Bipartisan Policy Center: "Champions, Critics and Consequences of a New Fiduciary Standard"
Closing Remarks
As prepared for delivery

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Good morning. I am Ken Bentsen, president and CEO of SIFMA. I want to thank the Bipartisan Policy Center for hosting this important event today on what is a very complex but extremely consequential matter. This morning we've heard a variety of views on Department of Labor's proposal, and I appreciate the opportunity provide some closing remarks.

Let's start with our common ground.

There is at least one thing we can agree on: Americans are simply not saving enough for retirement, and more needs to be done to encourage smarter and better savings.

If we take a snapshot of the current market: Our current retirement market holds $24.7 trillion in market assets, up from $23.3 trillion in 2013. Ownership of retirement accumulations has become widespread; 63 percent of U.S. households (or 77 million) reported that they had employer-sponsored retirement plans, IRAs, or both in mid-2014; IRAs made up 10.9 percent of household financial assets at year-end 2014; at year-end 2014, households had 9.9 percent of their financial assets in 401(k) and other retirement plans, up from 7.0 percent in 1994; and in 2013, about eight out of 10 near-retiree households had accrued benefits in employer-sponsored retirement plans—defined-benefit and defined-contribution plans sponsored by private-sector and government employers—or IRAs.

While we are moving in the right direction, we have a ways to go. It is imperative that we continue to move forward to make retirement saving easier and more accessible, and avoid steps to make it more difficult.

This discussion is not about who is for or against a "best interest standard." That question has been asked and answered.

My members, who include broker-dealers, banks and asset managers, and who provide multiple services in both retail and institutional markets, including commission based brokerage services under the Securities Exchange Act of 1934 and fee based investment advisory services under the Investment Advisors Act of 1940, long ago endorsed a best interest or uniform fiduciary standard of care for all retail investors, not just the retirement sector. In fact, we endorsed it before Congress enacted Section 913 of Dodd-Frank. We have subsequently made our position very clear in comment letters to the SEC in 2010, 2011, 2012 and 2013.

Further, while the SEC has not yet acted under the authority explicitly granted to them by Congress, it is worth noting that the rules and precedents governing broker-dealers conduct with respect to retail investors, both in retirement and non-retirement accounts, have migrated toward a "best interest standard." FINRA, the congressionally mandated independent regulatory organization which writes and enforces rules governing broker-dealer conduct, on behalf of the SEC, has been refining its definition of suitability under Rule 2111 and most recently through guidance related to 401(k) and similar plan rollovers under Regulatory Notice 13-45 to require brokers to put clients' best interests ahead of their own. Further, investor claims in FINRA arbitration routinely include a fiduciary duty component. I don't say this to argue that we should stop here, but rather to point out where we are today which often gets overlooked by policy makers but is already accepted by firms and their compliance officials.

The debate is not if, but how we should implement such a standard. In our view, such standard should be consistent across the entire retail market. It should be consistent with the intent of Congress as defined in Section 913.

Our concern with the Department of Labor's proposal is not with its definition of "best interest," for as I stated we support that and that's where we are largely today. Rather, it is the further conditionality and restrictions on investors that the Department seeks to impose on top of and beyond that standard that we believe is extraneous, burdensome and perhaps ultimately in practice inconsistent with the best interests of the client.

The DOL's proposed definition of who is a fiduciary is very broad - encompassing many more activities as was ever intended, or that the Department originally proposed in 2010. For example, the seller's exception for the previous version allowed brokers to market their products and activities to retail customers. This time around, there is no seller's exception to market one's services or products to a retail customer or even to sell a plan to a small business owner.

In addition, while there is an education exception to being a fiduciary, it is more narrowly crafted than the education bulletin that has been in place since 1996. Under the current proposal, one can no longer name any specific investments without the activity becoming a fiduciary activity.

The Department's mechanism by which the rule could be business model neutral and allow for commission based accounts, the Best Interest Contract Exemption, contains so many conditions and restrictions that our members believe it is unworkable as drafted. This is material as the vast majority of IRAs, and for that matter all retail accounts, are held in commission brokerage accounts. Investors routinely choose between commission based brokerage and fee based managed accounts, most of our members offer both, and investors have overwhelming chosen brokerage, particularly for IRAs.

The Best Interest Contract Exemption would subject firms and advisors to a new legal liability (on top of existing legal liability), explicitly limit investor choice of product, impose level fees at the firm level and thus seek to set market prices and require firms to develop and build unprecedented new disclosure and compliance regimes, some of which may well conflict with other securities laws. Because of the increased liability risks and compliance costs, firms have indicated that the safer course of action would be to migrate most commission based accounts to fee based accounts that in most cases are exempt from the rule.

However, as stated fee based accounts cost the investor more than commission brokerage accounts. And, because of the higher service and compliance costs associated with fee based accounts, most firms limit such accounts to higher balanced accounts, thus potentially leaving millions with no option for advice or guidance. Further, the SEC has questioned whether higher cost fee based accounts are always in the clients' best interest, particularly buy and hold investor, which creates a conundrum. And, perhaps most importantly, clients have largely already made the choice of the type of account they wish to purchase, a choice they may be forced to lose.

Ironically, in the DOL's regulatory impact analysis accompanying the rule and a previous Council of Economic Advisors study in support of the rule, a study that we believe is seriously flawed, by the way, the Department cites the recent experience in the United Kingdom through its Retail Distribution Review in support of its effort. However, if you read the UK's own analysis of the RDR cited, you will find that more than 300,000 investors have lost service from brokers, 60,000 new clients turned down as the cost of advice has risen and firms have established account balance thresholds of 50,000 GBP. So in our view, the UK experience should be a warning as to the potential for unintended consequences.

In conclusion, I want to reiterate that this is not about being for or against the best interest standard. The industry's position in support of such a standard is quite clear and well documented. Rather it's how you do it. In our view the Department's proposal goes far beyond such a standard to limit choice and raise costs, unnecessarily so in our opinion. Equally troubling is that this experience underscores a failure in the public policy market place, something BPC has rightly focused on in the past. Rather than adopting a policy prerogative that will apply across the entire retail market place, we are headed in a direction of bifurcated rules, compliance and disclosure regimes imposed on the same market participants from different regulators. It is hard to see how investors won't be confused and the industry forced to build duplicative and redundant systems that will further affect costs. It seems illogical that we cannot address this in a uniform manner.

Thank you.