September 6, 2017

Via: *Rule-comments@sec.gov*

The Honorable Jay Clayton
Chairman
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: Request for Comment on Standards of Conduct for Investment Advisers and Broker-Dealers

Dear Secretary Clayton:

On behalf of our 38 million members and other Americans saving for retirement, AARP[1] appreciates the opportunity to respond to the Security and Exchange Commission's (SEC) request for public comments on standards of conduct for investment advisers and broker-dealers. AARP believes this analysis is an important step in accomplishing one of the most important reforms the SEC can undertake to benefit retail investors: ensuring that all financial industry participants who provide clients with advice about securities are held to a fiduciary standard.

Adoption of a uniform standard that would apply to both broker-dealers and investment advisers when providing personalized investment advice to retail customers, as contemplated by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Section 913), is of critical importance and long overdue. The fiduciary standard should be based on the core principle that when providing personalized investment advice to retail customers, a financial adviser must always act in the best interests of those customers regardless of their marketing strategy, business model, or registration status. Ensuring that all securities professionals who offer investment advice to retail investors are subject to a fiduciary standard is needed to ensure a level and transparent market for investors seeking advice.

[1] AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocates for what matters most to families with a focus on health security, financial stability and personal fulfillment.

As you move forward, AARP urges the SEC to maintain its mission of protecting investors and implement a fiduciary standard for financial professionals who provide personalized investment advice to retail investors.

General Questions

1. *Retail investors have expressed confusion about the type of professional or firm that is providing them with investment advice, and the standards of conduct applicable to different types of relationships. To what extent has this reported confusion been addressed? If meaningful confusion remains, is the confusion harming retail investors or resulting in other costs? If so, what steps should be taken to address this situation? What disclosures, advertising, or other information do investment advisers and broker-dealers provide to retail investors currently, and how do those contribute to or mitigate any investor confusion? Are there specific disclosure requirements or other steps the Commission should consider to address any confusion regarding applicable standards?*

Because of the Department of Labor's (Department) 2016 Definition of Fiduciary Rule ("Rule"), consumers have deeper understanding of the scope and nature of conflicts of interest in the advice they receive and are demanding advice in their best interest as they save for retirement: advice that minimizes conflicts of interest, is solely in the interest of the client, and which is provided with the care, skill, prudence and diligence necessary under the circumstances. AARP believes the Department's Rule provides necessary protection for retirement investors, without which it would be difficult for an individual to effectively plan for a secure and adequate retirement. However, meaningful investor confusion continues to exist because of the multiple standards governing those advising retail investors in the marketplace. As the Section 913 study indicated, harmonization of rules governing broker-dealers and investment advisers when performing the same or substantially similar functions would establish meaningful investor protections.

A consistent Impartial Conduct Standard, across agencies, should be applied for investor clarity and risk mitigation. The average investor cannot distinguish between the different categories of brokers and advisers and does not recognize that their "financial adviser" may operate under a lower legal standard than that to which a registered investment adviser is held. The regulatory imbalance between the duties of brokers and investment advisers has persisted for many years, even as evidence demonstrating that brokers have portrayed themselves from salesmen into advisers has grown. Brokers today call themselves "financial advisers," offer services that clearly are advisory in nature, and market themselves based on the advice offered.

Research has found that investors typically rely on the recommendations they receive from brokers and investment advisers alike. The trust most investors place in financial professionals is encouraged by industry marketing, leaving investors vulnerable not only to fraud but also to those who would take advantage of that trust in order to profit at their expense. Investors who place their trust in salespeople who market services as financial advisers can often end up paying higher costs for higher risk or underperforming investments that only satisfy a suitability standard, but not a fiduciary standard. That is money most middle-income investors cannot afford to waste.

Additionally, AARP's research indicates that investors do not understand the different legal standards that apply to brokers and investment advisers. Investors expect financial intermediaries to be required to act in their (the customer's) best interest. Further, older Americans may not be able to tell you the precise legal definition of fiduciary, but they have clear views on what they expect from financial professionals. In six state specific opinion polls conducted by AARP during consideration of the Dodd-Frank Act, AARP asked residents age 50 plus questions related to the various investor and consumer reforms under consideration. Respondents overwhelmingly favored requiring financial professionals to put the client's interest ahead of their own when making recommendations. In addition, respondents favored upfront disclosure of fees, commissions, and potential conflicts that could bias advice. The level of support for this reform ranged from a low of 88 percent (Arkansas) to a high of 95 percent (Indiana).[2]

Under the Rule, Americans for the first time will know that the investment advice they receive will be in their best interests. Many people assumed this had always been the rule[3] and many advisers preyed on that lack of knowledge. AARP is hopeful the consistent use of high standards will encourage more Americans to use investment advisers because they will now be able to count on getting advice in their best interest. AARP urges the SEC to implement uniform standards of conduct applicable to both investment advisers and broker dealers.

The SEC should eliminate any remaining investor confusion in the investment market by enacting a uniform rule.

As previously stated, many broker-dealers are not subject to a fiduciary duty when they provide personalized investment advice. Instead, they are required only to make suitable investment recommendations. There is no obligation under the suitability rule to

[2] To view the state-specific surveys go to http://www.aarp.org/money/scams-fraud/info-04-2010/finprotect_states.html.
[3] Matthew Frankel, *The Fiduciary Rule: Pros and Cons: Here's what the fiduciary rule means and why many people are opposed to it*, MOTLEY FOOL (Feb 3, 2017), https://www.fool.com/retirement/2017/02/03/the-fiduciary-rule-pros-and-cons.aspx.

have reasonable grounds to believe a recommendation is in the best interest of the customer.

Changes that reduce confusion are a good first step; however, the Commission can do more to protect investors. The Commission should not rely on disclosure alone to manage conflicts. The best interest standard must include substantive prohibitions on conflicts of interest as opposed to simply disclosing conflicts of interest. Regulators must utilize economic and other analyses of product markets to evaluate the potential effectiveness of disclosures and impact to consumers. The Commission's own financial literacy study casts doubt on the likely effectiveness of conflict disclosure alone in protecting investors from recommendations that fail to put their interests first.[4]

In addition to comments above, see AARP's response to Question # 8.

2. *Have potential conflicts of interest related to the provision of investment advice to retail investors in various circumstances been appropriately identified and, if so, have they been appropriately addressed? Are there particular areas where conflicts are more prevalent, have greater potential for harm, or both? To what extent are retail investors being, or expected to be, harmed by these conflicts currently and in the future? For example, do certain types of relationships result in systematically lower net returns or greater degrees of risk in retail investors' portfolios relative to other similarly-situated investors in different relationships? Are there steps the Commission should take to identify and address these conflicts? Can they be appropriately addressed through disclosure or other means? How would any such steps to address potential conflicts of interest benefit retail investors currently and over time? What costs or other consequences, if any, would retail investors experience as a result of any such steps? For example, would broker-dealers or investment advisers be expected to withdraw from or limit their offerings or services in certain markets or products?*

Requiring a fiduciary standard of care would make a substantial difference in the quality of investment advice and enhance the retirement security of individual investors. Currently, if a security recommended by a broker-dealer is suitable for a customer but a different security would be a better choice for that customer, there is no obligation to recommend the better-suited security. The broker-dealer is free to recommend the security that pays the broker-dealer the highest compensation, as long as it is suitable, and the broker-dealer is not necessarily obligated even to disclose the conflict of interest that the differential compensation represents. While the duty to make suitable recommendations prohibits some abusive practices, it does not require, as a fiduciary

[4] https://www.sec.gov/news/studies/2012/917-financial-literacy-study-part1.pdf

duty would, that broker-dealers or their representatives give advice in the best interest of their clients.

There have been too many horror stories about individuals being placed into "suitable" investments that are neither prudent nor in their best interests. *See, e.g.*, Bob Egelko, J*udge orders ING to pay $36.8 million to Fireman's Fund employees*, SANFRANCISCO CHRONICLE (Oct. 31, 2014), http://www.sfgate.com/bayarea/article/ Judgeorders-ING-to-pay-36-8-million-to-5861719.php (Fireman's Fund employees and retirees placed their pensions, 401(k) plans and other funds in investments that advisers assured them were safe, but turned out to be speculative private placements, losing significant amounts of retirement monies). A survey by the AARP Fraud Watch Network finds that the individuals who are the most susceptible to investment fraud typically exhibit an unusually high degree of confidence in unregulated investments and tend to trade more actively than the general investor population.[5] This issue is of keen interest to AARP because individuals today shoulder a significant responsibility to make appropriate investment choices so they have adequate income to fund their retirement years. According to one industry observer in remarks before financial services executives:

> The boomers who retire over the next 20 years are going to roll over their 401(k)s, downsize their houses, and sell their small businesses. The result will be a mass movement of money from retirement plan assets, personal assets and other illiquid assets to investable assets. As financial service professionals, almost all of you are with dealing investable assets. So your business will be a very good one to be in over the next 20 years.[6]

Rulemaking to extend the fiduciary duty of care to all financial professionals who offer investment advice is an important step in promoting retirement security. This is especially true given the increasing number of Americans who are personally responsible for preparing for their retirement and who will want and need investment advice.

Finally, conflicts cannot be appropriately addressed through disclosure requirements alone. See AARP's response to Question # 8.

3. *Market developments and advances in technology continue to transform the ways in which retail investors obtain advice (e.g., robo-advisers, fintech). How do retail*

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[5] Doug Shadel and Karla Pak, *AARP Investment Fraud Vulnerability Study 5-6* (2017), http://www.aarp.org/content/dam/aarp/ research/surveys_statistics/econ/2017/investment-fraudvulnerability-study-res-econ.pdf.
[6] Warren S. Hersch, *Retiring Boomers Fuel Surge in Planning, Investments*, LifeHealth Pro (Apr. 9, 2013), http://www.lifehealthpro.com/2013/04/09/retiring-boomers-fuel-surge-in-planning-investment.

> *investors perceive the duties that apply when investment advice is provided in new ways, or by new market entrants? How should these market developments and advances in technology affect the Commission's consideration of potential future actions? What steps should the Commission take, if any, to address potential confusion or lack of information in these emerging areas?*

The market is responding to the public demand for fewer conflicts of interest, greater transparency, and lower fees. The recent development of new investments with differentiated fees (such as clean shares and T shares) by leading investment firms demonstrates that the marketplace is fully capable of fashioning new products to mitigate conflicts and to lower the differential compensation that creates incentives to favor sales that increase compensation to the adviser. These shares could allow the broker's compensation for fund recommendations to be negotiated separately with the investor, not unlike commissions on sales of stocks and ETFs. In addition, advisers and their firms can charge additional fees for services, such as recordkeeping fees, but the investor would be specifically informed about these fees.

AARP believes that these innovations could result in more transparency and fewer conflicts of interest, as well as significantly lower costs. These innovations could lower the pressure on advisers to recommend investments from which they will make more in indirect fees. A Morningstar analysis finds that investors could save at least 50 basis points in returns compared with current offerings, plus another 20 basis points because advisers will have the incentive to recommend a fund in the investor's best interest. Aron Szapiro, Paul Ellenbogen, *Early Evidence on the Department of Labor Conflict of Interest,* MORNINGSTAR (Apr. 2017), http://corporate1.morningstar.com/ResearchLibrary/article/802119/early-evidence-on-the-department-of-labor-conflict-of-interest-rule/. A savings of an additional seventy basis points would result in a significant increase in an investor's account value. U.S. Gov. Accountability Office, *GAO-07-21, Private Pensions: Changes Needed to Provide 401(k) Plan Participants and the Department of Labor Better Information on Fees* 7 (Nov. 2006).[7] While these innovations hold great promise, the Department must look closely at the structure of these new investments to determine if they address all conflicts of interest or whether they merely mitigate them. The Commission should also engage in regular and robust analysis of market developments and advances in technology to ensure products do more than simply mitigate conflicts but in fact eliminate conflicts and fairly informs investors of all necessary information to facilitate their decision-making. Ongoing analysis will be important because conflict-free, low-cost products directly benefit retirement investors.

[7] The GAO has estimated that $20,000 in a 401(k) account that had a one-percentage point higher fee for 20 years would result in an over 17 percent reduction in the account balance, a loss of over $10,000. We estimate that over a 30-year period, the account would be about 25 percent less. Even a difference of only half a percentage point — 50 basis points — would reduce the value of the account by 13 percent over 30 years. Conflicted advice resulting in higher fees and expenses can have a huge impact on retirement income security levels.

In addition, financial professionals have long used automated investment tools to help their customers build and manage their investment portfolios. These tools are now directly available to customers and some of these tools have been combined into what are now being called robo-advisors. Robo-advisors usually use passive investing, which empirical evidence has found, for a large majority of consumers, to be a successful strategy. Robo-advisors can provide advice at low cost and in a tax-efficient manner. Portfolios can be monitored and rebalanced easily. In addition, robo-advisor programs can be designed to be transparent, easy to use, and systematic. Finally, robo-advisors have the ability to provide broad access to investors, including small account holders.[8] AARP recognizes that robo-advisors are still in their relative infancy. Ongoing advancements in this technology may create new and additional access points to non-conflicted advice for savers. Robo-advisors will continue to become more sophisticated over time and thus have the potential to provide excellent advice in the small account market.[9]

While these developments are promising, it is imperative that the Commission is vigilant and thoroughly examines the design of robo-advisor programs to ensure investors are not being steered into higher cost or risky investments that are not in the investor's best interest. For example, recently Morningstar Inc. and two retirement-focused subsidiaries of Prudential Financial Inc. were subject to a class action in Illinois federal court, where investors accused the companies of colluding to design a robo-adviser program to steer them toward expensive investments that earned Prudential millions in fees.[10] AARP encourages the Commission to examine all investment vehicles available in the marketplace and ensure the products are developed consistently with the best interest principles AARP has laid out in this letter. We believe that as a general rule, non-conflicted advice, in any form, is superior to conflicted advice.

AARP has confidence that the financial services industry and retirement advice market will continue to develop innovative new products and systems to help hardworking Americans save for retirement. AARP encourages the Commission to thoughtfully and openly examine market developments and technology to ensure products are serving the best interest of investors.

4. *Is there a trend in the provision of retail investment advice toward a fee-based advisory model and away from a commission-based brokerage model? To what extent has any observed trend been driven by retail investor demand, dependability of fee-based income streams, regulations, or other factors? To what extent is any observed trend expected to continue, and what factors are expected to drive the*

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[8] Jonathan Walter Lam, *Senior Essay: Robo-Advisors: A Portfolio Management Perspective*, Yale University (Apr. 4, 2016), http://economics.yale.edu/sites/default/files/files/Undergraduate/Nominated%20Senior%20Essays/2015-16/Jonathan_Lam_Senior%20Essay%20Revised.pdf.
[9] If the advice is working correctly, investors should eventually move out of the small account balances category.
[10] Michael D. Green et al v. Morningstar Inc. et al, No. 1:17-cv-05652 (N.D. Ill. Aug. 3, 2017).

trend in the future? How has any observed trend impacted the availability, quality, or cost of investment advice, as well as the availability, quality, or cost of other investment products and services, for retail investors? Does any such trend raise new risks for retail investors? If so, how should these risks affect the Commission's consideration of potential future action?

The Department's Rule resulted in some adjustments within the retirement services industry, which was expected after updating a 40-year old regulation to make it relevant to the current retirement marketplace. Overall the adjustments has been positive for retirement investors – it has resulted in lower fees, advice in the best interest of the saver or retiree, and minimized conflicts in advice provided to individuals. Many investment firms and their advisers have also taken steps to meet the requirements of the regulation and already have incurred one-time, up-front compliance costs. Significantly, we have not seen prices increase for those companies that have significantly complied with the rule.

Under the Rule, Americans continue to access a variety of retirement savings offerings. There is no prohibition in the Rule against any type of retirement investment product. The Rule does not require investment firms to abandon products but instead allows the investment marketplace to evolve and innovate to provide investments and products that answer the needs of individuals who now shoulder greater responsibility for their retirement security as well as provide protection for their hard-earned retirement monies. The market is responding already to public demand and as individual firms respond to market signals, they may discontinue offerings that do not meet client demands. The choice to develop or discontinue an offering is up to an individual adviser, broker or firm.

In addition, we understand there are many firms that have chosen to use a level fee structure to comply with the Rule. Some have decided to abandon their commission structure. Others have decided to offer both commission and fee options.[11] Individual retirement investors can determine which option is best for them -- no doubt the market will respond. Moreover, if a commission structure were in the best interests of the retirement investor, we would expect that the adviser would so advise the retirement investor.

Americans saving for retirement have the majority of their savings in defined contribution plans and IRAs. Given the nearly $8 trillion in assets in IRAs and the almost

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[11] Michael Wursthorn, *A Complete List of Brokers and Their Approach to 'The Fiduciary Rule'*, Wall Street Journal (Feb. 6, 2017), https://www.wsj.com/articles/a-complete-listof- brokers-and-their-approach-to-the-fiduciary-rule-1486413491.

$5 trillion in 401(k) plans, there is neither evidence— nor any reason to believe — that financial service providers will abandon this lucrative market.[12] Thus, to the extent there are disruptions, retirement savers stand to benefit as the various players in the financial services industry adjust to maintain their competitive edge. AARP has every confidence that the financial services industry and the retirement advice market will continue to develop innovative new products and systems to help hard working Americans save for retirement.

5. *Although the applicability date of the Department of Labor's Fiduciary Rule has not yet passed, efforts to comply with the rule are reportedly underway. What has been the experience of retail investors and market participants thus far in connection with the implementation of the Fiduciary Rule? How should these experiences inform the Commission's analysis? Are there other ways in which the Commission should take into account the Department of Labor's Fiduciary Rule in any potential actions relating to the standards of conduct for retail investment advice?*

Many investment firms and their advisers have taken steps to meet the requirements of the Rule and have incurred one-time, up-front compliance costs, including installing new systems; establishing revised policies and procedures; amending service provider, record keeping, and participant agreements; and changing marketing. These organizations and the investment advisors employed by them have generally determined that providing retirement investment advice in the best interests of their clients is the right thing to do for their clients. See, e.g., Michael Wursthorn, *Wealth Adviser Daily Briefing: Trump Begins Roll Back of Fiduciary Rule*, WALL STREET JOURNAL (Feb 6, 2017), http://blogs.wsj.com/moneybeat/2017/02/06/ wealth-adviser-daily-briefing-trump-begins -roll-back-of-fiduciary-rule/ (listing Merrill Lynch, Morgan Stanley, Wells Fargo Advisors, LPL Financial Holdings, Raymond James Financial, J.P. Morgan Chase, Edward Jones as companies that would comply with the Rule); Financial Engines and Betterment Comment Letters on Proposed Rule to Delay; Attachment on Industry Compliance and Costs. Given the $12.6 trillion in 401(k) plans and IRAs, their decision is not surprising. We note that the bulk of costs to the financial service industry are one-time startup costs. Much of the marketplace has already made these expenditures, which benefit investors. Significantly, we have not seen prices increase for those companies that have complied with the Department’s Rule and we have not seen evidence of, nor do we anticipate a reduction in investor access.

Evidence of industry compliance, innovation and competitiveness is already apparent and investors are directly benefiting from this change. The financial services industry

[12] ICI Research Report, *Defined Contribution Plan Participants’ Activities, First Three Quarters of 2016* at 2 (Feb. 2017), https://ici.org/pdf/ppr_16_rec_survey_q3.pdf.

generally agrees that investment advice should be provided in the best interests of the participant and retirement investor. Registered investment advisers and certified financial planners have for decades successfully provided fiduciary advice. Noting that the public demand for fiduciary advice has increased dramatically and that the market continues to move in the direction of providing fiduciary advice, in June 2017, the Certified Financial Planner Board of Standards issued for public comment proposed revisions to its Standards of Professional Conduct, which sets forth the ethical standards for CFP® professionals. The draft revision broadens the application of the fiduciary standard, effectively requiring CFP® professionals to put a client's interest first at all times. The current Standards require CFP® professionals to act in a fiduciary capacity only when providing financial planning. The CFP® Board is expected to finalize its updated Standards later this year.

AARP has enthusiastically supported the Department's Rule as a necessary protection for savers when they make investment decisions concerning their retirement monies. AARP members were actively engaged in voicing their support for this Rule during the open comment period in 2015. Close to 100,000 AARP members took over 200,000 actions in support of the Rule, including submitting close to 60,000 messages to the Department and delivering over 26,000 petitions to the House Financial Services Committee. AARP has also used its own channels to inform our members and the broader public about the benefits of the Rule, including multiple articles in AARP's Bulletin, which is mailed to all 38 million members. We have worked in collaboration with organizations such as Yahoo Finance to produce educational videos regarding the Rule and its benefits. In addition, AARP is developing a tool that will walk investors through the questions they should ask a prospective or existing financial adviser, including whether the adviser operates under a fiduciary standard. We developed the application in collaboration with the North American Securities Administrators Association and anticipate launching in the fall of 2017. Furthermore, AARP continues to inform members about the Rule and ongoing considerations and issues related to its enforcement by the Department.

In addition to comments above, see AARP's response to Question # 4.

6. *As of the applicability date of the Fiduciary Rule, there will be different standards of conduct for accounts subject to the Department of Labor's rule and those that are not, as well as existing differences between standards of conduct applicable to broker-dealers and those applicable to investment advisers when providing investment advice. What are the benefits and costs of having multiple standards of conduct?*

AARP believes there should be congruence between the existing fiduciary standard enacted by the Department and any new rule developed by the SEC. The cost of having multiple standards of conduct is continued investor confusion and potential negative impact to their savings.

Many states agree the fiduciary rule is needed to protect residents and deter potential exploitative practices. In fact, earlier this year Attorneys General from across the country -- including Hawaii, Illinois, New York, North Carolina, Iowa, Oregon, Pennsylvania, Washington, and the District of Columbia -- issued letters urging the Department to proceed with the Rule that would require financial advisers to put their clients' best interests ahead of their own. Additionally, California, Missouri, South Carolina and South Dakota already impose a fiduciary standard on brokers in their states. In response to recent efforts to dilute the Department Rule, Nevada enacted legislation to subject broker-dealers and investment advisers to a fiduciary standard, with the support of AARP Nevada. We expect more states to establish this standard going forward.

The Department and the SEC, as well as related governmental agencies, should continue to coordinate during the rulemaking process. The Department previously collaborated with the SEC during the rulemaking process for the current Rule. The carve-out for swap and security based swap transactions clearly reflected interagency coordination. AARP encourages the SEC to continue to coordinate its efforts with the Department. The Department's stewardship of a thorough, inclusive and deliberative process resulted in a needed Rule to address a changing retirement plan landscape and to minimize investment advisers' conflicts of interest. As a result, hard-working Americans have a better opportunity to achieve the American dream of a more secure and dignified retirement. AARP believes any effort to develop standards at the SEC should be consistent with the Department's efforts in both substance and process.

7. *Are there particular segments of the market (e.g., smaller and regional broker-dealers and investment advisers, or smaller investor accounts) to which the Commission should pay particular attention in considering potential future actions?*

The smaller the account, the more important it is for best interest advice, as lower fees are more critical to helping account holders to hopefully grow their balances. AARP encourages the Commission to particularly focus on opportunities to strengthen investor protections in this segment of the market.

Furthermore, as stated above in Question # 6, many states agree the fiduciary rule is needed to protect residents and deter potential exploitative practices. In fact, many are already moving towards a best interest standard.

8. *If the Commission were to proceed with a disclosure-based approach to potential regulatory action, what should that be? If the Commission were to proceed with a standards-of-conduct-based approach to potential regulatory action, what should that be? Should the standards for investment advisers and broker-dealers be the same or different? Why?*

The standard for investment advisers and broker-dealers should be consistent and in the best interest of the investor, meaning a fiduciary standard that obliges the broker-dealer to act in the best interest of the consumer. The best interest standard provisions must be stronger than the current suitability standard. Disclosure and consent alone do not meet the fiduciary test. Recent behavioral science studies have shown that disclosures are ineffective because they increase conflict in advisers and make the investor more likely to follow biased advice.[13] Moreover, AARP believes that investors should not be forced to request disclosures. We know that investors will, more likely than not, refrain from making such requests. AARP wants to clearly emphasize disclosure and consent alone is not consistent with a fiduciary standard. As previously stated, the Commission's own financial literacy study casts doubt on the effectiveness of conflict disclosure alone in protecting investors.

While we believe that disclosure alone is insufficient in minimizing conflicts of interest, we think investors will benefit from the development of a uniform pre-engagement disclosure document for brokers and advisers, in addition to a true fiduciary standard. The Commission generally has done a good job of identifying the key issues that should be addressed in such a document. We encourage the Commission to adopt a format for disclosures by brokers and investment advisers that are uniform to the greatest extent possible given the differences in their basic business models. The goal should be to promote easy comparisons of different types of financial professionals. The disclosures should be brief and clear. Design experts should be engaged to develop and test the documents for effectiveness in conveying key information and promoting investor understanding.

AARP encourages the SEC to implement uniform standards of conduct applicable to both investment advisers and broker dealers. AARP members and the general public

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[13] Sunita Sah, *Gray Matter The Paradox of Disclosure*, N.Y. TIMES, July 8, 2016, https://www.nytimes.com/2016/07/10/opinion/sunday/the-paradox-of-disclosure.html?_r=0; Sunita Sah and George Loewenstein, *Nothing to Declare: Mandatory and Voluntary Disclosure Leads Advisors to Avoid Conflicts of Interest*, 25(2) PSYCHOL. SCI. 575 –584 (2014); cf. Sunita Sah, Angela Fagerlin, and Peter Ubel, *Effect of physician disclosure of specialty bias on patient trust and treatment choice*, http://www.pnas.org/content/113/27/7465.full.pdf.

have demanded and supported the protections of an Impartial Conduct Standard. In an AARP 2013 survey of over 1,400 adults who had money saved in either a 401(k) or a 403(b) plan, more than nine in ten (93%) respondents favored requiring retirement advice to be in their sole interest, and fewer than four in ten (36%) respondents indicated they would trust the advice from an adviser who is not required by law to provide advice that is in their best interests. Another survey demonstrated an overwhelming percentage of respondents believe it is important for financial advisors to give financial advice in a client's best interests. In a companion survey of over 3,000 plan sponsors of all sizes, nearly nine in ten (89%) plan sponsors said they would favor requiring giving advice that is in the sole interest of plan participants.

9. *How would any such suggested approach (disclosure, conduct standards, etc.) be implemented? Specifically, what initial steps would need to be taken to conform to the new rules, and what ongoing processes (e.g., policies and procedures) would need to be put into place to promote compliance and oversight? Would the Commission need to provide additional regulatory guidance or rules? If so, what should those be and why would it be important for the Commission to provide those? Should the Commission address related disclosures or engage in other regulatory improvements in conjunction with any future action with respect to standards of conduct (e.g., adopt enhanced standards for performance disclosures)?*

The Commission must ensure that broker-dealers who provide "personalized investment advice" meet minimum training and competency requirements. Advisory firms should adopt practices and written policies and procedures to comply with the impartial conduct standards. They should also monitor the implementation of those practices and the compliance of advisers with the impartial conduct standards. In addition, even with policies and procedures, there must be objective requirements to reduce conflicts. Lastly, the advisory firms should take appropriate action when the impartial conduct standards are violated and modify their policies and procedures when necessary to improve overall compliance.

10. *Should the Commission consider acting incrementally, taking into account the effects of its initial action before considering further proposed actions? What are the benefits and costs of such an approach?*

AARP encourages the Commission to engage in a thorough, inclusive and deliberative rulemaking process that fairly serves the best interest of impacted investors and takes into accounts the operational issue and impact on industry. The Department's process, which resulted in the Rule, is an appropriate model for the Commission to replicate. The Department reviewed thousands of comment letters from stakeholders, held public hearings, and made significant adjustments to its proposed Rule, including changes to address concerns raised by the financial services industry. It is imperative that the Commission act similarly in order to avoid harm to investors and the marketplace.

11. *If the Commission were to impose new requirements, should private remedies be available for violations of any new requirements? If so, in what venue or venues should such claims be brought? Should the Commission establish uniform rules, or should parties determine available remedies by contract, so long as not inconsistent with the securities laws?*

Please see AARP's public record on this issue.[14]

12. *To what extent, if any, can changes in technology enhance the effectiveness and efficiency of regulatory action?*

Innovations in technology could result in more transparency and fewer conflicts of interest, as well as significantly lower costs. AARP believes the Commission should engage in regular and robust analysis of changes in technology to ensure products eliminate conflicts and serve the best interest of the investors. In addition, see AARP's Response to Question # 3.

13. *For purposes of Commission action in this area, if any, who should be considered to be "retail investors"?*

AARP believes this is an important matter and as we review the issues raised in other comments, AARP may respond with further comments of our own.

[14] Comment Letter from AARP to DOL (July 21, 2015), *available at* https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA25/00148.pdf.
AARP sign-on brief with AAJ in Thrivent, *available at* http://www.aarp.org/content/dam/aarp/aarp_foundation/litigation/pdf-beg-02-01-2016/thrivent-v-perez.pdf.
AARP's Chamber amicus brief in 5th Circuit, *available at* http://www.aarp.org/content/dam/aarp/aarp_foundation/litigation/pdf-beg-02-01-2016/chamber-commerce-v-dol.pdf.

14. *For purposes of Commission action in this area, if any, how should "investment advice" be defined? Should certain activities be expressly excluded from the definition of "investment advice"?*

Section 913 frames the SEC's authority to impose a fiduciary standard on brokers in terms of "personalized investment advice." Defining this term is key in determining when the fiduciary duty will apply to brokers and, as a result, whether it will afford meaningful new protections for investors. The SEC should clearly establish that it will interpret the term "personalized investment advice" in a manner consistent with its long history and usage in the Advisers Act. As such, the SEC must broadly define the term by making clear that advice will be deemed "personalized" if it is personalized in substance and reality -- tailored to the individual needs of a specific client.

The Commission must include as a central component of its fiduciary standard a broad, principles-based requirement that those providing "personalized investment advice" to retail customers act in the best interest of the customer without regard to their own financial interest. It is not enough to simply disclose conflicts of interest. The Commission must require that brokers, like advisers, have a reasonable basis for believing their recommendations are in the best interest of the customer and are prepared to demonstrate the basis on which they reached that conclusion.

Financial professionals should not be permitted to call themselves advisers if they are not offering personalized advice and if they are not being regulated as advisers. Furthermore, it is essential to apply a strong fiduciary standard to all personalized investment advice, regardless of how the professional is compensated for that advice. The Department's Rule offers the appropriate model for applying a fiduciary standard to those whose business model includes sales-related conflicts because it takes the imperative step of requiring the firm to rein in practices and reduce incentives that directly conflict with the best interest standard appropriate for personalized advice. A best interest standard that does not require firms to reduce incentives that reward and encourage advice that is not in investors' best interests is likely to be a best interest standard in name only.

15. *What are the expected benefits, costs, or other economic effects, whether direct or indirect, of the potential approaches that the Commission could consider in this area, on retail investors, market participants, and on the market for investment advice more generally? To what extent, if any, would the investment opportunities and choices available to retail investors be affected?*

Under the Department's Rule, Americans are still able to gain access to a variety of retirement savings offerings. There is no prohibition against any type of retirement investment product. Karen Damato, *Trump Advisor Uses Terrible Food Analogy to Defend Financial Deregulation*, MONEY (Feb 03, 2017), http://time.com/ money/4659485/trump-advisor- uses-terrible-food-analogy-to-defend-financialderegulation/. The Rule does not require investment firms to abandon products but instead allows a wide variety of investment products. The Rule permits the investment marketplace to evolve and innovate to provide investments and products that answer the needs of participants and beneficiaries who now shoulder greater responsibility for their retirement security as well as provide protection for their hard-earned retirement monies. Access to numerous products is still available to retirement investors and the Commission should continue this approach. There should not be a "legal" or "authorized" list of investments.

16. *Where does the U.S. stand in this area relative to other jurisdictions and should the approaches of other jurisdictions inform our analysis? Have any regulatory developments occurred in non-U.S. jurisdictions over the past years that you believe have impacted the market for retail investment advice in those jurisdictions in a manner that would be instructive to our consideration? Are there any related studies or analyses that demonstrate the impact of these reforms on the market for retail investment advice?*

Analysis of investment practices and impact on investors across multiple jurisdictions may be useful in informing the Commission. Researchers examining retail investment advice in Canada and Germany, where the laws differ but advisers also derive substantial compensation from conflicted payments, found that advised accounts underperform by more than 150 basis points.[15] Clients of a German brokerage and a German bank receiving advice from advisers primarily compensated through conflicted payments earn lower net returns not justified by reduced risk. Clients' accounts also exhibited higher turnover.[16] However, when examining other jurisdictional experience in investment advice regulation, it is important to have fair and honest conversations about divergent aspects of the laws. For instance, there is often a distortion in the comparison between the U.K., where advisors are explicitly banned from receiving commissions, and the U.S Department's Rule, which requires retirement investment advice in the best interest of the client saving for retirement.

[15] Stephen Foerster et al., *Financial Advice: Does One Size Fit All?* (National Bureau of Economic Research Working Paper 20712, 2014); Andreas Hackethal, Michael Haliassos, and Tullio Jappelli, *Financial Advisers: A Case of Babysitters?* (Journal of Banking and Finance 36(2), 2012a), 509-524; Andreas Hackethal, Roman Inderst, and Steffen Meyer, *Trading on Advice*, (University of Frankfurt, 2012b) *available at* SSRN 1701777.
[16] Hackethal et al. 2012a.

17. *[T]he Commission in 2013 issued a comprehensive solicitation of data and other information, including about the then-current market for personalized investment advice, and about the potential effects of a Commission-mandated single standard of conduct for investment advisers and broker-dealers (e.g., following Section 913 of the Dodd-Frank Act). In that release, the Commission used a series of assumptions that, while not indicating a chosen direction with respect to key issues, was intended to narrow and focus comment. For example, the Commission's assumptions included that broker-dealers could continue to receive commissions and engage in principal trades with their customers; that any conduct standard would apply at the point of sale and not impose a continuing duty; and that prior guidance and precedent applicable to investment advisers would be tailored to broker-dealers in a manner that reflects the difference in their engagement with customers. The Commission also sought information about private claims against investment advisers and broker-dealers by retail investors. Are there any material changes to the assumptions that the Commission laid out in that request for comment, the requested data and other information, or any other developments that you believe the Commission should consider in its continued review and analysis of these issues?*

While AARP was encouraged that in 2013 the SEC took the step of requesting additional information from interested parties, we were concerned that the assumptions contained in the RFI failed to include key elements of the fiduciary standard, such as the obligation to act in the best interest of the customer. If the fiduciary duty rulemaking going forward is based on those RFI assumptions, it would be weaker than that originally set forth in the Section 913 study <u>and</u> less rigorous than imposed under the Advisers Act. The RFI seemed to contemplate little more than the existing suitability standard supplemented by conflict of interest disclosures. If the SEC were to adopt this approach, it would significantly weaken the fiduciary standard for investment advisers while adding few new protections for investors who rely on broker-dealers for investment advice. AARP opposes this backwards approach, which would have negative consequences for investors.

Over the years, brokers have been permitted to call themselves financial advisers and offer extensive investment advisory services without having to meet the best interest standard included as part of the fiduciary duty that applies to all other investment advisers. As a result, many investors erroneously believe they are dealing with a trusted adviser when they are actually dealing with a salesperson – a salesperson that is free to put his or her own financial interests ahead of the interests of the investor. Investors who place their trust in these salespersons can end up paying excessively higher costs for higher risk or underperforming investments that only satisfy a suitability standard, but not a fiduciary duty. That is money most middle income investors cannot afford to waste.

AARP remains committed to the strongest possible fiduciary standard for retirement investment advice and recommends a similar standard for all other investment advice. There is a growing need to update the rules that accurately reflects the realities of the marketplace today and provides investors with the protections they need to save and invest for retirement. We urge the Commission to follow the Department's rulemaking process in implementing a uniform Impartial Conduct Standard to protect investors.

We look forward to working with you and your colleagues to ensure that any fiduciary rulemaking delivers meaningful investor protections for the customers of investment advisers and broker-dealers. As we review the issues raised in other comments, AARP may respond with further comments of our own. If you have any questions, please feel free to contact me or Jasmine Vasquez of our Government Affairs office at [redacted].

Sincerely,

David Certner
Legislative Counsel & Legislative Policy Director
Government Affairs