PENSION RIGHTS CENTER
PROTECTING AND PROMOTING RETIREMENT SECURITY
1350 Connecticut Ave., NW, Suite 206 | Washington, DC 20036-1739
P: 202-296-3776 | F: 202-833-2472 | www.pensionrights.org

Statement of Maria Freese on Behalf of the Pension Rights Center Before the Employee Benefits Security Administration U.S. Department of Labor Hearing on the Definition of Fiduciary Investment Advice Wednesday, August 12, 2015

Good morning. My name is Maria Freese. I am a Senior Policy Advisor for the Pension Rights Center, and I'm also a business partner with Barbara Kennelly Associates. The Center is a national consumer organization dedicated exclusively to the protection and promotion of the retirement security of workers, retirees and their families.

We are very grateful to the Department for allowing us to participate in the hearings on this critical retirement issue. The Center believes the Department of Labor's proposed regulations on conflicts of interest and the definition of investment advice pay tribute to the original language of ERISA and that their implementation is essential for the enhancement of the retirement security of America's workers.

I know you have heard a litany of complaints from various segments of the financial services industry about how the rules are unworkable, and that middle-income Americans and communities of color will suffer grievous harm if the proposals are implemented. We at the Center would point out that every single consumer-oriented group with an interest in retirement security who represents these communities has expressed support for the proposals, while the opposition has come exclusively from an industry with billions of dollars at stake in maintaining the status quo. We should be wary when the lion claims to represent the interests of the lamb.

I would also point out that, for groups such as the Pension Rights Center, your proposed regulations already represent a significant compromise. Retirement assets are unique, and Congress has dedicated billions of tax dollars to encourage workers to save for their retirement. Yet there is a $7.7 trillion retirement income deficit in this country, which is the gap between what Americans have saved to date and what they should have saved to have a reasonable standard of living in retirement. If it were up to us, the Center would not permit advisors with a conflict of interest to advise on retirement assets at all. But we have been willing to acknowledge and accept the need to accommodate the realities of the current investment landscape. We believe the Department has hit the "sweet spot" with this proposal – finding a middle ground that protects retirement investors while also accommodating the reasonable and legitimate concerns of the financial industry.

We have submitted more extensive written comments, so my statement will focus on three issues: first, that the inclusion of advice concerning plan distributions and IRAs is essential; second, that a "facts and circumstances" test is appropriate for determining whether a person rendering investment advice is a fiduciary; and third, that the exceptions in the regulations are appropriate and well considered.

1. **Advice concerning distributions and IRAs must be included**

The decision on whether to take a lump-sum distribution from a plan can have profound effects on a person's financial security in retirement. In some cases, the decision to move assets from a defined contribution plan to an IRA can result in the retirement saver paying higher fees for similar investment assets and can also result in loss of access to plan investment options that may not be available in an IRA. The effects of such a decision can be especially profound in a traditional pension plan, where a participant gives up an annuity benefit or, in the case of a married participant, a joint-and-survivor annuity.

While there are certainly situations in which a distribution of benefits from a plan may be warranted, in the majority of cases such a distribution will expose the participant to significant costs. The person providing advice to take a distribution, however, typically has strong financial incentives to recommend taking the distribution and this, unfortunately, can influence the advice. Our written comments have a paper attached that demonstrates this point.

The financial services industry's arguments are, to say the least, contradictory. While they insist that knowing the cost of advice will act as a disincentive to savers, who will forgo advice rather than knowingly pay for it, they suggest that brokers and other advisors are completely immune to financial incentives offered to promote certain investment products. While the Center is quite confident that most advisors are concerned about the financial well-being of their clients, we believe it is disingenuous to claim they are completely immune to financial incentives to promote poorly performing investments with high profit margins. Financial incentives matter. If they didn't, Congress could eliminate all tax incentives and no one's behavior would change.

2. **The definition of fiduciary should not be tied to the existence of an agreement.**

The proposed rule states that a person who provides investment advice is a fiduciary if the advice is rendered "pursuant to a written or verbal agreement, arrangement or understanding…" We are concerned that this reference may be interpreted as requiring bilateral or shared understanding by both the retirement investor and the advisor that advice is being directed toward the advice recipient. This interpretation could send us back to the current regime where a boilerplate disclosure indicating the advice is not intended to be relied on exclusively by the investor insulates the advisor from fiduciary responsibility.

We believe that a person offers investment advice if, under the totality of circumstances, it appears that a person is offering advice to another person regarding an investment or management decision related to assets of a plan or IRA. This test would apply regardless of whether there is a bilateral, common, or shared understanding that advice is being provided.

3. **The proposed exceptions and carve-outs from the new regulation are appropriate and workable responses to legitimate industry concerns.**

The package of new PTEs is meticulously constructed, and the Best Interest Contract exemption succeeds in mitigating the impact of conflicts while preserving substantial flexibility for financial institutions to market their products and compensate those persons who recommend and sell them. While we strongly support the BIC, we believe there are ways to strengthen it for consumers.

For example, the Department should clearly provide that the exemption applies to rollover advice provided by either a third-party call center or advisors not affiliated with the plan. While we read the exemption to clearly cover this advice, we understand some in the financial services industry have raised questions about its applicability.

The Center also opposes mandatory arbitration clauses in all situations. However, we believe mandatory arbitration is especially inappropriate in disputes involving a plan fiduciary and a participant or beneficiary in an employer sponsored plan. Congress provided that one of ERISA's core purposes was providing ready access to federal courts and permitting a mandatory arbitration would undermine these fundamental protections.

We have noted your previous exchanges during these hearings relating to implementation issues involving the BIC. We believe that implementing the BIC is workable – consumers are used to signing documents involving a wide variety of transactions and the financial industry is always adaptable. The Center would endorse sensible modifications of implementation issues as long as the integrity of the best-interest standard is maintained and legally enforceable.

In relation to the carve-outs identified in the rule, we would make two points: First, we believe elimination of the sales exception for individuals is a critically important revision to the 2010 proposal and must be retained. In our experience, most plan participants will not be able to discern whether advice is impartial or conflicted in the context of a sales presentation and will often assume the adviser is acting in their best interest. Second, we believe the Department has correctly drawn the line to preclude identification of specific products in presentations of an educational nature. This is key to protecting consumers who often cannot identify sophisticated sales presentations in the guise of educational activities.

Finally, we want to make a few points on variable annuities. The Pension Rights Center has been a strong proponent of lifetime income streams for retirees in a wide variety of contexts. We have supported the role that annuities – including some variable annuities – play in providing retirement security for America's workers.

But we also note that variable annuities and similar annuity products can be among the most complicated financial investment products being marketed to average Americans today. It is virtually impossible for the average person to determine the cost or implications of the various options available for complex annuity products. Expecting them to make intelligent decisions about whether to invest in an annuity and what features to select when they cannot understand the costs of the options is simply unrealistic. In fact, previous industry witnesses have stated that the sellers of these products themselves cannot specifically identify their costs.

Most Americans will have no choice but to rely on investment professionals to do the comparisons for them, and to advise them on the best product for them to invest in. They do this with every expectation that the advisor will be providing this service based on the customer's best interest and we strongly advise the agency to make sure that is the case.

In conclusion, ERISA was designed to ensure that Americans can build adequate financial security for that period in their life when they no longer participate in the workforce and to ensure that their reasonable expectations are protected. That is why ERISA is organized around a fiduciary standard – the highest standard of behavior in law – to eliminate rather than merely to disclose conflicts of interest. Secretary Perez has made it clear this is the "north star" the new rules are pointed toward, and we strongly agree with this goal. As long as the goal is not lost, we would support reasonable changes to facilitate implementation of the new regulations.

There is no question the Department of Labor has worked mightily to construct a regulatory regime consistent with the purpose of protecting savers while accommodating legitimate concerns of advisors. The Department deserves high praise for its efforts to date, and we encourage you now to complete your work expeditiously as it is essential to the protection of America's workers.