STATEMENT FOR THE RECORD

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Impact of the DOL Fiduciary Rule on the Capital Markets

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On behalf of our 38 million members and Americans saving for their retirement, AARP thanks Chairman Huizenga, Ranking Member Maloney and members of the Capital Markets, Securities and Investments Subcommittee for the opportunity to testify today on the Impact of the DOL Fiduciary Rule on the Capital Markets.

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocates for what matters most to families with a focus on health security, financial stability and personal fulfillment. As a trusted source for news and information, AARP produces the world's largest circulation publications, AARP THE MAGAZINE and AARP BULLETIN. Nearly half of our members are employed full or part-time, with many of their employers providing retirement plans.

A major priority for AARP is to assist Americans in accumulating and effectively managing adequate retirement assets to supplement Social Security. The shift from defined benefit plans to defined contribution plans has transferred significant responsibility to individuals for investment decisions that will directly impact the adequacy of the assets available to fund future retirement needs. Unfortunately, the state of America's retirement landscape is cause for great concern. According to calculations by the Center for Retirement Research at Boston College, only about half of households have retirement savings and the rest of Americans have no source of income other than Social Security and the "retirement income deficit" for American households continues to grow.[1] According to recent analysis by EBRI, 47 percent of workers in 2017 reported the total value of their household's savings and investments, not just for retirement, was less than $25,000 and 24 percent had less than $1,000.[2] Given these trends, it is critical to do all we can to help Americans keep as much of their hard-earned nest egg as possible.

AARP has enthusiastically supported the Fiduciary Rule ("rule") as a necessary protection for savers when they make investment decisions concerning their retirement monies. Without this protection, it is difficult for an individual to effectively plan for a secure and adequate retirement. The rule requires retirement investment advice in the best interest of the client saving for retirement—that is to say, advice that minimizes conflicts of interest, is solely in the interest of the client, and which is provided with the care, skill, prudence and diligence that a prudent person would use. AARP agrees with the simple and basic tenet that retirement plan advisers should act in the best interest of retirement savers, and not in their own best interest.

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[1] Alicia H. Munnell, *401(K)/IRA Holdings in 2013: An Update from the SCF* (Sept. 2014), http://crr.bc.edu/wp-content/uploads/2014/09/IB_14-151.pdf.

[2] Lisa Greenwald et al., *The 2017 Retirement Confidence Survey: Many Workers Lack Retirement Confidence and Feel Stressed About Retirement Preparations* (Mar. 21, 2017), https://www.ebri.org/pdf/briefspdf/EBRI_IB_431_RCS.21Mar17.pdf.

I. The Public Has Demanded The Protections Of This Rule.

AARP members and the public generally have demanded and supported the protections of this rule. In survey after survey, we have found that retirement savers overwhelmingly want advice that is in their best financial interest. In an AARP 2013 survey of over 1,400 adults who had money saved in either a 401(k) or a 403(b) plan, more than nine in ten (93 percent) respondents favored requiring retirement advice to be in their sole interest, and fewer than four in ten (36 percent) respondents indicated they would trust the advice from an adviser who is not required by law to provide advice that is in their best interests.[3] A survey taken after the rule was promulgated demonstrated that an overwhelming percentage of respondents were in favor of the rule and believe it is important for financial advisers to give financial advice in a client's best interests.[4] Among those individuals who have received professional financial advice, the support was the deepest, with nearly 8 in 10 (78 percent) strongly agreeing with the rule.

In addition, plan sponsors generally favor the rule. In a survey of over 3,000 plan sponsors of all sizes, nearly nine in ten (89 percent) plan sponsors said that they would favor requiring giving advice that is in the sole interest of plan participants.[5]

In the Committee room today are several AARP members who have traveled here today to attend the hearing and show their support for the rule. AARP members were actively engaged in voicing their support for this rule during the open comment period in 2015. Close to 100,000 AARP members took over 200,000 actions in support of the rule in 2015, including submitting close to 60,000 messages to the U.S. Department of Labor, and delivering over 26,000 petitions to the House Financial Services Committee. The 26,000 petitions we delivered to the Committee have been resubmitted to the Committee for the record.

We are communicating with our members now about the Department of Labor's current open comment period on modifications to the rule and further delay of its enforcement and expect that many of our members will write or call to support the rule. AARP has also used its own channels to inform our members and the broader public about the benefits of the rule, including multiple articles in AARP's Bulletin, which is mailed to all 38 million members. We have worked in collaboration with organizations such as Yahoo Finance to produce educational videos regarding the rule and its benefits. Finally, AARP is developing a tool that will walk investors through the questions they should ask a prospective or existing financial adviser,

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[3] AARP, *Fiduciary Duty and Investment Advice: Attitudes of 401(k) and 403(b) Participants* (Sept. 2013), http://www.aarp.org/research/topics/economics/info-2014/fiduciary-duty-and-investment-advice---attitudes-of-401-k--and-4.html.

[4] S. Kathi Brown, *Attitudes Toward the Importance of Unbiased Financial Advice* 4, 6 (May 2016), http://www.aarp.org/content/dam/aarp/research/surveys_statistics/econ/2016/attitudes-unbiased-fin-advice-rpt-res-econ.pdf.

[5] AARP, *Fiduciary Duty and Investment Advice: Attitudes of Plan Sponsors* (Mar. 2014), http://www.aarp.org/research/topics/economics/info-2014/fiduciary-duty-and-investment-advice---attitudes-of-plan-sponsor.html.

including whether the adviser operates under a fiduciary standard. We developed the app in collaboration with the North American Securities Administrators Association and anticipate launching the tool this fall.

In addition to the support of individuals saving for their retirement, many states agree the fiduciary rule is needed to protect residents and deter potential exploitative practices. In fact, earlier this year Attorneys General from across the country, including Hawaii, Illinois, New York, North Carolina, Iowa, Oregon, Pennsylvania, Washington, and the District of Columbia, issued letters urging the Department of Labor to proceed with the rule that would require financial advisers to put their clients' best interests ahead of their own. Additionally, California, Missouri, South Carolina and South Dakota already impose a fiduciary standard on brokers in their states. In response to recent efforts to dilute the Department of Labor rule, Nevada enacted legislation to subject broker-dealers and investment advisers to a fiduciary standard, with the support of AARP Nevada. We expect more states to establish this standard going forward.

The rule also has the support of personal finance columnists and reporters who have repeatedly touted the beneficial effects of the rule. In scores of articles, personal finance writers from diverse publications have informed their readers of the rule's requirements and protections. Many of them have provided their readers with questions to ask their advisers to ensure that their advisers are fiduciaries.

I. Most of the financial services industry agrees that a fiduciary standard is the appropriate standard for providing retirement investment advice.

The financial services industry generally agrees that investment advice should be provided in the best interests of the participant and retirement investor. Registered investment advisers and certified financial planners have for decades successfully provided fiduciary advice. Noting that the public demand for fiduciary advice has increased dramatically and that the market continues to move in the direction of providing fiduciary advice, the Certified Financial Planner Board of Standards last month issued for public comment proposed revisions to its *Standards of Professional Conduct*, which sets forth the ethical standards for CFP® professionals. The draft revision broadens the application of the fiduciary standard, effectively requiring CFP® professionals to put a client's interest first at all times. The current *Standards* require CFP® professionals to act in a fiduciary capacity only when providing financial planning. The CFP Board is expected to finalize its updated *Standards* later this year.

Public comment letters to the Department of Labor also demonstrates the overwhelming consensus on the best interest standard. *E.g.*, Transamerica Comment Letter 894 ("The Company has consistently indicated its support for a best interest standard, transparency and treating customers fairly"); SIFMA Comment Letter 506 ("The industry … shares that goal" "to ensure financial services providers are looking out for their customer's best interest"); Plan Sponsor Council of America Comment Letter 614 ("[W]e believe our retirement system will be

greatly strengthened by ensuring that investment advice is provided in the recipient's best interest consistent with those fiduciary standards and that any financial conflicts are disclosed."); American Council of Life Insurers Comment Letter 621 ("We share the Department's interest in seeing that plan sponsors, plan participants and Individual Retirement Accounts (IRA) owners receive advice that is in their best interest."); American Bankers Association Comment Letter 622 ("We agree with the Department that retirement service providers, when acting in their capacity as fiduciaries, should act in the best interest of customers and that such customers deserve to be protected from financial abuse."); Insured Retirement Institute Comment Letter 626 ("Financial professionals should be held to a best interest standard when recommending investments to retirement investors."); Business Roundtable Comment Letter 645 ("Financial professionals should be required to act in the best interests of employee benefit plan participants when providing investment advice to a retirement plan or its participants."); Wells Fargo Comment Letter 647 ("[W]e remain supportive today of a "best interest" standard of care for clients.").

There should be no surprise about this consensus since these statutory standards have been in place since the Employee Retirement Income Security Act (ERISA) was enacted in 1974. Indeed, treating those who provide investment advice for a fee as a fiduciary is consistent with both the statute and the common law of trusts upon which ERISA was based. Significantly, although there have been attempts to weaken the rule requiring those who provide investment advice for a fee to be treated as a fiduciary, Congress has never agreed to dilute the standard adopted over 40 years ago to protect and preserve employees' hard-earned retirement savings.

II. Weakening The Fiduciary Rule Will Undermine The Financial Security Of Americans Saving For Retirement.

Although AARP is extremely disappointed that enforcement of the rule has been delayed until January 2018, we appreciate that the Department of Labor has decided to go forward with the applicability date for the fiduciary rule, beginning last month on June 9, 2017. To dilute or rescind the fiduciary rule is simply too costly to retirement investors. Retirement investors are at risk of a 1 percent drop in annual returns on retirement savings without the rule.[6] Increasingly, the way that most Americans save and invest is through their employer sponsored retirement plans, most typically a 401(k) type savings plan. The Government Accountability Office (GAO) has estimated that $20,000 in a 401(k) account that had a one percentage point higher fee for 20 years would result in an over 17 percent reduction in the account balance, a loss of over $10,000.[7] We estimate that over a 30-year period, the account would be about 25 percent less. Even a difference of only half a percentage point — 50 basis points — would reduce the value of the account by 13 percent over 30 years. Conflicted advice resulting in higher fees and expenses can have a huge impact on retirement income security levels.

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[6] U.S. Gov. Accountability Office, *GAO-11-119, Improved Regulation Could Better Protect Participants from Conflicts of Interest* 31 (Jan. 2011), http://www.gao.gov/assets/320/315363.pdf.

[7] U.S. Gov. Accountability Office, *GAO-07-21, Private Pensions: Changes Needed to Provide 401(k) Plan Participants and the Department of Labor Better Information on Fees* 7 (Nov. 2006).

Risks caused by conflicted investment advice are also increasing as the baby boomers retire and are encouraged to move their money from protected ERISA plans to IRAs. The Department of Labor (DOL) found that advice from conflicted investment advisers could cost these retirees between 12 to 24 percent in lost retirement savings over thirty years.[8] The DOL found that IRA investors tend to be older as they are close to or at retirement. These IRA investors are more vulnerable to the negative impact of conflicted advice because the amount of assets available for rollover are large, many older investors do not have strong financial literacy skills, and they are making significant and often one-time decisions to move their retirement savings from more protected employer based plans into significantly less protected IRAs.[9]

Lower and middle-income retirement investors need every penny of their retirement savings. "Among the 48 percent of households age 55 and older with some retirement savings, the median amount is approximately $109,000 — commensurate to an inflation-protected annuity of $405 per month at current rates for a 65- year-old."[10] DOL likewise has established that "small investors" (that is, those with low balances or those with modest means) are most negatively impacted by the detrimental effects of conflicted advice. Those with small accounts have fewer economic resources, and consequently any additional costs or losses diminish what little savings they have worked so hard to amass.

Congress sought to protect the retirement savings of millions of workers, retirees, and their families when it enacted the Employee Retirement Income Security Act of 1974. ERISA, the result of a decade of legislative consideration, established far-reaching standards to protect consumers through timely disclosure of information, minimum standards for participation, funding rules, fiduciary duty over invested monies, and access to legal redress for violations of the law. ERISA specifically applies to financial service firms that handle retirement monies, including insurance companies, investment firms, and broker-dealers. All of these actors are subject to ERISA when they are providing retirement advice, even if they are also subject to standards promulgated by other agencies or self-regulating bodies. These entities have largely successfully complied with ERISA for over forty years.

The rule could have important benefits for the broader economy. If households — especially lower and middle class older individuals — have more money in their modest retirement accounts because of lower fees, they will have more money to spend in the economy on goods and services. Conflicted advice may also impact the broader economy by misallocating capital, resulting in inefficiencies that do not promote economic growth.[11]

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[8] U.S. Dep't of Labor, *Fiduciary Investment Advice: Regulatory Impact Analysis* 3-4 (2015).
[9] *Id*. at 59-60.
[10] U.S. Gov't. Accountability Office, *GAO-15-419, Retirement Security: Most Households Approaching Retirement Have Low Savings* 11 (May 2015), http://www.gao.gov/
assets/680/670153.pdf.
[11] Benjamin P. Edwards, *Conflicts and Capital Allocation*, 78 Ohio St. L.J. 1 (2017) at 21.

Regardless of the method used to calculate the losses, it is clear that repeal of the rule jeopardizes the retirement security of hard working Americans, and could have a negative impact on the economy more broadly.

III. The Rule Has Not Reduced Access To Retirement Information And Financial Advice.

While some disruption within the retirement services industry can be expected after updating a 40-year old regulation to make it relevant to the current retirement marketplace, the disruption has overall been positive for retirement investors. The disruption has resulted in lower fees, advice in the best interest of the saver or retiree, and minimized conflicts in advice provided to individuals. Many investment firms and their advisers have also taken steps to meet the requirements of the regulation and already have incurred one-time, up-front compliance costs. Significantly, we have not seen prices increase for those companies that have significantly complied with the rule. In fact, repealing the rule, as this proposal seeks, will not only harm consumers but place these firms and advisers at a disadvantage.

Under the rule, Americans will still be able to access a variety of retirement savings offerings. There is no prohibition in the rule against any type of retirement investment product. The rule does not require investment firms to abandon products, but instead allows the investment marketplace to evolve and innovate to provide investments and products that answer the needs of individuals who now shoulder greater responsibility for their retirement security as well as provide protection for their hard-earned retirement monies. Indeed, the market is responding already to the public demand for fewer conflicts of interest, greater transparency, and lower fees. The recent development of new investments with differentiated fees such as clean shares and T shares by leading investment firms demonstrate this point. Conversely, as individual firms respond to market signals, they may discontinue offerings that do not meet client demands. The choice to develop or discontinue an offering is up to an individual adviser, broker or firm. Because ERISA does not have an authorized or legal list of investments, the rule is consistent with Congress's design of ERISA's broad fiduciary rule.

In addition, investment firms will continue to make business decisions on how to structure their customer relationships. Firms will determine whether to make use of the Best Interest Contract Exemption for certain products or particular fee arrangements. The decision of each firm may be different depending on an analysis of its business model and its client base. By way of example, three of the largest defined-contribution plan providers are reported to have chosen three distinctly different compliance strategies.[12]

Americans saving for retirement have the majority of their savings in defined contribution plans and IRAs. Given the nearly $8 trillion in assets in IRAs and the almost $5 trillion in 401(k) plans, there is neither evidence— nor any reason to believe — that financial service providers will

[12] Greg Iacurci, *Fidelity, Empower and T. Rowe take three different approaches to the DOL fiduciary rule*, INVESTMENT NEWS (Mar. 7, 2017), http://www.investmentnews.
com/article/20170307/FREE/170309941/fidelity-empower-and-t-rowe-take-three-different-approaches-to-the

abandon this lucrative market.[13] Thus, to the extent there are disruptions, retirement savers stand to benefit as the various players in the financial services industry adjust to maintain their competitive edge. AARP has every confidence that the financial services industry and the retirement advice market will continue to develop innovative new products and systems to help hard working Americans save for retirement.

IV. Broker-Dealers, Investment Advisers, and the Fiduciary Standard

Both broker-dealers and investment advisers play an important role in helping Americans manage their financial lives, and accumulate and manage retirement savings. Clients receiving investment advice should receive a standard of care that is in their best interest, regardless of whether the advice comes from a broker‐dealer or an investment adviser. Any effort to dilute existing safeguards, whether through rulemaking or legislative channels, puts consumers and their savings at unacceptable risk.

AARP appreciates that the draft bill under discussion today seeks to impose a best interest standard on broker-dealer recommendations. Advice in the best interest of individuals saving or investing is something AARP has long supported. However, by failing to identify the standard as a fiduciary standard and deviating from the standard applicable to all other advisers, the bill permits something short of full fiduciary protections. It could even suggest that compliance with the existing suitability standard, which makes reference to the best interest of the customer but does not require brokers to rein in conflicts or consider other investments, would meet this benchmark. If that is not the bill author's intent, we respectfully suggest that this point needs to be clarified. If this failure to impose a full fiduciary standard is intentional, however, that falls well short of the protections investors need and deserve.

a. The draft bill does not strengthen the suitability standard, leaving investors confused and at risk.

The regulatory imbalance between the duties of brokers and investment advisers has persisted for many years, even as evidence demonstrating that brokers have transformed themselves from salesmen into advisers has grown. Many brokers today call themselves "financial advisers," offer services that clearly are advisory in nature, and market themselves based on the advice offered. For example, one firm advertises that it "proudly strive[s] to embrace [its] own fiduciary responsibilities" and that its "highest value is to 'always put the client first,'"[14] even though its Form ADV brochure (a regulatory filing that the SEC requires to be given to clients after a transaction is completed) demonstrates otherwise, noting that "[d]oing business

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[13] ICI Research Report, *Defined Contribution Plan Participants' Activities, First Three Quarters of 2016* at 2 (Feb. 2017), https://ici.org/
pdf/ppr_16_rec_survey_q3.pdf.

[14] Letter from Robert Reynolds, President and CEO of Putnam Investments, to U.S. Dep't of Labor (July 20, 2015), *available at* https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA25/00077.pdf.

with our affiliates could involve conflicts of interest if, for example, we were to use affiliated products and services when those products and services may not be in our clients' best interests."[15] As a result of such deceptive statements, the average investor cannot distinguish between brokers and advisers and does not recognize that their "financial adviser" operates under a lower legal standard than that to which an investment adviser is held. Nor is it surprising that investors expect that those who advertise themselves as a trusted adviser will provide financial advice in the best interest of the investor.

Federal regulations have not kept pace with changes in business practice, and broker-dealers and investment advisers continue to be subject to different legal standards when they offer advisory services. According to the Commission's 2011 Study on Investment Advisers and Broker-Dealers, as of the end of 2009, FINRA-registered broker-dealers held over 109 million retail and institutional accounts and approximately 18 percent of FINRA-registered broker-dealers also are registered as investment advisers with the Commission or a state.[16] The draft bill is silent on the legal standards that will apply when a dually registered investment adviser and broker-dealer acts in both capacities and offers investment advice and/or executes sales.

Ensuring all securities professionals who offer investment advice to retail investors are subject to a fiduciary standard is needed to ensure a level and transparent market for investors seeking advice. Investors deserve a regulatory system that is designed to promote the best interests of the investor and imposes comparable standards on investment professionals who are performing essentially the same function as financial advisers. Research has found investors typically rely on the recommendations they receive from brokers and investment advisers alike. The trust most investors place in financial professionals is encouraged by industry marketing, leaving investors vulnerable not only to fraud but also to those who would take advantage of that trust in order to profit at their expense. Investors who place their trust in salespeople who market services as financial advisers can end up paying excessively high costs for higher risk or underperforming investments that only satisfy a suitability standard, but not a fiduciary standard. That is money most middle-income investors cannot afford to waste.

b. The duties of brokers must be clearly defined.

As currently drafted, the draft bill focuses on what is *not* required of a "best interest standard" and what the standard does *not* preclude (e.g., transaction-based compensation, including third-party payments, principal trades and recommendations of proprietary products). However, the proposal does not illustrate what *is* definitively required of broker-dealers in order to meet the standard (other than a newly conceived comparison to the business practices of another broker or dealer).

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[15] Putnam Advisory Company, LLC, SEC Form ADV Part 2A at 25 (Mar. 30, 2016), available at http://www.adviserinfo.sec.gov/IAPD/Content/Common/crd_iapd_Brochure.aspx?BRCHR_VRSN_ID=375046. (Putnam Investments wholly owns Putnam Advisory Company through various subsidiaries.)

[16] S.E.C, *Study on Investment Advisers and Broker-Dealers* (Jan. 11, 2011).

In addition, the section on disclosures is concerning. As currently drafted, the bill lists three options for the handling of conflicts -- avoid, disclose, or manage. Disclosing conflicts is not adequate and does not shield investors from conflicts nor does it compel mitigation of existing conflicts. Furthermore, the draft bill is ambiguous as to whether disclosures are required only at initiation of the relationship between the broker-dealer and the investor, and as to whether the disclosures described in this bill supersede other disclosures that do not pose a material conflict. The bill also does not specify the ways in which a broker-dealer must manage conflicts of interest. Failure to address this flaw in the proposal would leave investors vulnerable to unscrupulous advisers.

c. Agencies should retain authority to protect consumers and enforce rules under ERISA.

The draft proposal could potentially preclude both the SEC and DOL from taking action to adopt stronger protections for investors and retirement savers, even if they find that this bill's approach is inadequate, or the market evolves with unanticipated consequences. In addition, it could substantially weaken the standard that applies under ERISA to advice from registered investment advisers.

d. The draft bill raises numerous additional concerns.

The draft bill raises numerous additional concerns. The draft bill does not ensure broker-dealers who provide investment advice meet minimum training and competency requirements. By contrast, fiduciaries are affirmatively required to obtain training on their duties and their legal obligations. The draft bill fails to require brokers to apprise investors in advance of a sale of the amounts of all compensation (only the types of compensation must be reported). The bill covers retail sales and exempts institutional sales, but fails to define either term. It permits broker-dealers to provide advice for "non-discretionary" roll-overs of retirement assets, but also fails to define what meets this standard. Finally, it broadly exempts investment advisers for variable annuities, which are costly and complex, from adhering to a fiduciary standard when recommending variable annuities to investors.

We thank the Committee for the opportunity today to share AARP's views on the Department of Labor's fiduciary rule and on the draft bill which would repeal that rule and replace it with a discretionary best interest standard for broker-dealers. AARP remains committed to the strongest possible fiduciary standard for retirement investment advice and recommends a similar standard for all other investment advice. Repealing the fiduciary rule as promulgated by the Department of Labor would significantly diminish retirement security, and we oppose its repeal. AARP stands ready to serve as a resource and partner in developing an effective

standard for investment advice that will promote and protect the retirement security of American families.