WRITTEN STATEMENT OF

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FOR THE HEARING

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BEFORE THE

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Good morning. I would like to thank Chairman Good and Ranking Member DeSaulnier for inviting me to testify today and all of the members of the Subcommittee for their dedication to improving retirement security for all Americans. The topic of this hearing is the U.S. Department of Labor's ("Department" or "DOL") overreaching 2023 proposal to re-define persons who function as investment advice fiduciaries for purposes of the Employee Retirement Income Security Act of 1974 ("ERISA") and the Internal Revenue Code ("Code") (the "Proposal").

I am a Principal with Groom Law Group in Washington, D.C. I concentrate my practice on ERISA-related matters involving retirement plans. I assist retirement plans, plan sponsors and plan fiduciaries on matters related to the investment of plan assets and plan administration. I also work with financial institutions and investment professionals that offer products and services to ERISA plans and to individual retirement accounts ("IRAs"). I have counseled on issues related to ERISA's fiduciary responsibility and prohibited transaction rules for more than 30 years.

My testimony this morning reflects my own personal views and not those of any client, my firm or my colleagues. I am not testifying on behalf of a client or any other party and I am not being paid in connection with my testimony today.

ERISA fiduciary status is not something to be lightly assigned or to be assigned in inappropriate contexts. ERISA imposes a high standard of conduct - the "highest known to law" on persons who are responsible as fiduciaries to ERISA plans.[1] The ERISA fiduciary standard of conduct does not merely require acting in the *best interest* of plan participants and beneficiaries. It requires acting prudently and "*solely in the interest*."[2] ERISA's prohibited transaction restrictions supplement that standard of conduct by disallowing fiduciaries from acting in self-interested transactions, or receiving compensation from third-parties in connection with a transaction for which they are responsible unless a statutory or administrative exemption is available and the fiduciary complies with the conditions of that exemption.[3]

The Proposal's fundamental flaw is that it would sweepingly confer fiduciary status on virtually *all* financial professionals and sales people, including broker-dealer representatives and insurance agents, who today are available to provide much needed assistance to retirement investors, including plan participants and IRA owners. Many of those investment professionals are compensated for their work by receiving transaction-based compensation (*i.e.,* commissions) for completed sales. If ERISA fiduciary status were to be assigned to those same financial professionals, the commissions that they earn on completed sales would automatically be re-classified as illegal kickbacks, absent compliance with a series of complex, highly burdensome, prohibited transaction exemptive relief conditions prescribed by the DOL.

The significance of such an outcome cannot be overstated: under the DOL's Proposal, otherwise ordinary sales commissions and other traditional forms of transaction-based compensation would be transformed into illegal "kickbacks" when an investment professional makes a recommendation to an ERISA plan, plan participant or IRA owner, unless that investment professional adheres to the Department's prohibited transaction exemption

[1] *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8, (2d Cir.), *cert. denied*, 459 U.S. 1069 (1982).
[2] ERISA section 404(a)(1).
[3] ERISA section 406(b).

conditions. But compliance with the Department's exemptions affords no relief from the general standards of fiduciary responsibility under ERISA. An ERISA fiduciary remains obligated to act prudently and not merely in the best interest, but "solely in the interest" of the plan's participants and beneficiaries.

In many contexts, the application of ERISA's fiduciary standard of conduct is entirely appropriate and is protective of the interests of participants and beneficiaries. But when fiduciary status is inappropriately assigned, it can have the opposite effect. Such is the case with the DOL's Proposal. The inappropriate assignment of fiduciary status to investment professionals such as broker-dealer representatives and insurance agents who earn transaction-based compensation for completed sales will sharply curtail retirement savers' access to financial assistance and to the products and services those investment professionals make available. That would be a tragic outcome. American workers need professional financial assistance and require access to the financial products and services that investment professionals who are compensated on a transaction basis make available.

The Department's Proposal is overreaching as matter of law. The Proposal is in conflict with the 5th Circuit Court of Appeals' holding in *Chamber of Commerce v. United States Department of Labor* that ERISA's statutory text "necessarily implies a special relationship beyond that of an ordinary buyer and seller" and "preserves [t]he important distinction" between "[s]tockbrokers and insurance agents [who] are compensated only for completed sales" and "[i]investment advisers" who are "paid fees because they 'render advice.'"[4] The Department's Proposal contravenes the 5th Circuit's holding by "reject[ing] the purported dichotomy between a mere 'sales' recommendation to a counterparty, on the one hand, and [fiduciary investment] advice, on the other, in the context of the retail market for investment products."[5]

The Proposal also reflects the Department's incorrect view that it holds the authority to comprehensively regulate standards of conduct applicable to broker-dealers, registered investment advisers, and insurance agents. It does not. This point was specifically addressed by the *Chamber of Commerce* decision wherein the 5th Circuit concluded that the Department's similar 2016 fiduciary rule usurped and violated "two Congressional initiatives" enacted as part of the Dodd-Frank Act.[6] Specifically, the 5th Circuit pointed out that under Dodd-Frank, Congress authorized the SEC and not the Department "to promulgate enhanced, uniform standards of conduct for broker-dealers and investment advisers who render 'personalized investment advice about securities to a retail customer.'"[7] The same decision held that Section 989J of Dodd-Frank deferred regulation of fixed indexed annuities "to the states, which have traditionally and under federal law borne responsibility for thoroughgoing supervision of the insurance business."[8]

The 5th Circuit explained this point as follows –

> The Fiduciary Rule conflicts with both of these efforts. The SEC has the expertise and authority to regulate brokers and dealers

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[4] 885 F.3d 360, 373 (5th Cir. 2018)
[5] 88 Fed. Reg. 75890, 75907 (Nov. 3, 2023)
[6] *Chamber of Commerce*, at 385.
[7] *Id.*
[8] *Id.*

> uniformly. DOL has no such statutory warrant, but far from confining the Fiduciary Rule to IRA investors' transactions, DOL's regulations effect dramatic industry-wide changes because it is impractical to separate IRA transactions from non-IRA securities advice and brokerage. Rather than infringing on SEC turf, DOL ought to have deferred to Congress's very specific Dodd-Frank delegations and conferred with and supported SEC practices to assist IRA and all other individual investors. By presumptively outlawing transaction-based compensation as "conflicted," the Fiduciary Rule also undercuts the Dodd-Frank provision that instructed SEC not to prohibit such standard forms of broker-dealers' compensation. And in direct conflict with Congress's approach to fixed indexed annuities, DOL's regulatory strategy not only deprives sellers of those products of the enhanced PTE 84-24 exemption but it also subjects them to the stark alternatives of using the BIC Exemption, creating entirely new compensation schemes, or withdrawing from the market. While Congress exhibited confidence in the states' insurance regulation, DOL criticizes the Dodd-Frank provisions as "insufficient" to protect the "subset" of retirement related fixed-indexed annuities transactions within DOL's purview. Certainly, however, most such products are sold to retirement investors, so DOL is occupying the Dodd-Frank turf.[9]

Through the Proposal, the Department re-commits prior missteps that resulted in the vacatur of its 2016 rulemaking. It again ignores the clear distinctions between the statutory duties owed by investment advice fiduciaries under Title I of ERISA and those owed by investment advice fiduciaries under the Code. In *Chamber of Commerce*, the 5th Circuit noted the distinction Congress made between the duties owed by fiduciaries to Title I plans, which include the duties of prudence and loyalty (*i.e.,* to act solely in the interest) under ERISA section 404 in addition to prohibited avoidance responsibilities under ERISA section 406, and the duties applicable to Title II plan fiduciaries under Code section 4975, which are confined solely to prohibited transaction avoidance and contain no ERISA section 404 counterparts.

In subsequent cases, including the 2023 *American Securities Association*[10] and *Federation of Americans for Consumer Choice*[11] cases, District Courts have similarly emphasized those same statutory distinctions, and have vacated or recommended vacatur of Department interpretations that inappropriately overlook the distinction. The Department's new Proposal once again conflates the distinction between the separate statutory duties owed by fiduciaries to Title I plans and those owed by fiduciaries to Title II plans. As an example, the Department indicates in its new Proposal that ERISA's fiduciary obligations apply to "considerations of how . . . money might be invested after [a] rollover" from a Title I plan to a Title II plan.[12]

[9] *Id.,* at 386.
[10] 2023 WL 1967573 (M.D. Fla. 2023)
[11] 2023 WL 5682411 (N.D. Tex. 2023)
[12] 88 Fed. Reg. 75890, 75905 (Nov. 3, 2023)

The five-part test for determining fiduciary status as set forth in the Department's longstanding 1975 regulation provides that persons act as investment advice fiduciaries if, for a fee or other compensation, they: (1) render advice or make recommendations as to the advisability of investing in, purchasing, or selling securities, or other property; (2) on a regular basis; (3) pursuant to a mutual agreement between such person and the plan; where the advice; (4) serves as a primary basis for investment decisions with respect to plan assets; and (5) is individualized based on the particular needs of the plan.[13]

The Department's 2023 Proposal jettisons the "primary basis" prong of the test altogether and employs a regulatory sleight of hand to give the appearance that the "regular basis" prong has been retained while re-framing that prong as a description of whether the recommendation provider is engaged in the business of providing advice on a regular basis to other investors. Whether or not a recommendation provider regularly engages in the business of selling to others has no bearing on the nature of the relationship with any one recommendation recipient.

The Proposal would also sweepingly attach fiduciary status to otherwise ordinary course communications conducted by or on behalf of financial institutions if they contain any covered recommendations, even in the absence of any consideration of a retirement investor's particular needs or individual circumstances. Under proposed section 3-21(c)(1)(i), fiduciary status would attach to any recommendation made by a person if that person has an affiliate relationship with another entity who has discretionary authority or control over any property for the retirement investor, including property held outside of a plan or an IRA. Hence, in the situation where a financial institution's asset management business has a discretionary management relationship with a retirement investor in any capacity, any recommendation made by any of its affiliates – including recommendations delivered through generalized marketing materials – would be deemed to be fiduciary in nature no matter how distant the affiliate relationship. This sort of attribution of fiduciary status through affiliate relationships exemplifies the unreasonable and random nature of the Proposal's fiduciary status assignments.

The major questions doctrine, which requires that when an agency seeks to regulate a "significant portion of the economy," it must point to "clear congressional authorization" to do so is implicated by the Proposal.[14] The Proposal would clearly affect significant portions of the economy. In this regard, as the Department states in the preamble to the Proposal, IRAs collectively hold approximately $13.2 trillion, defined contribution plans hold $9.2 trillion, and defined benefit plans hold $3.7 trillion, and the Department expects $4.5 trillion to rollover from defined contribution plans to IRAs from 2022 through 2027.[15]

The Proposal would regulate pure sales activity in connection with these plans, including rollover sales recommendations, as fiduciary investment advice. The Department indicates that its Proposal is prompted by the "the shift toward individual control over retirement investing"—not by any Congressional command to update the fiduciary investment advice definition.[16] Although Congress has amended ERISA a number of times over the time period that this shift was

[13] ERISA section 3(21)(A)(ii); 29 CFR section 2510.3-21(c).
[14] *See*, *e.g.*, *Utility Air Regulatory Group v. EPA,* 573 U.S. 302, 324 (2014)
[15] 88 Fed. Reg. 75890, 75915 (Nov. 3, 2023)
[16] *Id.* at 75892.

occurring, it has left the fiduciary investment advice definition under ERISA section 3(21)(A)(ii) untouched since 1974. There is therefore no clear Congressional authorization for the Proposal.

The Proposal would inappropriately confer investment advice fiduciary status under ERISA and the Code to broad segments of the financial services provider community when engaged in the sale and marketing of investment products and services. Such a sweeping assignment of fiduciary status both contravenes the Department's statutory authority and would work a hardship on individual retirement savers by depriving them of access to information, products, and services.

Thank you for the opportunity to testify today. I look forward to taking your questions.