



Consumer Federation of America

**Statement of Micah Hauptman
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before the
U.S. Department of Labor
Retirement Security Proposal Hearing
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Good morning, I am Micah Hauptman, director of investor protection at the Consumer Federation of America (CFA). Thank you for the opportunity to testify today in strong support of the Department's Retirement Security Proposal.

I want to devote my time to first, making the case for why this proposal is necessary for the protection of retirement investors, and second, rebutting the meritless and cynical claims by the industry opponents.

As we all know, retirement investing can be complicated, and many retirement investors turn to financial professionals for advice. Retirement investors reasonably expect and believe the financial experts they turn to will act in their best interests, and retirement investors trust and rely on the advice they receive.

Retirement investors' beliefs and expectations about the relationships they are in and the services they receive isn't misplaced. It's because everything financial professionals and their firms do is designed to send the message that they are in relationships of trust and confidence with investors and they provide advice in investors' best interests that should be relied upon.

From the titles they use, to how they describe their services and relationships, and most importantly, how they function, any reasonable person would view these as trusted advice relationships.

To provide some examples, I've pulled some previous comments and public facing materials by the trade associations represented on this panel.

For example, ACLI:

- has repeatedly highlighted the “benefits of using a financial advisor;”¹

¹ <https://www.acli.com/-/media/acli/files/fiduciary-rule-public/aclicommentletterondolfiduciaryrule07212015.pdf>

- stated that “families turn to life insurance companies and trusted agents and advisors to protect their financial futures,”²
- referred to the need to preserve “advice about annuity purchases,”³ and
- compared the value of “commission-based advice” to “fee-based advice,” suggesting that the critical difference between the two is the method of payment for the advice, not that they are different services and relationships altogether.⁴

Similarly, FSI has stated that it advocates “on behalf of independent financial advisors...so they can provide affordable, objective financial advice to hard-working Main Street Americans.”⁵

- FSI has further stated that, “Now more than ever, individual investors need to have confidence in the reliability of the investment advice they receive.”⁶

So, who are the professionals these groups purport to represent? Advisors. What do these advisors do? Provide advice. What should consumers think of these advisors? They should have trust and confidence in them.

You know what retirement investors don’t want or expect? To be steered to overpriced, suboptimal products or services that aren’t in their best interest by people who seek to evade their regulatory obligations and accountability, all so they can get a big payday.

Unfortunately, that’s what the 1975 five-part test defining fiduciary investment advice allows. It allows investment professionals to function as advice providers, to occupy positions of trust and confidence with retirement investors, and to foster reliance on the advice they provide, while evading the fiduciary duty appropriate to their advisory role.

The five-part test is inconsistent with the text of ERISA and it defeats investors’ reasonable expectations about the relationships they are in and the services they are receiving.

The proposed redefinition of fiduciary investment advice, on the other hand, is faithful to the statute and would honor retirement investors’ reasonable expectations when receiving advice from financial professionals who hold themselves out and function as trusted advice providers.

It would appropriately cover rollover recommendations, plan advice, advice about insurance and other non-securities, ensuring regardless of the type of investment professional a retirement investor works with or the type of product the professional recommends, their advice would be subject to a strong best interest framework that ensures conflicts of interest do not taint their advice.

² <https://www.acli.com/Posting/NR13-005>

³ https://www.acli.com/-/media/acli/public/files/pdfs-public-site/public-public-policy/ali_cle_outline100615_web.pdf

⁴ https://www.acli.com/-/media/acli/files/newsroom-news-releases-public/031419_regbihearingstatementfinal.pdf

⁵ <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/00724.pdf>

⁶ <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/00724.pdf>

Turning to rebutting industry opponents' meritless and cynical claims, let's first consider their most cynical claim that small savers would lose access to advice under the proposal: This is little more than a scare tactic based on their 2016 rule assumptions, which are not applicable to the current proposal.

First, the proposal broadly aligns with the SEC's Reg. BI, and there is no evidence that that rule has reduced small savers' access to investment recommendations. We expect the DOL rule to operate similarly, providing comparable protections to retirement plans and participants and to IRA investors.

Second, many financial professionals already support and successfully operate under a strong fiduciary standard while serving clients of all means. If some firms were to decide to pull out of the market, others would step in to provide high quality products and services without harmful conflicts.

The reality is small savers have the most to gain from the DOL proposed rule. They can least afford to lose any of their retirement savings to bad advice, yet they are particularly vulnerable to the detrimental effects of conflicted advice.

I'll also remind the Department that those claiming small savers would lose access to advice argued in court that they don't provide advice, they provide arms-length sales pitches like car dealers. While I strongly disagree with that assertion, they can't be allowed to continue to make mutually inconsistent arguments to different audiences, based on whatever it most advantageous to them at the time.

Now let's consider another argument that they make, that the Department has disregarded protections by other regulators.

The reality is neither the SEC nor the NAIC have fully addressed the problem of conflicted retirement advice. The SEC's Reg. BI is limited to recommendations to retail customers about securities, so it doesn't apply to recommendations about non-securities or recommendations to retirement plans.

And the NAIC Model Rule for Annuity Transactions is a best interest in name only standard. Under the Model, a producer has been deemed to have met the "best interest" standard if they satisfy four component obligations, none of which includes an explicit requirement to act in the consumer's best interest. The key standard they have to meet, "having a reasonable basis to believe the recommended option effectively addresses the consumer's financial situation, insurance needs, and financial objectives," is largely a restatement of the previous suitability rule.

In addition, the Model defines "material conflict of interest" to exclude both cash and non-cash compensation. As a result, it does not require producers recommending annuities to mitigate their compensation-related conflicts. In short, the only interest the NAIC Model Rule serves is the insurance industry's, which helps to explain the strong endorsement by ACLI.

The reality is this proposal largely extends the Reg. BI framework where Reg. BI doesn't apply, providing uniformity across regulatory regimes. When the industry trade associations supported Reg. BI and urged consistency across regulatory frameworks, which they claimed would "best serve consumers and avoid harmful regulatory arbitrage,"⁷ perhaps it was just rhetoric. Their shifting arguments suggest that what they really want is a patchwork of different standards, which allow them opportunities to continue their very profitable but harmful conflict-ridden practices.

In sum, the DOL proposal is appropriately tailored to ensure that ERISA's fiduciary standards uniformly apply to all situations where retirement investors can—and should—place their trust and confidence in investment advice providers. The industry opponents' self-serving arguments should not divert the Department from completing this important investor protection project.

Thank you.

⁷ https://www.acli.com/-/media/ACLI/Public/Files/PDFs-PUBLIC-SITE/Public-Newsroom/ACLI_Submission_on_Reg_BIAug18.ashx?la=en