

STATEMENT FOR THE RECORD

PROTECTING AMERICANS' RETIREMENT SAVINGS

**AMERICAN BANKERS ASSOCIATION
THE FINANCIAL SERVICES ROUNDTABLE
THE FINANCIAL SERVICES INSTITUTE
INSURED RETIRMENT INSTITUTE
NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL
ADVISORS
SECURITIES INDUSTRY AND FINANCIAL MARKETS
ASSOCIATION**

On

**The U.S. House Committee on Education and the Workforce,
Subcommittee on Health, Education, Labor, and Pensions Hearing on**

***Retirement Security:
Challenges Confronting Pension Plan Sponsors, Workers, and Retirees***

June 14, 2011

The American Bankers Association, The Financial Services Roundtable, the
Financial Services Institute, the Insured Retirement Institute, and the
Securities Industry and Financial Markets Association

Respectfully Offer This

Statement for the Record

To the

U.S. House Committee on Education and the Workforce,
Subcommittee on Health, Education, Labor, and Pensions Hearing
On:

*Retirement Security:
Challenges Confronting Pension Plan Sponsors, Workers, and Retirees*

I. WE SUPPORT RETIREMENT SECURITY.

The undersigned organizations¹ share the Congress' and the Obama Administration's goal of increasing opportunities for Americans to save and plan for their retirement. We support increased incentives and opportunities for Americans to save and invest. It is our belief that providing these opportunities for Americans is important because savings increase domestic investment, encourage economic growth, and result in higher wages, financial freedom, and a better standard of living. We believe that most Americans should approach retirement with a comprehensive strategy that incorporates a number of retirement vehicles. Consumer education about retirement savings products can help consumers make sound investment decisions and allow them to maximize their retirement savings.² Further gains can be achieved through better use of investment advice, and by promoting policies that provide for more diversified, dynamic asset

allocation, and exploration of new and innovative methods to help individuals make better investment decisions.

As a partner with the Congress and the Obama Administration in our collective efforts to protect Americans' retirement security, we strongly believe that one of the largest challenges currently confronting pension plans, plan sponsors, small business owners, individual retirement account owners, employees, and retirees is the Department of Labor's (the "Department") proposed rule that would expand the definition of the term *fiduciary*³ under Title I of the Employee Retirement Income Security Act of 1974 ("ERISA").⁴ In our view, the Department's Proposal will negatively impact the ability of hard-working Americans to save and plan for their retirement. Moreover, the Department's Proposal would substantially increase the categories of service providers who would be deemed *fiduciaries* for purposes of ERISA,⁵ and thereby decrease the availability of retirement planning options for all Americans.⁶ We respectfully request the Department formally withdraw its proposed definition of *fiduciary*⁷ and re-propose a more narrow definition of *fiduciary* that targets specific abuses.

II. WE BELIEVE THAT THE PROPOSED EXPANSION OF THE DEFINITION OF *FIDUCIARY* WOULD JEOPARDIZE THE RETIREMENT SECURITY OF MILLIONS OF AMERICANS.

Most Americans rely on retirement plans to supplement Social Security and private savings.⁸ For instance, Americans have increased their participation in 401(k) plans by 250 percent over the last twenty-five years.⁹ In addition, a 2009 study showed that over two-thirds of "U.S. households had retirement plans through their employers or individual retirement accounts ("IRAs")."¹⁰

IRAs are the fastest growing retirement savings accounts.¹¹ IRAs are widely held by small investors¹² who seek to maximize return by minimizing overhead on their accounts. According to the OLIVER WYMAN REPORT, smaller investors overwhelmingly prefer to use a brokerage account for their IRAs (rather than an advisory account)¹³ because of the lower operating costs associated with brokerage accounts. In fact, 98% of IRAs with less than \$25,000 in assets are serviced by securities brokers.¹⁴

We believe that the sheer breadth of the proposed expansion of the definition of *fiduciary* would have the unintended—but entirely foreseeable—consequence of reducing alternatives available to hard-working Americans to help them save for retirement, and increasing the costs of remaining retirement savings alternatives. The resulting increase in the number of persons who could be subject to fiduciary duties, increased costs, and increased uncertainty for retirement services providers will very likely reduce the level and types of services available to benefit plan participants and IRA investors by making benefit plans and IRAs more costly and less efficient.¹⁵

Thus, if the Department were to adopt the expanded definition of *fiduciary* in its present form,¹⁶ we believe it is clear that fewer Americans would have access to the advice they need to help them make prudent investment decisions that reflect their

financial goals and tolerance for risk as they prepare for their retirement because of their reluctance to pay the increased costs that will likely be associated with professional investment advice.¹⁷

We also are concerned that the Department's Proposal could lead to lower investment returns, and ultimately, a reduced amount of savings for retirement.¹⁸ Moreover, if the Department were to adopt its expanded definition of *fiduciary* in its present form, millions of hard-working Americans are likely to have reduced access to meaningful investment services or help from an investment professional,¹⁹ and likely would incur greater expense to access the broad range of product types associated with brokerage accounts.²⁰ We find the potentially adverse consequences that the Department's proposed expanded definition of *fiduciary* would have on our nation's retirement system and the retirement security of all Americans to be untenable.

In summary, our specific concerns with the Department's proposed expansion of the definition of *fiduciary* are:

- The Department has not demonstrated that the current definition needs to be completely re-written.
- The proposed expansion of the *fiduciary* definition to encompass IRAs is ineffective and counterproductive.
- The Department's rule could result in significantly fewer retirement accounts and less retirement savings.
- The Department has not evaluated the economic impact on small business owners.
- Consultation and coordination with each of the relevant regulatory authorities is needed, including without limitation the Securities and Exchange Commission and the Commodity Futures Trading Commission.
- The Department provided insufficient regulatory analyses.
- Given the substantive concerns raised in the public comment record concerning the adverse impact of the rule, the Department should publish notice of its proposed revisions to the definition of *fiduciary*, and solicit public comment on the proposed revisions.

1. The Department has not demonstrated that the current definition needs to be completely re-written.

- Despite 35 years of experience with the *current definition of fiduciary*,²¹ the Department has not provided adequate justification for its wholesale revisions to the current definition.
- The Department's stated rationale is to pursue bad actors (*i.e.*, pension consultants and appraisers) who allegedly have provided substandard services and who failed to recognize or

disclose conflicts of interest.²² If this is the goal, then the Department should more narrowly tailor the proposed changes to reach those particular bad actors.

- The Department also should consider whether other regulations (including those enforced by other authorities) already provide adequate safeguards. For example, the Department’s recent disclosure regulations will require pension consultants to disclose all direct and indirect compensation they receive before entering into a service arrangement with a plan.²³ This may address the Department’s concerns.

2. The proposed expansion of the *fiduciary* definition to encompass IRAs is ineffective and counterproductive.

- The proposed expansion of the definition of *fiduciary* would constrain the availability of lower-cost commission-based IRAs, which would increase costs for IRA owners and reduce retirement savings.²⁴
- The Department previously expressed the view that regulatory initiatives designed for ERISA employee benefit plans were neither necessary nor appropriate for IRAs.²⁵
- Sales practices for IRAs currently are subject to oversight by the Securities and Exchange Commission and FINRA. If the Department is concerned about oversight of sales practices, it should work together with those regulators to address those concerns, as opposed to overhauling a much broader regulatory régime.
- Service providers to IRAs should be expressly excluded from any definition of *fiduciary* for purposes of Title I of ERISA.

3. The Department’s rule could result in significantly fewer retirement accounts and less retirement savings.

- The Department issued the Proposal without having done any study or survey—or providing any data—on the Proposal’s projected impact or effect on IRA owners or IRA service providers.²⁶
- According to the OLIVER WYMAN REPORT, the effect of the Department’s rule “could well result in hundreds of thousands of fewer IRAs opened per year.”²⁷

- “Nearly 90% of IRA investors will be impacted by the proposed rule.”²⁸
- The Department’s Proposal would make service providers fiduciaries when merely providing a valuation of a security or other asset held in the account. This may lead service providers to withdraw from providing valuation services for real estate, venture capital interests, swaps, or other hard to value assets. As a consequence, investors will have far fewer investment choices available to diversify assets in their accounts as they seek to increase their retirement savings.

4. The Department has not evaluated the economic impact on small business owners.

- Small plan sponsors are not likely to be able to absorb the potentially substantial increase in costs arising from the expanded definition of *fiduciary*.²⁹
- Small business owners are struggling to recover in the U.S. economy.³⁰
- We urge the Department to ensure that its regulations not only protect retirement plan participants and beneficiaries, but also remove undue burdens that constrain the feasibility for small business owners to provide retirement plans for their employees.

5. Consultation and coordination with each of the relevant regulatory authorities are needed, including without limitation the Securities and Exchange Commission,³¹ FINRA, and the Commodity Futures Trading Commission.

- Investors and retirement services providers need a regulatory régime that provides clarity and certainty.
- Regulations that establish conflicting rules create confusion, increase costs to service providers, and tend to lessen the availability of retirement services overall.

6. The Department provided insufficient regulatory analyses.

- The Department was obligated under Executive Order 12866³² to determine whether its proposed expansion of the definition of *fiduciary* was a “significant” regulatory action.³³ Even

though the Office of Management and Budget determined the Department's proposed definition was economically significant,³⁴ the Department performed an insufficient Regulatory Impact Analysis of the Proposal.³⁵

- The Department stated “it is uncertain about the magnitude of [the] benefits and potential costs” of its regulatory action.³⁶ Yet, the Department failed to provide any data whatsoever in support of its Regulatory Impact Analysis, in which the Department “tentatively conclude[d] that the proposed regulation’s benefits would justify its costs.”³⁷
- The Department’s Initial Regulatory Flexibility Analysis failed to provide either an estimate of the number of affected small entities³⁸ or the increased business costs small entities would incur if they were determined to be fiduciaries under the proposal as required by the Regulatory Flexibility Act.³⁹ As a consequence, it appears that the Department of Labor performed an insufficient analysis under the Regulatory Flexibility Act when it estimated the impact of its rule proposal on small businesses, a segment of the market also impacted by the proposed expansion of the definition of *fiduciary*.
- On January 18, 2011, President Barack Obama issued Executive Order 13563 “Improving Regulation and Regulatory Review.”⁴⁰ The Order explains the Administration’s goal of creating a regulatory system that protects the “public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation,”⁴¹ while using “the best, most innovative, and least burdensome tools for achieving regulatory ends.”⁴²
- The Department’s Proposal contravenes the Obama Administration’s publicly articulated goal to “identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public.”⁴³

7. Given the substantive concerns raised in the public comment record concerning the adverse impact of the rule, the Department should publish notice of its proposed revisions to the definition of *fiduciary*, and solicit public comment on the proposed revisions.

- The definition as proposed would require substantial changes to address concerns identified in the public comment file.⁴⁴

- It is likely that class exemptions will be necessary and should be *part of the rule itself*, so that hard-working Americans do *not lose access* to investment products they need to fund their retirement *while the financial services markets wait for the Department* to adopt the required prohibited transaction class exemptions.
- The current definition of *fiduciary*⁴⁵ has informed almost 35 years of Department guidance on investment advice for ERISA retirement plans and IRAs. Revisions to such a mature rule ordinarily should not require ancillary exemptions in order for the final rule *to work in the real world*.

III. IN LIGHT OF THE SUBSTANTIVE CONCERNS RAISED BY THE PUBLIC, WE BELIEVE THE DEPARTMENT SHOULD WITHDRAW ITS PROPOSED EXPANSION OF THE DEFINITION OF *FIDUCIARY*, AND RE-PROPOSE A DEFINITION OF *FIDUCIARY* THAT ADDRESSES DEFICIENCIES NOTED IN THE PUBLIC COMMENT FILE.

We and other parties have filed comments and supplemental materials with the Department that generally have raised these and other concerns about the adverse impact of the Proposal.⁴⁶ At present, it is our understanding that the Department is considering substantial revisions to its Proposal in response to the views expressed during the public comment period.⁴⁷

It is in the interest of the millions of hard-working Americans who are saving for retirement that the Obama Administration and the Congress collaborate actively with the private sector—in particular, the small business community and the retirement security community—to develop a regulatory régime that will benefit consumers and expand Americans’ retirement savings.

IV. CONCLUSION

In closing, strengthening the retirement security of all Americans is our priority. Strong and vibrant retirement programs benefit employees and their beneficiaries. As well, it strengthens the financial health and well-being of our nation. We, therefore, reiterate our request that the Department withdraw and re-propose a definition of the term *fiduciary*.

While we support policies that encourage safeguards in retirement savings programs to protect consumers and our markets from fraudulent practices, we vigorously oppose regulations that would discourage participation by employers and employees in

retirement programs or would imperil retirement security for millions of hard-working Americans.

We urge policymakers to work with us to preserve a retirement system that helps strengthen retirement security for all Americans. We encourage the Congress to support policies that help promote retirement savings and enable the financial services industry to better meet the long-term retirement needs of hard-working Americans.

We stand ready to work with you and the Department on this important issue.

RESPECTFULLY SUBMITTED:

AMERICAN BANKERS ASSOCIATION

THE FINANCIAL SERVICES ROUNDTABLE

THE FINANCIAL SERVICES INSTITUTE

THE INSURED RETIREMENT INSTITUTE

**NATIONAL ASSOCIATION OF INSURANCE
AND FINANCIAL ADVISORS**

**SECURITIES INDUSTRY AND FINANCIAL
MARKETS ASSOCIATION**

END NOTES

¹ **The American Bankers Association** represents banks of all sizes and charters and is the voice for the nation's \$13 trillion banking industry and its two million employees. Many of these banks are plan service providers, providing trust, custody, and other services for institutional clients, including employee benefit plans covered by the Employee Retirement Income Security Act of 1974. As of year-end 2010, banks held over \$8 trillion in defined benefit, defined contribution, and retirement-related accounts (Source: FDIC Quarterly Banking Profile, Table VIII-A (Dec. 2010)).

The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Among the Roundtable's Core Values are *fairness* ("We will engage in practices that provide a benefit and promote fairness to our customers, employees or other partners."); *integrity* ("[E]verything we do [as an industry] is built on trust. That trust is earned and renewed based on every customer relationship."); and *respect* ("We will treat the people on whom our businesses depend with the respect they deserve in each and every interaction."). See *Roundtable Statement of Core Values*, available at <http://www.fsround.org/>.

Roundtable member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America's economic engine, accounting directly for \$92.7 trillion in managed assets, \$1.2 trillion in revenue, and 2.3 million jobs.

The Financial Services Institute, which was founded in 2004, is the only advocacy organization working on behalf of independent broker-dealers and independent financial advisors. **Our vision** is that all individuals have access to competent and affordable financial advice, products, and services delivered by a growing network of independent financial advisors affiliated with independent financial services firms. **Our mission** is to create a healthier regulatory environment for independent broker-dealers and their affiliated independent financial advisors through aggressive and effective advocacy, education, and public awareness. **Our strategy** supports our vision and mission through robust involvement in FINRA governance, constructive engagement in the regulatory process, and effective influence on the legislative process.

The Insured Retirement Institute has been called the "primary trade association for annuities" by *U.S. News and World Report* and is the only association that represents the entire supply chain of insured retirement strategies. Our members are the major insurers, asset managers, broker dealers and financial advisors. IRI is a not-for-profit organization that brings together the interests of the industry, financial advisors and consumers under one umbrella. Our official mission is to: encourage industry adherence to highest ethical principles; promote better understanding of the insured retirement value proposition; develop and promote best practice standards to improve value delivery; and to advocate before public policy makers on critical issues affecting insured retirement strategies. We currently have over 500 member companies which include more than 70,000 financial advisors and 10,000 home office financial professionals.

National Association of Insurance and Financial Advisors ("NAIFA") comprises more than 700 state and local associations representing the interests of approximately 200,000 agents and their associates nationwide. NAIFA is one of the only insurance organizations with members from every Congressional district in the United States. Members focus their practices on one or more of the following: life insurance and annuities, health insurance and employee benefits, multiline, and financial advising and

investments. According to a Fall 2010 survey, nearly two-thirds of NAIFA members are licensed to sell securities, and 89% of NAIFA member clients are “main street” investors who have less than \$250,000 in household income. The Association’s mission is to advocate for a positive legislative and regulatory environment, enhance business and professional skills, and promote the ethical conduct of its members.

Securities Industry and Financial Markets Association (“SIFMA”) brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA’s mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit www.sifma.org.

² The financial services industry has developed numerous financial literacy initiatives, including initiatives directed toward elementary and high school students and programs presented to investors in the local community. See The Financial Services Roundtable, COMMUNITY SERVICE IMPACT REPORT at 64-69 (2010), available at <http://www.fsround.org/publications/pdfs/CS10-ImpactReport.pdf>; Insured Retirement Institute, *Retirement Planning Resources for Consumers*, available at <http://www.irionline.org/consumers/retirementPlanningResources>; Securities Industry and Financial Markets Association Foundation, available at <http://www.sifma.org/Education/SIFMA-Foundation/About-the-SIFMA-Foundation/>; Investment Company Institute, available at http://ici.org/#investor_education; and FINRA, available at <http://www.finra.org/Investors/>.

³ Definition of the Term “Fiduciary” [RIN: 1210—AB32], 75 Fed. Reg. 65263 (Oct. 22, 2010) (the “Proposal”).

⁴ 29 U.S.C. § 1001, *et seq.*

⁵ See Oliver Wyman, Inc., OLIVER WYMAN REPORT: ASSESSMENT OF THE IMPACT OF THE DEPARTMENT OF LABOR’S PROPOSED “FIDUCIARY” DEFINITION RULE ON IRA CONSUMERS at 13 (Apr. 12, 2011) (the “OLIVER WYMAN REPORT”), available at <http://www.dol.gov/ebsa/pdf/1210-AB32-PH060.pdf> (noting that “practically every investment-related conversation or interaction with a client [could become] subject to [a] fiduciary duty”). “Even . . . discussions with call center and branch staff[] could be curtailed (so as to avoid inadvertently establishing a fiduciary duty.” *Id.* at 15. The OLIVER WYMAN REPORT is based on aggregate proprietary data furnished by “[twelve] financial services firms that offer services to retail investors.” *Id.* at 1. These firms “represent over 19 million IRA holders who hold \$1.79 trillion in assets through 25.3 million IRA accounts [or roughly forty percent (40%) of IRAs in the United States and forty percent (40%) of IRA assets].” *Id.*

⁶ OLIVER WYMAN REPORT, *supra* note 5 at 19-20. If the Department were to adopt the Proposal, the likely result would be a “[r]educ[ed] choice of investment professional, level of investment guidance, and investment products,” according to the OLIVER WYMAN REPORT. *Id.* at 19.

⁷ It also would afford the Department an opportunity to receive further information and analyses from the public on the effectiveness of the proposed revisions. See *Natural Resources Defense Council v. Environmental Protection Agency*, 279 F.3d 1180, 1186 (9th Cir. 2002) (reviewing the “notice and comment” requirements, the court stated that “one of the salient questions is ‘whether a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule’”).

⁸ Insurance Information Institute and The Financial Services Roundtable, THE FINANCIAL SERVICES FACT BOOK at 37 (2011) (“THE FINANCIAL SERVICES FACT BOOK”), available at [http://www.fsround.org/publications/pdfs/2011/Financial_Services_Factbook_2011\[1\].pdf](http://www.fsround.org/publications/pdfs/2011/Financial_Services_Factbook_2011[1].pdf).

⁹ *Retirement Security: 401(k)s* (Sept. 23, 2010) (“*Retirement Security*”), available at <http://www.fsround.org/fsr/pdfs/fast-facts/2010-09-23-RetirementSecurity.pdf>. In 2009, \$2,121 billion of retirement assets were held in defined benefit plans compared to \$3,336 billion of assets in defined contribution plans. THE FINANCIAL SERVICES FACT BOOK, *supra* note 8 at 43 (2011) (Source: Securities Industry and Financial Markets Association).

¹⁰ THE FINANCIAL SERVICES FACT BOOK, *supra* note 8 at 37.

¹¹ OLIVER WYMAN REPORT, *supra* note 5 at 4.

¹² *Id.* at 10 (“[A]pproximately half of IRA investors in the report sample have less than \$25,000 in IRA assets, and over a third have less than \$10,000.”).

¹³ *Id.* at 12. Investors who hold IRA assets in a brokerage account pay commissions to the brokers who buy or sell securities for their IRAs. In the alternative, investors can hold IRA assets in an “advisory” account and pay a fee that is a percentage of the assets held in the IRA. A study of 7,800 households conducted by Cerulli Associates found that more affluent investors also “prefer paying commissions.” See *Fee vs. commission: No doubt which investors prefer*, BLOOMBERG (June 8, 2011), <http://www.investmentnews.com/apps/pbcs.dll/article?AID=/20110608/FREE/110609950> (reporting that the survey examined “households with more than \$50,000 in annual income or more than \$250,000 in . . . assets”).

¹⁴ OLIVER WYMAN REPORT, *supra* note 5 at 2.

¹⁵ *Id.* at 19-22.

¹⁶ Proposal, *supra* note 3 at 65277-78.

¹⁷ See OLIVER WYMAN REPORT, *supra* note 5 at 2; *Fee vs. commission*, *supra* note 13.

¹⁸ OLIVER WYMAN REPORT, *supra* note 5 at 22 (“These increased investment costs would serve as a drag on long-term investment gains, and therefore on the ultimate retirement savings available to impacted [IRA] holders.”).

¹⁹ *Id.* at 19.

²⁰ *Id.* at 20.

²¹ 40 Fed. Reg. 50842 (Oct. 31, 1975). See also, Mercer Bullard, *DOL’s Fiduciary Proposal Misses the Mark* (June 14, 2011), available at <http://news.morningstar.com/articlenet/article.aspx?id=384065> (“It is unfair to the industry because it disregards decades of administrative law and practice under ERISA. It is bad for investors because it strips them of fiduciary protections when they are needed most.”).

²² Proposal, *supra* note 3 at 65271 (citing a Securities and Exchange Commission staff report that found a majority of the 24 pension consultants examined in 2002-2003 “had business relationships with broker-dealers that raised a number of concerns about potential harm to pension plans”); GAO, *Conflicts of Interest Can Affect Defined Benefit and Defined Contribution Plans*, GAO-09-503T, Testimony Before the Subcommittee on Health, Employment, Labor and Pensions, Education and Labor Committee, House of Representatives at 4 (Mar. 24, 2009), available at <http://www.gao.gov/new.items/d09503t.pdf> (noting that 13 of the 24 pension consultants examined by the Securities and Exchange Commission’s staff “had failed to disclose significant ongoing conflicts of interest to their pension fund clients”).

²³ Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans; Final Rule [RIN: 1210—AB07], 75 Fed. Reg. 64910 at 64937 (Oct. 20, 2010).

²⁴ OLIVER WYMAN REPORT, *supra* note 5 at 2 (noting that “estimated direct costs would increase by approximately 75% to 195% for these investors”).

²⁵ See Preamble to Interim Final 408(b)(2) Regulations, 75 Fed. Reg. 136 (July 16, 2010).

“The Department does not believe that IRAs should be subject to the final rule, which is designed with fiduciaries of employee benefit plans in mind. An IRA account-holder is responsible only for his or her own plan’s security and asset accumulation. They should not be held to the same fiduciary duties to scrutinize and monitor plan service providers and their total compensation as are plan sponsors and other fiduciaries of pension plans under Title I of ERISA, who are responsible for protecting the retirement security of greater numbers of plan participants. Moreover, IRAs generally are marketed alongside other personal investment vehicles. Imposing the regulation’s disclosure regime on IRAs could increase the costs associated with IRAs relative to similar vehicles that are not covered by the regulation. Therefore, although the final rule cross references the parallel provisions of section 4975 of the [Internal Revenue] Code, paragraph (c)(1)(ii) provides explicitly that IRAs and certain other accounts and plans are not covered plans for purposes of the rule.” *Id.*

²⁶ Proposal, *supra* note 3 at 65274-76.

²⁷ OLIVER WYMAN REPORT, *supra* note 5 at 2.

²⁸ *Id.* at 19-20 (IRA holders who cannot qualify for an “advisory account” would be “forced to migrate to a purely ‘low support’ brokerage model . . . and have little access to investment services, research and tools” to support their IRA savings goals.). See also, *Most Americans Haven’t Planned for Retirement and Other Areas of Concern*, WALL ST. J., June 6, 2011, available at <http://blogs.wsj.com/economics/2011/06/06/most-americans-havent-planned-for-retirement-and-other->

[areas-of-concern/](#) (“Efforts to make people essentially their own money managers may also be futile. Only 21% to 25% of respondents said they have used information sent to them from Social Security.”)

²⁹ While the costs associated with providing various employee benefits (including retirement plans) impact all employers, smaller companies typically are more sensitive to the costs associated with these programs. To the extent that service providers’ expenses increase, those costs are passed through to their clientele. An example of expenses associated with the Department’s Proposal is the legal cost associated with the initial “compliance review.” According to the Department, the cost of legal review would average sixteen (16) hours of time at a rate of \$119 per hour. Proposal, *supra* note 3 at 65274. This rate, however, is significantly lower than the average billing rate of \$295 per hour for 10,913 lawyers surveyed by the *National Law Journal*. SURVEY OF LAW FIRM ECONOMICS, NAT’L L. J. (2010) (“LAW FIRM SURVEY”), available at <http://www.alm.com/pressroom/2011/02/10/alm-legal-intelligence-releases-2011-survey-of-billing-and-practices-for-small-and-midsize-law-firms/>.

³⁰ See, Kelly Greene, *Retirement Plans Make Comeback, With Limits*, WALL ST. J., June 14, 2011, available at <http://professional.wsj.com/article/SB10001424052702303714704576384072497942338.html> (reporting that in the face of a “slowly improving job market, [many companies] seek to balance the need to retain highly skilled workers with the need to limit costs”).

³¹ The Securities and Exchange Commission released a study evaluating the regulatory régimes applicable to investment advisers and broker-dealers who provide advice to retail customers, as required by section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act [Pub. L. No. 111-203, § 913, 124 Stat. 1824 (2010) (the “Dodd-Frank Act”)]. STUDY ON INVESTMENT ADVISERS AND BROKER-DEALERS AS REQUIRED BY SECTION 913 OF THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT (Jan. 21, 2011), available at <http://sec.gov/news/studies/2011/913studyfinal.pdf>. Section 913(f) authorized the Commission to engage in rulemaking to address the legal or regulatory standards of care applicable to investment professionals who provide “personalized investment advice about securities” to retail customers. Section 913(f) of the Dodd-Frank Act, 124 Stat.1827-28.

³² 58 Fed. Reg. 51735.

³³ 75 Fed. Reg. at 65269.

³⁴ *Id.* (According to the Office of Management and Budget, the Department’s proposed rule “is likely to have an effect on the economy of \$100 million in any one year.”).

³⁵ For example, the Department estimated that service providers would incur about sixteen (16) hours of legal review at a rate of \$119 per hour. While the complexity of the compliance review likely would far exceed the Department’s estimate of sixteen (16) hours, an allocation of just \$119 per hour for legal services vastly understates the cost of legal services in the United States. See LAW FIRM SURVEY, *supra* note 28 and accompanying text.

³⁶ 75 Fed. Reg. at 65275 (“[The Department’s] estimates of the effects of this proposed rule are subject to uncertainty.”).

³⁷ *Id.*

³⁸ *Id.* at 65276.

³⁹ *Id.*

⁴⁰ *Improving Regulation and Regulatory Review*—Executive Order 13563 (Jan. 18, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order>.

⁴¹ *Id.* at Section 1.

⁴² *Id.*

⁴³ *Id.* at Section 4.

⁴⁴ See *infra* note 47.

⁴⁵ 29 C.F.R. § 2510.3-21(c).

⁴⁶ See, e.g., Employee-Owned S Corporations of America (Jan. 12, 2011), available at <http://www.dol.gov/ebsa/pdf/1210-AB32-040.pdf>; American Council of Engineering Companies (Jan. 19, 2011), available at <http://www.dol.gov/ebsa/pdf/1210-AB32-048.pdf>; American Institute of CPAs (Jan. 19, 2011), available at <http://www.dol.gov/ebsa/pdf/1210-AB32-050.pdf>; National Association of Realtors (Jan. 20, 2011), available at <http://www.dol.gov/ebsa/pdf/1210-AB32-052.pdf>; Glass Lewis & Co. (Jan. 20, 2011), available at <http://www.dol.gov/ebsa/pdf/1210-AB32-053.pdf>; Securities Law Committee of

Business Law Section of the State Bar of Texas (Jan. 11, 2011), *available at* <http://www.dol.gov/ebsa/pdf/1210-AB32-039.pdf>; Retirement Industry Trust Association (Jan. 26, 2011), *available at* <http://www.dol.gov/ebsa/pdf/1210-AB32-064.pdf>; International Corporate Governance Network (Jan. 21, 2011), *available at* <http://www.dol.gov/ebsa/pdf/1210-AB32-065.pdf>; New York City Bar Committee on Employee Benefits & Executive Compensation (Jan. 28, 2011), *available at* <http://www.dol.gov/ebsa/pdf/1210-AB32-070.pdf>; Investment Adviser Association (Feb. 2, 2011), *available at* <http://www.dol.gov/ebsa/pdf/1210-AB32-082.pdf>; International Data Pricing and Reference Data, Inc. (Feb. 2, 2011), *available at* <http://www.dol.gov/ebsa/pdf/1210-AB32-082.pdf>; The ERISA Industry Committee (Feb. 2, 2011), *available at* <http://www.dol.gov/ebsa/pdf/1210-AB32-090.pdf>; Institutional Shareholder Services Inc. (Feb. 2, 2011), *available at* <http://www.dol.gov/ebsa/pdf/1210-AB32-104.pdf>; U.S. Chamber of Commerce (Feb. 3, 2011), *available at* <http://www.dol.gov/ebsa/pdf/1210-AB32-111.pdf>; CFA Institute (Feb. 2, 2011), *available at* <http://www.dol.gov/ebsa/pdf/1210-AB32-128.pdf>; Business Roundtable (Feb. 3, 2011), *available at* <http://www.dol.gov/ebsa/pdf/1210-AB32-139.pdf>; and Committee of Federal Regulation of Securities of the Section of Business Law of the American Bar Association (Feb. 3, 2011), *available at* <http://www.dol.gov/ebsa/pdf/1210-AB32-152.pdf>

⁴⁷ Definition of the term “Fiduciary” Proposed Rule Public Comments, *available at* <http://www.dol.gov/ebsa/regs/cmt-1210-AB32.html>.