United States House of Representatives
House Committee on Education and the Workforce
Subcommittee on Health, Employment, Labor and Pensions

Hearing entitled:
"Protecting American Savers and Retirees From DOL's Regulatory Overreach"

Supplemental Testimony for the Record

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Thank you to the committee for the opportunity to supplement my testimony with this response for the record. Throughout my testimony I discussed the fact that investors' beliefs that their financial professionals have their best interest in mind is due at least in part to the marketing of advisors and trade professionals.

As I further discussed, the Department of Labor Retirement Security Rule (DOL Rule) would help close the disclaimer loophole. The DOL Rule will significantly limit the impact of fine-print disclaimers by preventing them from automatically controlling an investment advice fiduciary's status where it is inconsistent with the investor's oral communications or interactions with the financial professional.[1]

In Mr. Roberts' testimony, it appeared that he was confused on my position with respect to financial advisors, who are insurance agents. Mr. Robert's talked about "professional salesman." I have never met an investor who handed over their life savings to a financial advisor that referred to himself as a "professional salesman." Instead, they refer to themselves as "Financial Advisors," "Investment Advisors," "Retirement Specialists," or even "Wealth Architects." Only when they are called to account for their conflicted advice are "Financial Advisors" suddenly transformed into "Professional Salesmen." It's no wonder why investors don't know the difference.

Mr. Robert's and other industry representatives claimed that the NAIC Model rule would cure the problem of conflicted advice for financial advisors, who are insurance agents. They further claimed that the DOL Rule would prevent these agents from earning commissions. Neither is true.

First, the NAIC Model rule does not solve the problem of conflicted advice. The NAIC Model Rule states that an insurance professional "has met" their best interest obligation 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. That's not a true best interest standard. Indeed, the NAIC Model Rule excludes a huge source of conflicts – the advisor's commissions and other non-cash compensation – from its definition of conflicts of interest.

Second, the DOL Rule would still allow financial advisors acting as insurance agents to receive compensation for their advice. It would simply require them to act in their clients' best interest when giving advice on which investment vehicles to buy.

Further the DOL Rule would align with the SEC's 2019 Regulation Best Interest. The proposed rule is seeking to correct the disconnect of advisors who are required to follow the best interest standard and retirement savings provides who hold themselves out as financial consultants, financial planners, or wealth mangers. The narrowly tailored focus of the proposed rule is directly responsive to the concern of the Fifth Circuit Courts of Appeals, which held that the 2016 fiduciary

[1] AARP, Letter to DOL Assistant Secretary Liza M. Gomez re: Proposed Retirement Security Rule (Jan. 2, 2024), at 8.

rule was overbroad. [2] The Department is striking a careful balance in the proposed rule, avoiding breadth of concerns while improving upon the rigid, outdated five-apart test, which the District Court of the District of Columbia said was more "difficult to reconcile" that the 2016 proposal.[3]

The DOL Rule provides that fiduciary status would only attach if compensated recommendations are made in certain specified contexts where a retirement investor can and should reasonably place their trust and confidence in the advice provide. The DOL Rule established new criteria addressing the Fifth Circuit's view that investment advice fiduciary definition must incorporate elements of trust and confidence.[4] This is done by ensuring that the financial advisor is generally in the business of providing recommendations to clients and that the recommendations are individualized and may be relied upon as the basis for the interest of the investor.[5]

I appreciate the Committee allowing me to supplement my testimony.

[2] Chamber of Com. of United States of Am. v. United States Dep't of Lab., 885 F.3d 360 (5th Cir. June 21, 2018).
[3] National Association for Fixed Annuities v. Perez,217 F.Supp.3d 1, 6, 7 (D.D.C., 2016).
[4] Better Markets, letter to Office of Regulations and Interpretations. (Jan. 2, 2024), at 14.
[5] *Id*.