

American Retirement Association
Statement for the Record
U.S. House Education and the Workforce
Subcommittee on Health, Employment, Labor, and
Pensions entitled:
“Protecting American Savers and Retirees from
DOL’s Regulatory Overreach”
February 15, 2024

Thank you, Chair Good, Ranking Member DeSaulnier, and Members of the Subcommittee on Health, Employment, Labor, and Pensions for the opportunity to submit a statement for the record on behalf of the American Retirement Association (ARA) in connection with the Hearing entitled “Examining the DOL Fiduciary Rule: Implications for Retirement Savings and Access.”

The ARA is the coordinating entity for its five underlying affiliate organizations representing the full spectrum of America’s private retirement system – the American Society of Enrolled Actuaries (ASEA), the American Society of Pension Professionals and Actuaries (ASPPA), the National Association of Plan Advisors (NAPA), the National Tax-Deferred Savings Association (NTSA), and the Plan Sponsor Council of America (PSCA). Combined the ARA represents over 35,000 retirement plan professionals nationwide. The ARA’s members and their affiliated organizations support 95 percent of all the defined contribution plans, such as 401(k) plans, in the United States. The ARA and its underlying affiliate organizations are diverse in the roles they play, but united in their dedication to the success of America’s private retirement system.

The ARA’s mission has always been to expand and strengthen the employer-based retirement plan system. Consistent with this mission, the ARA embraced the enactment of ERISA almost fifty years ago in 1974 because it included a principles-based fiduciary standard designed to protect the interests of both plan sponsors and participants. A central component to this protection is that a service provider offering investment advice for a fee to a plan with respect to plan assets must do so consistent with ERISA’s fiduciary standard. The definition of what constitutes “investment advice” under ERISA is thus extremely important.

The regulatory definition of investment advice was first promulgated in 1975. Under the regulation, a service provider is considered to be giving investment advice if the service provider: (1) renders advice to a plan as to the value of securities or other property, or makes 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 understanding; (4) that such advice will be a primary basis for investment decisions; and that (5) the advice will be individualized to the plan.

This is commonly known as the “five-part test.” Needless to say, the retirement plan landscape has changed dramatically since 1975, including the advent of the participant-directed 401(k) plan which has grown to become the predominant employer-based retirement plan. The regulations, however, have not been updated to reflect the shift and have left a significant population without any fiduciary protection, in clear contrast to the statutory language and intent of ERISA.

A Rulemaking is Needed to Ensure ERISA Continues to Operate as Intended

The purpose of ERISA is to promote and protect the interests of employees and their beneficiaries enrolled in employee benefit plans, and the fiduciary provisions of the statute were carefully crafted to protect these retirement investors. When ERISA was enacted and the existing regulation was promulgated in 1975 (the 1975 Rule), defined benefit pension plans of large companies represented the vast majority of employer-sponsored retirement plans. In fact, 401(k) plans did not even exist. Individuals enrolled in these plans typically received payments of annuity distributions from their pension plans, and therefore were not making individual investment decisions. Rather, representatives from large companies made these investment decisions on behalf of all participants.

Today, the retirement landscape is almost unrecognizable from its beginnings: 401(k) plans dominate the retirement plan market, the number of small business employers sponsoring plans has skyrocketed, individual investors make most of the investment decisions for their retirement plan assets, and the variety of investment vehicles included in these plans continues to grow. Despite the evolving retirement landscape, ERISA’s statutory protections continue to apply uniformly without any regard to these significant shifts and leaves a significant number of retirement savers and small employers without any fiduciary protection.

Modernizing ERISA’s Definition of Investment Advice

A significant gap under the 1975 Rule (the current rule) affects advice given to an employer with respect to its retirement plan. Under the 1975 Rule, an advisor must have a regular and ongoing relationship with the investor in order for the advisor to be considered an investment advice fiduciary under Section 3(21) of ERISA. When employers decide to establish a new retirement plan, they often solicit advice from an investment professional who will provide plan-level advice regarding the specific investment options that will be offered to participants. Small businesses seek this one-time, plan-level advice from investment advisors far more frequently than large businesses because smaller companies lack the requisite time and resources to set up retirement plans on their own.

Under the 1975 regulation, “selling” a small business retirement plan to a plan sponsor, including the specific investment options offered to participants, is not considered “investment advice.” This is because, as often is the case with smaller plans, there is no ongoing advice relationship so the “regular basis” prong of the 1975 five-part test is not met. Practically, this means that when most small business retirement plans are established, the advice that they

receive is not subject to ERISA's fiduciary standard of care, which creates significant risk exposure for small business plan sponsors and participants, potentially resulting in a chilling effect on retirement plan participation and adoption in these smaller organizations.

Similarly, small businesses are unprotected by SEC's Regulation Best Interest ("Reg BI") because "plan-level" advice is considered "institutional advice," even when the small business owner is clearly not a sophisticated investor. Although the NAIC Model Rule has increased protections for individual purchasers of annuities in over half the states, it does not apply to the purchase of annuity-based retirement plans for small business owners. Significantly, both SEC Reg BI and the NAIC Model Rule provide investor protections to individuals on a transactional basis whether or not there is an ongoing advice relationship on a so-called "regular basis." It is simply nonsensical to give an unsophisticated small business owner, who is arguably making a more consequential set of investment decisions on behalf of his or her employees, fewer investor protections than that same small business owner would likely get with respect to investment advice received on his or her own personal investments. For these reasons, ARA support efforts by Congress and the Department of Labor to modernize the 1975 regulatory definition of investment advice leading to fiduciary responsibility under ERISA, particularly as it applies to advice to retirement plan sponsors with respect to plan investments (i.e., plan-level advice).

The Department of Labor's proposed rule "Retirement Security Rule: Definition of an Investment Advice Fiduciary" and related exemptions (the Proposal) strive to fix this problem by ensuring that advice given to plan sponsors will be subject to the same fiduciary standard of care, regardless of whether the advice is given once or as part of an ongoing relationship. Under the Proposal, the definition of fiduciary investment advice generally provides that a person acting in a position of trust (whether stated or implied) is a fiduciary when the person provides an investment recommendation for a fee. In enumerating the circumstances under which someone is acting from a position of trust, the Proposal provides three instances when an investment recommendation triggers fiduciary investment advice: (1) the person has discretionary authority or control, (2) the person represents they are acting as a fiduciary, or (3) the person makes investment recommendations on a regular basis as part of their business and makes a recommendation to a retirement investor under certain circumstances that meet the rule. The ARA supports this expanded, transactional definition of fiduciary investment advice and believes that it better aligns with the statutory language and intent of ERISA to protect all retirement investors.

Closing the Retirement Coverage Gap

It is well recognized that the gateway for working Americans to achieve a comfortable retirement is having access to a workplace retirement plan. Moderate income workers are fifteen times more likely to save for retirement when covered by an employer-based retirement plan than on their own in an IRA. The advent of automatic enrollment has made the connection between retirement plan coverage and positive retirement outcomes even stronger. Congress plays a pivotal role in expanding retirement plan

coverage and it should continue to support initiatives specifically designed to provide increased protections and startup incentives for businesses (particularly small employers) who want to begin offering retirement benefits for their workers.

Having access to a workplace-based retirement is the surest pathway to achieving a comfortable retirement for American workers. These plans provide long-term economic growth and build financial security for the middle class. According to recent data, nearly \$10 trillion is housed in employer-based defined contribution plans and retirement assets account for 32 percent of all household financial assets in the United States.¹

Nearly two-thirds of active participants in 401(k) plans have an adjusted gross income of less than \$100,000 per year.² One-third of participants have an income less than \$50,000.³ The critical factor that determines whether these moderate-income workers save for their retirement is whether they have access to a retirement savings plan at work. Research shows that workers are 15 times more likely to save for retirement when covered by an employer-based retirement plan than on their own in an IRA, primarily because of higher contribution limits and employer matching contributions.⁴ The advent of automatic enrollment in these employer-sponsored plans has only improved retirement outcomes for American workers.

Despite these positive developments, far too many Americans still lack access to a retirement plan at work and thus struggle to build their retirement savings. This so-called retirement plan coverage gap impacts tens of millions of working Americans and it tends to disproportionately impact small businesses who often lack the sophistication, time, or money to offer a retirement plan.

Compounding this problem is the fact nearly half of all working Americans are employed by small businesses.⁵ According to the Department of Labor's Bureau of Labor Statistics, only 53 percent of employees at smaller businesses (i.e., firms with fewer than 50 workers) have access to a workplace-based retirement plan, compared to 69 percent of those working at organizations with more than 50 workers and 83 percent of those at organizations with more than 100 workers.

This has contributed significantly to the savings inequity among communities of color whose employment skews to smaller businesses. Specifically, data shows that 52 percent of Black

¹ Investment Company Institute, Quarterly Retirement Market Data, January 10, 2023, available at https://www.ici.org/statistical-report/ret_23_q3

² Judy Xanthopoulos, PhD of Quantria Strategies, analysis of Internal Revenue Service, Statistics of Income, Individual Income Tax, and IRA Studies, 2017 Tax Year

³ Ibid.

⁴ Jacqueline Salmon, AARP, State Programs, Federal Incentives Spur Rise in 401(k)s, March 2023, available at: <https://www.aarp.org/retirement/planning-for-retirement/info-2023/rise-in-401k-benefits.html>

⁵ U.S. Small Business Administration, Frequently Asked Questions, March 2023, available at: <https://advocacy.sba.gov/wp-content/uploads/2023/03/Frequently-Asked-Questions-About-Small-Business-March-2023-508c.pdf>

Americans and 68 percent of Latinx Americans do not currently have access to a workplace-based retirement plan. By contrast, only 40 percent of White Americans lack access to a retirement plan at work.⁶

Congress has made great strides in recent years to address this growing problem. SECURE 2.0 included many provisions designed to help close the gap, including the creation of Starter K plans and robust start-up tax credits for small businesses adopting new retirement plans, but more needs to be done. Ensuring ERISA protections for plan sponsors is critical as we look to increase small business retirement plan coverage. Leaving small business owners looking to provide a retirement plan for their employees with zero regulatory protections when receiving advice related to plan investment options is bad policy and will have severe consequences for American workers saving for retirement .

Conclusion

The ARA appreciates the House Committee on Education and the Workforce's focus on the ongoing challenges confronting the retirement industry. We thank the Congress for its great work on improving America's employer-sponsored retirement system and look forward to working with the Committee as it moves forward with further improvements in the future.

⁶ Monique Morrissey, Economic Policy Institute, The State of American Retirement Savings, December 2019, available at: <https://www.epi.org/publication/the-state-of-american-retirement-savings/>