of their choice or any financial advisor at all
- The majority of others will face higher costs when providers shift brokerage accounts to advisory accounts
- Individuals without the help and support of financial advisors are less likely to open an IRA, leading to increased cash-outs when changing jobs and lower savings rates compared with advised individuals
- Unadvised individuals are likely to carry excess portfolio risk due to less diversification and less frequent re-balancing."

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