STATEMENT OF

THE FINANCIAL PLANNING COALITION

BEFORE THE

UNITED STATES HOUSE OF REPRESENTATIVES

EDUCATION AND THE WORKFORCE COMMITTEE

SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, & PENSIONS

HEARING ON

"PRINCIPLES FOR ENSURING RETIREMENT ADVICE SERVES THE BEST INTERESTS OF WORKING FAMILIES AND RETIREES"

December 2, 2015

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I. Introduction

Mr. Chairman, Ranking Member Polis, and Members of the Subcommittee, thank you for the opportunity to testify in support of the Department of Labor's (DOL) proposal to update the definition of fiduciary investment advice under the Employee Retirement Income Security Act (ERISA). My name is Marilyn Mohrman-Gillis and I am Managing Director for Public Policy and Communications for the Certified Financial Planner Board of Standards, Inc. (CFP Board). I am testifying today on behalf of the Financial Planning Coalition (Coalition), which is comprised of CFP Board, the Financial Planning Association® (FPA®) and the National Association of Personal Financial Advisors (NAPFA).

We believe that the Coalition brings a unique perspective to the DOL's re-proposed fiduciary rule. CFP Board stakeholders and FPA and NAPFA members have committed, by virtue of their Certified Financial Planner™ certification or their membership codes of conduct, to provide financial planning services under a fiduciary standard. They provide fiduciary-level services across business models – as investment advisers, broker-dealers and insurance agents – and across compensation models – including commission and fee models.

We believe that a strengthened fiduciary rule under ERISA is essential for America's Retirement Investors and is workable for Advisers, and we strongly support adoption of the DOL's re-proposed rule. For those Members of Congress who truly want to strengthen retirement security and ensure that Advisers protect their clients' best interests, allowing the DOL to promulgate a final rule without Congressional intervention is the best way to achieve those goals. The re-proposed rule is fully consistent with the principles of a true fiduciary standard under ERISA. Congressional intervention in the DOL rulemaking process is unnecessary and will only serve to delay or derail this long overdue reform needed to protect and preserve Americans' retirement savings.

II. DOL's Re-Proposed Fiduciary Rule is Needed to Protect Retirement Investors

Retirement Investors face a perfect storm in today's financial services marketplace. With the dramatic shift in the retirement landscape from defined benefit plans to 401(k) plans and Individual Retirement Accounts (IRAs), Americans are increasingly responsible for their own retirements. At the same time they need to choose from an increasingly complex set of financial products and services. When they seek financial advice, they face a marketplace in which they cannot distinguish a salesperson from an Adviser; nor can they distinguish between those Advisers who are legally obligated to provide advice in their best interest versus those who are not. At a time when Retirement Investors more than ever need competent financial advice that is in their best interest, the current regulatory framework allows Advisers to make financial recommendations that place Advisers' interests ahead of Retirement Investors' interests. As a consequence of this misalignment of interests allowed under our current regulatory structure, Retirement Investors are harmed – in the form of higher costs and lower savings – which the DOL conservatively estimates to be $18 billion per year.[1]

[1] U.S. Dep't of Labor, *Fiduciary Investment Advice: Regulatory Impact Analysis*, Apr. 14, 2015, *available at* http://www.dol.gov/ebsa/pdf/conflictsofinterestria.pdf.

American workers who leave employment or who switch employers – and face the decision of whether to roll over their 401(k) retirement assets into an IRA – are particularly vulnerable to the negative impact of conflicted advice. They are making significant and often one-time decisions to move their retirement savings from more protected employer-based plans into less protected IRAs. Yet due to conflicted advice, permitted because of loopholes in a 40-year old rule, Retirement Investors who move their retirement savings from a 401(k) to an IRA can expect to lose 12 to 24 percent of the value of their retirement savings over 30 years.[2]

Congress wisely recognized, when it adopted ERISA in 1974, that advice related to tax-preferred retirement savings should be provided under a fiduciary standard of conduct. The DOL proposal, which would close those loopholes that allow for conflicted advice, is a long overdue reform needed to protect and preserve Americans' retirement savings.

III. <u>DOL's Re-Proposed Fiduciary Rule is Workable and Secures Critical Consumer Protections without Reducing Access to Advice</u>

When CFP Board adopted a fiduciary standard of conduct for CFP® professionals when providing financial planning services in 2007, many firms and industry organizations made arguments similar to those being made about the DOL's re-proposed rule today. They asserted that CFP Board's fiduciary requirement was unworkable with their business models and that CFP® professionals would be forced to rescind their certification if required to operate under a fiduciary standard.

Contrary to those predictions, the number of CFP® professionals has grown by more than 30 percent to nearly 73,000 since CFP Board established a fiduciary standard. And many firms, to their credit, are recognizing the value of competent and ethical advice and are supporting CFP® certification for their Advisers. Based on our own experience working with firms on compliance with CFP Board's rules, we believe the re-proposed rule can work for Advisers.

More specifically, many argue that the rule will eliminate the broker-dealer business model and force Advisers into fee-only models that will be more expensive for consumers. This is not consistent with the rule itself or with our experience in implementing a fiduciary standard. The Best Interest Contract (BIC) Exemption is a principles-based, business-model neutral exemption that allows Advisers to continue to receive commissions and still comply with the fiduciary standard under ERISA.

To those who say that the BIC requirements are unworkable, we point to CFP Board's *Standards of Professional Conduct,* which contain requirements that are similar to those under the BIC Exemption. Under CFP Board's *Standards,* CFP® professionals, when providing financial planning services, are required to:

- Act in the best interest of the client;
- Exercise reasonable and prudent judgment;
- Execute a written contract with the client;

[2] *Id.*

- Identify and mitigate conflicts of interest; and
- Provide written disclosures including the full costs of products and services and compensation paid to the CFP® professional and the employer.

In short, CFP® professionals today are operating under these BIC-like requirements with commission, commission and fee, and fee-only business models.

Many also claim that the re-proposed rule will force Advisers to stop serving middle-income Americans. The primary support for this oft-repeated assertion is an industry study that is based on the premise that commissions would be banned under the DOL rule. In fact, the re-proposed rule specifically permits Advisers to receive commissions for the sale of securities and insurance products. The BIC Exemption and other prohibited transaction exemptions (PTEs) in the rule broadly permit firms to continue compensation practices typically used by registered representatives of broker dealers and insurance agents with middle-income Retirement Investors, such as commission-based advice and revenue sharing practices, as long as they put in place policies and procedures aimed at ensuring their advice is in their clients' best interest.

Reliable empirical data from numerous studies conducted by and cited by the Coalition demonstrate that a fiduciary duty will not force Advisers to abandon middle-income households and will not leave them without investment advice. In addition, the Coalition's own experience belies the notion that Advisers, required to act in the best interest of the client, will be unable to serve middle-income clients. Today, there are thousands of CFP® professionals and FPA and NAPFA members across the country who provide fiduciary-level services to everyday Americans either under commission-based business models or for fees with no or very low minimum asset requirements. If our experience is any indication of the true impact of the re-proposed rule, firms and Advisers are much more likely to adjust their policies and practices, to keep this business, rather than to abandon middle-income clients.

IV. Congressional Intervention in the DOL Rulemaking Process is Unnecessary and Premature

With respect to the rulemaking, the DOL is the expert agency charged with implementing Congress' original intent under ERISA to provide fiduciary-level advice for tax-preferred retirement assets. The Coalition urges Members to reject any legislative proposal related to the DOL rulemaking – whether standalone legislation or appropriations "riders" on an omnibus funding bill. Such legislation is unnecessary and would delay or derail a final rule to legally obligate Advisers to serve their clients' best interests.

The DOL has engaged in a comprehensive, deliberative, fully open and transparent administrative rulemaking process. Over a five year period, the DOL has: (i) issued a re-proposed rule after incorporating an initial round of comments and extensive further study; (ii) provided two additional comment periods (totaling 163 days) for its re-proposed rule; (iii) conducted four days of public hearings consisting of 25 panels with 75 witnesses; (iv) conducted hundreds of meetings with interested parties; (v) consulted with and received technical guidance from the Securities & Exchange Commission (SEC); (vi) testified before Congress; and (vii) held many group and individual meetings with Members of Congress of both parties.

This extensive and robust rulemaking process is working precisely as intended. The DOL has publicly indicated that it plans to make changes to address issues raised by us and by other stakeholders. For example, the DOL publicly stated that it intends to simplify the mechanics and timing of the best interest contract, that it will review expanding the types of assets that would be allowed in retirement accounts, and that it will review extending the transition time for firms to comply with the new rule. Any legislative effort directing the outcome of this open, transparent, and fully participatory administrative process – before the DOL has an opportunity to consider and to incorporate public input into a final rule – is unnecessary and premature.

Congressional intervention in the middle of an administrative rulemaking, particularly through an appropriations bill, is not consistent with the principles of good governance or the principles of separation of powers provided under the U.S. Constitution. If Congress disagrees with a federal administrative agency's interpretation or implementation of a statute, the Administrative Procedure Act provides a process for Congressional review of a final agency rule before the rule becomes effective and is implemented.

V. Alternative Proposals Will Unnecessarily Delay the DOL Rulemaking and Serve to Undermine – Not Advance – A Fiduciary Standard under ERISA

The Coalition believes that any alternative proposal must be measured against the principles of a true fiduciary standard under ERISA. The principles of a true ERISA fiduciary standard include requirements to: (i) provide advice without regard to the financial interests of the firm and Adviser; (ii) receive compensation that is reasonable in relation to the value of the specific services provided; (iii) not only disclose but also mitigate conflicts of interest; and (iv) act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise. Such a fiduciary standard must be fully enforceable to protect Retirement Investors.

Legislation based on the "declaration of principles" as proposed by Representatives Roskam and Neal is not needed to achieve their stated goals to strengthen retirement security and ensure that Advisers protect their clients' best interests. The DOL re-proposed rule already embraces these goals and is fully consistent with, and in fact exceeds, the proposed principles. The push for legislation is not a response to any actual deficiency in the rule. Rather it is an attempt to rewrite the rule, without the benefit of a full and open regulatory process, which would only serve to delay or derail the rule completely.

Moreover, any legislation based on the Roskam/Neal principles would weaken – not strengthen – the proposed rule and would undermine – not protect – the client's best interests. These principles refer only to disclosure of conflicts of interest; but are completely silent on a fundamental component of the fiduciary standard – an obligation to mitigate compensation practices and incentives that give rise to conflicts of interest. These principles are also silent on whether Advisers must provide advice without regard to their financial interests and whether Retirement Investors will have meaningful legal recourse to enforce a "best interest" obligation against a firm or an Adviser.

Alternative “best interest” standard proposals, offered by financial services firms and industry organizations in this rulemaking, also fall short of meeting the principles of a true fiduciary standard under ERISA. While they purport to establish a “best interest” standard, they omit a key and essential component of the “best interest” standard – the requirement that the advice be provided without regard to the financial interests of the firm and Adviser. Among other deficiencies, they do not require firms to reduce incentives that cause conflicts with a client’s best interest and they rely on disclosure alone to address conflicts.

The need for an updated fiduciary rule under ERISA is long overdue. A final rule, promulgated by DOL, the expert agency required to enforce ERISA, and fully informed though its rulemaking process, is the best solution to actually ensure that Advisers are required to serve Retirement Investors’ best interests. The Coalition urges Congress to refrain from legislation – whether stand alone or in the funding bill – and let the DOL promulgate a final rule to require fiduciary-level advice for all Americans’ retirement assets under ERISA.