



AARP Statement for the Record

Hearing on  
“Protecting American Savers and Retirees From DOL’s Regulatory Overreach”

before the

House Committee on Education & the Workforce  
Subcommittee on Health, Employment, Labor, and Pensions

February 15, 2024

For more information, contact:  
Clark Flynt-Barr,  
Government Affairs Director, Financial Security  
([cflyntbarr@aarp.org](mailto:cflyntbarr@aarp.org))

AARP appreciates the opportunity to comment for the record on the House Committee on Education & the Workforce’s hearing to discuss the much-needed Retirement Security Rule recently released by the Department of Labor. At AARP, we work very hard to empower Americans to save and give them the tools to ensure they have a secure retirement.

When Americans seek out financial advice for their retirement savings, they expect the advice they get will be in their best interest, not in the best interest of their financial advisor. This is very simply what the Retirement Security Rule does. Families need to be able to trust the advice they get from financial advisors.

According to the Federal Reserve's 2022 Economic Well-Being of Households Survey, only 31% of non-retirees thought their retirement saving was on track, down from 40% in 2021.<sup>1</sup> A lack of fundamental protections for retirement savers is exacerbating this crisis. Regulatory loopholes allow some financial advisers to recommend their clients invest their retirement savings in products simply because the adviser will get higher fees and commissions for doing so. This conflicted advice eats into retirement savings, and lessens peoples’ ability to retire securely, ultimately resulting in further costs to state and federal budgets.

The Department of Labor (DOL) Retirement Security Rule proposal would require financial professionals providing advice to retirement savers to put their clients’ best interests before their own. This is a commonsense requirement and AARP supports its implementation – as do voters.

According to a December 2023 poll conducted by AARP, 89% of adults 50+ say that they expect professional financial advice to be in their best interest, and a similarly large share (87%) say that they use professional financial advice to make important financial decisions. Further, 90% agree that financial professionals should be *required* to give advice in the best interest of the retirement savings account holder. In fact, two-thirds (66%) of adults ages 50-plus say that they would be less likely to vote for their member of Congress if they were to overturn a rule requiring financial professionals to provide advice in the best interest of their clients.<sup>2</sup>

*This Proposal Is Critical to Closing Existing Regulatory Gaps and Providing Retirement Savers the Protections They Deserve*

When Employee Retirement Income Security Act (ERISA) was enacted in 1974, individual retirement accounts (IRAs) had just been introduced, and 401(k) plans were not yet a reality. At that time, the primary method of ensuring retirement security was through Defined Benefit plans, commonly known as traditional pensions. These pensions offered a guaranteed income for retirees that was designed to last throughout their retirement. They were advantageous because they pooled assets and were managed by a fiduciary, leading to cost efficiencies and pooled risk.

---

<sup>1</sup> Board of Governors of the Federal Reserve System, “Economic Well-Being of U.S. Households in 2022,” May 2023, <https://www.federalreserve.gov/publications/files/2022-report-economic-well-being-us-households-202305.pdf>.

<sup>2</sup> AARP Research, “Unbiased Financial Advice About Retirement Is Important to Older Adults,” January 2, 2024, <https://www.aarp.org/pri/topics/work-finances-retirement/financial-security-retirement/fiduciary-duty-retirement/>.

Today, the share of workers with traditional pensions has significantly declined. Defined contribution plans now hold the largest portion of retirement assets. For example, in 1975, 27.2 million people participated in private sector defined benefit plans and just 11.2 million in defined contribution plans. By 2019, these numbers had shifted dramatically, with 12.6 million people participating in private sector defined benefit plans and 85.5 million in private sector defined contribution plans.<sup>3</sup>

With the shift from pensions to individual accounts, the onus of retirement planning has largely fallen on individuals. They must navigate complex financial products and depend on professional advice, which unfortunately isn't always provided with their best interests at heart. This has frequently left individuals with the ultimate responsibility for assessing economic and market risks, sifting through complex financial products, and determining contribution levels, all over a decades-long time horizon.

Currently, retirees and future retirees face an investment landscape in which the advice they receive from their financial professionals about their retirement investments may not align with their best interests. This situation can lead to excessive fees, investments in underperforming or illiquid assets, and unnecessary risks.<sup>4</sup> According to some estimates, this conflicted advice can cost retirement savers up to 20 percent of their retirement savings over a lifetime.<sup>5</sup> Such circumstances are untenable, potentially delaying retirement or diminishing living standards post-retirement.

### *The Department of Labor Proposal Will Address Existing Regulatory Loopholes and Provide Retirement Savers with Essential Protections*

The proposed Department of Labor rule proposal addresses the many regulatory loopholes that result in retirement savers receiving conflicted advice that affects their long-term financial security and ability to retire with dignity. When implemented, the rule will help to ensure workers have access to high-quality advice and aims to eliminate conflicted advice, both of which are essential in the current retirement landscape. The proposed rule would create uniform fiduciary standards to safeguard retirees and their hard-earned assets. It proposes a “best interests” standard for investment advice, broadening the scope of what constitutes an investment recommendation. This change is crucial in empowering workers to effectively manage the increased responsibility and risk associated with saving for retirement.

---

<sup>3</sup> CRS, “A Visual Depiction of the Shift from Defined Benefit (DB) to Defined Contribution (DC) Pension Plans in the Private Sector, December 27, 2021, <https://crsreports.congress.gov/product/pdf/IF/IF12007>.

<sup>4</sup> Retirement Security Rule: Definition of an Investment Advice Fiduciary, RIN 1210-AC02 (Oct. 24, 2024) (“Fiduciary Release”) (“Overall, evidence demonstrates that the combination of inexperienced customers and conflicted advisers results in investment underperformance and negative outcomes for investors. According to a 2015 report by the Council of Economic Advisers, approximately \$1.7 trillion of IRA assets were invested in products with a payment structure that generates conflicts of interests. A substantial body of research has shown that IRA holders receiving conflicted investment advice can expect their investments to underperform by approximately 50 to 100 basis points per year.”), <https://www.dol.gov/sites/dolgov/files/ebsa/temporary-postings/retirement-security-rule-definition-of-an-investment-advice-fiduciary.pdf>

<sup>5</sup> The White House, “FACT SHEET: President Biden to Announce New Actions to Protect Retirement Security by Cracking Down on Junk Fees in Retirement Investment Advice,” October 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/>.

This proposal is a balanced approach, reflecting significant changes in our retirement system since 1975. It would address loopholes in existing regulations that allow financial professionals to take advantage of their clients and recommend they invest in ill-suited, high-fee products by focusing on the expectations of retirees – that their financial advisers will put their clients’ best interests before their own. It aligns with standards set by other regulators, notably the Securities and Exchange Commission’s (SEC) Regulation Best Interest (Reg BI) and puts forth the necessary consumer protections for retirement savers.

First, the proposal will do what Congress expected, and provide a uniform standard for those falling within the definition of investment advice fiduciary. In adopting ERISA, Congress sought to implement “uniform fiduciary standards” designed to “prevent transactions which dissipate or endanger” retirement assets.<sup>6</sup> Those providing investment advice for compensation would be subject to the best interests standard when retirees expect and trust that this is the case. The uniform standard would apply to advice providers who hold themselves out as fiduciaries, exercise discretionary control over retirement assets, or are in the business of making such recommendations on a regular and particularized basis.

Second, it closes a glaring loophole that allows some advisors to offer very bad advice to their clients, as long as they only do it once. The current, outdated regulation creates a “one time” exception, which is not in the statute Congress passed. So an advisor can give advice to convert the *entire balance of your retirement savings* and not have to do that in a retiree’s best interest, simply because it was one single recommendation rather than a series of recommendations. No senior would expect that making such a substantive and critical decision would somehow be exempted from basic consumer protections.

Third, the proposal would fill gaps in the existing regulatory regime by better aligning the Labor Department’s approach with what other regulators have already done. The proposal is very similar to the SEC’s Reg BI, which governs the standards applicable to broker-dealers when dealing with retail clients. The proposal will apply the best interests standard to recommendations concerning plan distributions, decisions not to engage in transactions, and investment strategies.

Fourth, the definition of “recommendation” will explicitly include rollovers, even when not accompanied by a specific recommendation concerning the investment of the assets.<sup>7</sup> Those deciding on whether to pull assets from a retirement plan and put them in an IRA will know that the recommendation must be in their best interests.

---

<sup>6</sup> 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 (August 22, 1974) (“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 make applicable the law of trusts; to prohibit exculpatory clauses that have often been used in this field; to establish uniform fiduciary standards to prevent transactions which dissipate or endanger plan assets; and to provide affective remedies for breaches of trust.”).

<sup>7</sup> Fiduciary Release, *supra* note 4 (“The Department continues to believe that advice provided in connection with a rollover decision, even if not accompanied by a specific recommendation on how to invest assets, should be treated as fiduciary investment advice.”).

Fifth, the effect of fine-print disclaimers will be limited. Under the proposal, disclaimers will not automatically control an investment advice fiduciary's status, at least where inconsistent with "the person's oral communications, marketing materials, applicable State or Federal law, or other interactions with the retirement investor." Where such an inconsistency arises, the disclaimer will be "insufficient to defeat the retirement investor's legitimate expectations."

Finally, the proposal also makes clear that platform providers have the same duty, at least where they make specific recommendations about the securities to be offered. As the Department knows, small employers often are sold such platforms with representations that the platform will satisfy the employer's fiduciary obligations.

### *The Impact of These Loopholes Affect Real People*

Janice Winston testified at the December 13<sup>th</sup> hearing before the Department of Labor on the Retirement Security Rule. Ms. Winston explained that she had worked for 29 years as a telecommunications engineer for Verizon. When she retired, her retirement plan gave her the choice of an annuity or a lump sum payout. Not feeling prepared to make this decision on her own, she picked an advisor based on recommendations from coworkers, family, and friends. As she testified, "my most important concern was trust. What I thought was that anyone I paid to advise me would be guided by what was best for me, given my retirement and savings goals."<sup>8</sup>

The advisor she chose recommended that she take a lump sum from her defined benefit plan and roll her 401(k) plan into two individual retirement accounts. The advisor then steered her toward investing a quarter of her total assets in a variable annuity product. They did not explain the product, why they were recommending it, nor the complex features and fees it featured.

Ms. Winston has since had her retirement investment portfolio independently evaluated by another investment advisor who showed her that she was paying fees that she did not know about, let alone understand. According to their analysis, even without the high fees, Ms. Winston's total investment proposal was not well designed in accordance with her best interest - her investments were high cost, and her overall allocation was inappropriate for her long-term goals. The analysis was most critical of the placement of 25% of her assets in a variable annuity, which had annual fees equal to 3.3% of her investment. Some of those fees purchased complex features that had no value to her. The high annual cost to maintain these investments resulted in a return of barely 0% and Ms. Winston would face financial penalties if she decided to move money out of the annuity.

As Ms. Winston put it, "I worked long and hard, and saved over my career, so that I could enjoy a decent retirement. And I should have been able to assume that investment advice given to me was crafted solely in my best interest. I've since learned that there are investment advisors who put aside their monetary interests and focus on the best interest of their clients... When regular

---

<sup>8</sup> Janice Winston, Testimony before Employee Benefits Security Administration Public Hearing on the Retirement Security Rule: Definition of an Investment Advice Fiduciary, Wednesday, December 13, 2023, <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AC02/hearing-transcript-day-2.pdf>.

people like me are getting advice about how to access our money in retirement we should be able to depend on our financial advisors acting in our best interest, even if that sometimes means they cannot recommend a product that pays them the most compensation. And honestly, I don't see how anyone could argue with that, or who would want advice from someone not subject to that standard...For the current and future generations of retirement savers I ask you to please adopt these proposed regulations so that those who give my daughter, my grandchildren, my great-grandchildren investment advice must put their client's interest ahead of maximizing their own profit.”<sup>9</sup>

The existing gaps in current law hurt real people who seek out advice, assuming that it will always be made in their best interest, only to be provided advice that does not suit their financial best interest. People expect that when they go to a financial advisor, just as when they go to a doctor or a lawyer, the advice they receive will be made in their best interest, and they deserve for this to be a requirement.

### *Criticisms of the Proposed Rule are Based on Faulty Research and Baseless Claims*

Those opposing this important and commonsense rule have made baseless claims and do not support a requirement to put their clients' best interests before their own financial interests. We would like to dispel any misconceptions about the proposal.

Some have argued that this rule is not necessary, as the SEC's Reg BI has already addressed all conflicts of interest in financial advising. This is not true. Under Reg BI, implemented in 2019, broker-dealers registered with the SEC are subject to a “best interests” requirement.<sup>10</sup> Reg BI, however, has limited application. First, it only applies to retail investors and therefore does not extend to all recommendations made to retirement plans. For another, the standard applies only to “investment securities.” As a result, the standard does not generally include such investments as real estate, certificates of deposit, certain insurance products, or commodities. Even more complex, the same investment may or may not be a security depending upon the circumstances, such as gold coins or interests in limited liability companies.

Annuities further illustrate the complexity. Variable annuities are subject to the federal securities laws; fixed annuities are not. The status of fixed index annuities, according to the SEC, “may or may not” be a security.<sup>11</sup> Broker-dealers providing recommendations on an array of annuities could find themselves subject to Reg BI for some of them but not others. And in the case of fixed index annuities, even the advice provider may not be sure whether the best interests standard applies.

---

<sup>9</sup> Id.

<sup>10</sup> Securities and Exchange Commission, “Regulation Best Interest: The Broker-Dealer Standard of Conduct, Exchange Act Release No 86031,” June 5, 2019 (effective Sept. 10, 2019), <https://www.sec.gov/files/rules/final/2019/34-86031.pdf>.

<sup>11</sup> See Annuities, Investor.gov, SEC, last visited Nov. 27, 2023, <https://www.investor.gov/introduction-investing/investing-basics/glossary/annuities> (“Variable annuities are securities regulated by the SEC. An indexed annuity may or may not be a security; however, most indexed annuities are not registered with the SEC. Fixed annuities are not securities and are not regulated by the SEC.”).

Some have argued that the National Association of Insurance Commissioners (NAIC) Model Rule is sufficient regulation for the insurance industry – despite its gaping limitations. The NAIC Model Rule – which states adopt voluntarily, and which has not been adopted by all states – would impose some obligations on those selling fixed annuities. However, while the NAIC uses the words “best interests”, it does not reflect a “best interests” standard. For example, it does not apply to all annuities or other insurance products, and it excludes cash and non-cash compensation in determining material conflicts (which is the very source of many conflicts).<sup>12</sup> It is clear this Model Rule does not provide consumers with sufficient protections and falls far short of the protections generally included in plans covered by ERISA.

Recommendations to rollover plan assets into an IRA likewise may or may not be subject to a best interests standard under the current regulation’s 5-part test. This is true even though the “decision to roll over assets from a plan to an IRA is often the single most important financial decision a plan participant makes, involving a lifetime of retirement savings” and the fact that these recommendations “carry with them an inherent conflict of interest.”<sup>13</sup> And while rollovers are more common among retirees exiting from defined contribution plans, those entitled to defined benefit pensions may also be in a position to rollover assets when receiving a lump-sum pay out.

Conflicted advice in rollovers can significantly eat into retirement savings. According to a study from the Pew Charitable Trusts, “in 2018 alone, investors rolled \$516.7 billion from employer retirement plans into traditional IRAs. An analysis of fee differentials suggests that over a hypothetical retirement period of 25 years, those retail investors could see an aggregate reduction in savings of about \$45.5 billion—just from that single year of rollovers.” Failure to ensure best interest advice for rollovers is a glaring gap that can harm the long-term financial security of retirement savers.<sup>14</sup>

Another important gap left by the current 5-part test that must be addressed is the lack of protections for plan sponsors. The requirement that a relationship with an investor be regular or ongoing for it to be subject to a fiduciary standard has resulted in this standard not applying to advice provided to small businesses. These plan sponsors are also not protected under Reg BI, because advice to them is considered “plan-level”, which falls under “institutional advice” and is

---

<sup>12</sup> See National Association of Insurance Commissioners, “Suitability in Annuity Transactions Model Regulation,” Spring 2020, <https://content.naic.org/sites/default/files/inline-files/MDL-275.pdf>, (“Section 6. Duties of Insurers and Producers... (A)(1)(d) “The requirements under this subsection do not create a fiduciary obligation or relationship and only create a regulatory obligation as established in this regulation.” And Section 5(I)(2) ““Material conflict of interest” does not include cash compensation or non-cash compensation.”).

<sup>13</sup> Fiduciary Release, *supra* note 4 (“Financial institutions face an innate conflict of interest, in that a financial institution that provides a recommendation or advice concerning a rollover to a retirement investor may expect to earn transaction-based compensation such as commissions and/or receive an ongoing advisory fee that it likely would not receive if the assets were to remain in an ERISA-covered plan. Further, under the 1975 rule, if an investment advice provider makes a one-time recommendation that the worker move the entire balance of their retirement plan into an IRA and invest it in a particular annuity, then the advice provider has no fiduciary obligation under ERISA to honor the worker's best interest unless this recommendation is part of an ‘ongoing’ advice relationship. The resulting compensation represents a significant revenue source for investment advice providers.”).

<sup>14</sup> Pew Charitable Trusts, “Small Differences in Mutual Fund Fees Can Cut Billions From Americans' Retirement Savings,” June 30, 2022, <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>.

therefore exempt. The NAIC Model Rule also excludes from its suitability requirements the purchase of annuity-based retirement plans by small business owners. It is unclear why those small businesses managing retirement plans on behalf of their employees should not receive the same protections as individual investors.

Some have argued that in its passage of SECURE 2.0, Congress intended to expand access to annuities, indicating that the industry should not be regulated further. This is flawed logic – the fact that greater access to annuities was provided in SECURE 2.0 does not indicate that Congress intended for consumers to receive substandard protections. In fact, it underscores the need for greater protections and ensuring these products and the people recommending investments in them are held to a higher best interests standards.

Finally, some have argued that lower- and middle-income savers will lose access to financial advice, despite no hard evidence. Indeed, similar arguments were made before the SEC implemented its own best interest standard, and no access problems have arisen. Some have pointed to limited industry “research” provided by Deloitte. But Deloitte itself states: “The findings presented are based on the analysis of information and data provided to Deloitte. Deloitte has analyzed, aggregated and summarized the information provided, but was not asked to and did not independently verify, validate or audit the information provided during the course of the engagement.”<sup>15</sup> Indeed, the methodology for this “analysis” is not provided, nor was the underlying data made available to independent parties so that the conclusions found could be analyzed and tested – in spite of repeated requests by the Department of Labor.<sup>16</sup> In fact, the findings of this report are based on interviews with just 21 of hundreds of firms, with no information provided as to how these firms were chosen, whether they are representative of the market, or what questions were asked.<sup>17</sup> In short, it lacks academic rigor and transparency.

A more recent study from the National Association of Insurance and Financial Advisors (NAIFA) similarly lacks rigor or transparency. It does however, shed light on the degree to which the members selected for participation in the survey provide conflicted advice to their clients. In the survey, 23.58% of participants agreed and 43.47% strongly agreed that they would have to stop or reduce sales of fixed annuities or non-securities investment products if the rule were implemented.<sup>18</sup> This underscores the importance of implementing this rule and ensuring that consumers have the protections they deserve.

Further, as noted, this proposed rule aligns with Reg BI, which was implemented in 2019. There has been no evidence that Reg BI has reduced lower- and middle-income workers’ access to

---

<sup>15</sup> Deloitte (commissioned by SIFMA), “The DOL Fiduciary Rule: A study on how financial institutions have responded and the resulting impacts on retirement investors,” August 19, 2017, <https://www.sifma.org/wp-content/uploads/2017/08/Deloitte-White-Paper-on-the-DOL-Fiduciary-Rule-August-2017.pdf>.

<sup>16</sup> Consumer Federation of America, “Comment Letter Re: RIN 1210-AB82, Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions,” October 24, 2017, <https://consumerfed.org/wp-content/uploads/2017/10/cfa-dol-fiduciary-response-to-industry-rule-opponents.pdf>.

<sup>17</sup> Id.

<sup>18</sup> NAIFA, “Impact of the Proposed DOL Fiduciary-Only Rule on NAIFA Members,” December 2023, <https://2635471.fs1.hubspotusercontent-na1.net/hubfs/2635471/NAIFA%20Members%20Respond%20to%20the%20Proposed%20US%20DOL%20Rule.pdf>



investment recommendations. When looking abroad to the United Kingdom, we see that the application of similar standards has actually *increased* access to financial advice, rather than decreased access. The UK’s Financial Conduct Authority (FCA) found that “[in 2021] approximately 8% (4.1m) of all UK adults have received financial advice, an increase from 6% (3.1m) in 2017.”<sup>19</sup> Rather than the new proposed rule having a negative effect on retirement savers, the rule will instead improve their investing outcomes.

Under existing requirements, it is the lower- and middle-income retirement savers who suffer the most from conflicted advice, as wealthier investors tend to work with advisers who are already fiduciaries and put their clients’ best interests before their own. As one of today’s witnesses, Kamila Elliott, put it when she testified before the Department of Labor on the proposed rule: “*The wealthy receive financial advice that is best for them. Why shouldn’t those with moderate incomes be treated the same?*”<sup>20</sup> There is no reason that lower- and middle-income retirement savers do not merit the same consumer protections as wealthier investors.

While there may be a transition period during which advisers work through the requirements of this proposal, currently, 1 in 3 financial advisors (97,000 advisors) in the United States are Certified Financial Planner (CFP) Board certified. As part of the CFP certification, these financial planners make a commitment to act as a fiduciary when providing financial advice and to put their clients’ best interests first. Many financial professionals are already operating under a fiduciary standard and put their clients’ best interests before their own and will not have to make operational changes as a result of this rule.

Stronger consumer protections ultimately will result in better financial advice as those advisers who would rather put their own interests before their customers will either raise their standards or lose access to those clients. All retirement savers deserve to have their financial advisers make investment recommendations to them under a best interests standard – anything less is not serving retirement savers and will harm their ability to retire securely and with dignity.

### *Conclusion*

This is a common-sense rule – and most people are surprised to learn it isn’t already a requirement for financial professionals. AARP polling shows that 9 in 10 adults over the age of 50 support the requirement that financial professionals act in their best interest.<sup>21</sup> Retirement savers rely on financial professionals to make important investment decisions and need to be able to trust these advisers are acting in their best interest.

When people go to a financial advisor with questions about their life savings, they need to be able to trust they are getting good advice. The United States spends hundreds of billions on tax benefits to encourage retirement savings, and those dollars should not be wasted when families

---

<sup>19</sup> FCA, “FCA publishes evaluation of its work on the financial advice market,” November 29, 2021, <https://www.fca.org.uk/news/press-releases/fca-publishes-evaluation-financial-advice-market>.

<sup>20</sup> Kamila Elliott, “CFP BOARD 2022 CHAIR KAMILA ELLIOTT, CFP® TESTIFIES AT DOL HEARING ON RETIREMENT SECURITY RULE,” December 18, 2023, <https://www.cfp.net/news/2023/12/kamila-elliott-testimony>.

<sup>21</sup> AARP Research, *supra* note 2.

get conflicted advice from a professional. Where advice providers are not required to observe a best interest standard, retirement security is undermined, and retirees suffer the consequences. Monetary losses can be staggering, and retirement may be delayed or postponed. The quality-of-life post-retirement can be significantly reduced.

We urge members of Congress to support this proposal, oppose any efforts to defund it, and to ensure the Department of Labor implements this Rule swiftly. Thank you for considering AARP's perspective, and the perspective of millions of older Americans who have saved for retirement throughout their working lives, on this crucial proposal.