CLAIRE McCASKILL
MISSOURI

730 HART SENATE OFFICE BUILDING
WASHINGTON, DC 20510
(202) 224-6154
FAX: (202) 228-6326
http://mccaskill.senate.gov

United States Senate

WASHINGTON, DC 20510

COMMITTEES:
ARMED SERVICES

COMMERCE, SCIENCE AND TRANSPORTATION

HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
PERMANENT SUBCOMMITTEE ON INVESTIGATIONS
RANKING MEMBER

SPECIAL COMMITTEE ON AGING
RANKING MEMBER

August 5, 2015

The Honorable Thomas Perez
Secretary
U.S. Department of Labor
200 Constitution Avenue
Washington, DC 20210

RE: Comments on Proposed Conflict of Interest Rule RIN 1210-AB32

Dear Secretary Perez:

I want to congratulate you on your work examining the needs of American families saving for retirement. The Department of Labor's (the "Department") proposal to redefine the definition of "fiduciary" under the Employee Retirement Income Security Act of 1974 ("ERISA") has sparked much needed debate and interest about the financial needs of millions of individuals as they prepare for their later years. The retirement gap is now a truly staggering $7.7 trillion. Americans are living longer than ever and there is an increasing risk that many individuals will outlive their retirement savings. Ensuring that millions of Americans have access to affordable retirement advice is our best tool for shrinking this gap and helping these individuals as they age.

When five years ago, Congress passed the Dodd-Frank Wall Street Reform & Consumer Protection Act, we recognized that the regulations that govern the retirement savings and investment advice space deserved reexamination. In the 40 years since ERISA was passed into law, the way individuals save for retirement has shifted from defined benefit plans to defined contribution plans. Only 19 percent of private-sector workers now have access to defined-benefit plans. Instead of relying on a pension earned through a career with one employer, an individual will need to plan for retirement by managing savings in individual retirement accounts (IRAs) or an employer-sponsored 401(k). Furthermore, they will need to determine how to make those savings last through retirement. This more diverse retirement savings landscape, in addition to the multitude of applicable regulations that have developed, help us conclude that something must be done.

The proposal from the Department is expansive, and touches on nearly every aspect of the relationship between an investor and advisor in the qualified retirement space. I applaud the Department for highlighting the need for a universal best interest standard for all retirement advice. There should be a uniform standard for investments, distributions and rollovers. This is a step in the right direction.

However, there are still risks in this proposal. As drafted, the proposal risks forcing more investors away from the current brokerage model and toward an investment advisory account model. Investment advisory models are more expensive, and quite possibly unaffordable for holders of small accounts. Given a limited choice of only the more expensive advisory account model, more

555 INDEPENDENCE
ROOM 1600
CAPE GIRARDEAU, MO 63703
(573) 651-0964
FAX: (573) 334-4278

28 NORTH 8TH STREET
SUITE 500
COLUMBIA, MO 65201
(573) 442-7130
FAX: (573) 442-7140

4141 PENNSYLVANIA AVENUE
SUITE 101
KANSAS CITY, MO 64111
(816) 421-1639
FAX: (816) 421-2562

5850 DELMAR BOULEVARD
SUITE A
ST. LOUIS, MO 63112
(314) 367-1364
FAX: (314) 361-8649

324 PARK CENTRAL WEST
SUITE 101
SPRINGFIELD, MO 65806
(417) 868-8745
FAX: (417) 831-1349

individuals may completely lose access to in-person investment advice. Champions of the proposal suggest that new business models will evolve to assist these customers. However, the commission-based model serves 98 percent of IRAs under $25,000. At a time when policy-makers and regulators should be preserving, protecting, and enhancing retirement savings policy, the proposed rule reverses what has been a recent trend to increase coverage, reduce leakage and enhance savings vehicles. The stakes are too high to risk the loss of advice for such a critical segment of the retirement marketplace.

What follows are other areas of concern within the rule as proposed:

Protecting Rollover Advice

Transitioning to a new employer or retirement is an important milestone for any individual, and one overlooked by the Department's proposed rule. It was surprising that the proposal does not allow for this important conversation between an adviser and an investor about how to distribute or rollover the retirement account at this transition. In fact, the current draft appears to prohibit rollover advice. Investors looking for assistance with their transition are essentially cut off from advice from an investment professional under this proposed framework.

The proposed rule should be changed to allow for investors to discuss rollover options with an investment advisor. Too many in the retirement industry share tales of investors who seek to cash out their 401(k), because they lack the understanding of the tax consequences or their other options. These fateful decisions can push an individual into an unstable retirement. The Department should focus on risk posed by the retirement funds lost to leakage - those funds cashed out at a change of career, a layoff, or retirement. These billions of dollars in leakage will put individuals at greater risk in their retirement years. A simple conversation with an investment professional should be protected in this situation.

Preserving Advice for Small Businesses

A major focus of our work in the Senate is our concern about expanding access to retirement accounts to small employers. According to the Government Accountability Office (GAO), only 14 percent of small employers offer some type of retirement savings plan for their employees. The new proposal's "seller's exemption" makes it challenging, if not impossible, for investment advisors to speak to individuals who might be in a position to set up a plan for a small company. The best interest contract exemption will no longer apply to participant-directed small business plans with fewer than 100 participants, which make up the majority of small business plans. No other exemption is available for these plans. The small business owners will be left to figure out retirement platforms for their business without any help at all, or will have to hire an independent third party to do the work for him, neither of which are ideal options.

This is a blanket rule eliminating advice for all small employer plans with under 100 participants. Such a bright line does not take into account the sophistication of fiduciaries of these plans, which has no correlation to the number of participants in the plan. Principals of small companies may in many cases have broad and expansive business savvy. These business owners have the knowledge and experience to run their own successful business, but are likely still not experts in the retirement space. Even if the executives of a small business do not have all of the expertise needed, we can expect that they would know enough to consult with a financial advisor, and to also understand the advisor's financial share from any transaction.

We should be encouraging more small employers to offer retirement savings plans for employees and trust that preserving the relationship between a financial advisor and these small businesses can help us to increase the percentage of employers who offer a retirement platform to their workers.

Expanding Investment Education

The education exemption language in the proposed rule severely restricts educational conversations with investors. Under this proposal, the act of describing a financial product and explaining its features and how it can help meet the needs of an investor is no longer an educational conversation. Even general descriptions of investments used by similarly situated individuals, or explanations of the features of a particular investment fund is classified as investment advice under the proposed rule. All discussions, even those meant to be purely informative, will be halted under this new relationship until the parties to the conversation can sign a contract and trigger the fiduciary relationship. Financial literacy, especially when related to retirement savings, is not where it should be among ordinary individuals, and this proposal works only to decrease – not increase – access to financial education.

There should be a middle ground available here. The Department's final rule should clarify that general investment education and advice about distributions falls under an education exemption. Factual information about a plan's investment options and rollover options should be considered education and not advice. The Department should also coordinate with the Securities & Exchange Commission, which has a working definition of "recommendation" under their own rules.

Lifetime Income

Annuities are often sold to investors as a way to ensure guaranteed income for life. The Department's proposal would nearly eliminate access to many annuity products, and create an unlevel playing field for variable and fixed annuities. The proposed rule focuses exclusively on cost, which makes it difficult to match an investor with the most appropriate and safest lifetime income product, instead of just the cheapest option. Examples of ill-suited annuities sold to investors are already prohibited under the current ERISA framework. But this does not mean that annuities do not have a valuable place among a menu of retirement options. A one-sized fits all rule that restricts these products and creates confusion is inappropriate. Annuities are already subject to strict state regulation even beyond that of mutual funds and ordinary retirement accounts. While annuities have unique characteristics that make them unsuitable for some, there is no reason to eliminate them as an investment option entirely.

Lifetime income products are becoming increasingly more important, especially given the shift from defined benefit plans to defined contribution plans. This Administration has done an immense amount of work to promote lifetime income through Treasury guidance that encourages the use of annuities in 401(k)s. Furthermore, there has been a long-time bipartisan, bicameral effort to promote lifetime income illustrations in the private sector much like Federal employees receive on their Thrift Savings Plan statements. The proposed rule seems in conflict with the good work that has been done on lifetime income.

Reducing Onerous Disclosure Requirements

The Department's Best Interest Contract (the BIC) proposal is new to the landscape. Under the proposal, an investor and advisor will be parties to a contract that will have broad, standardized

disclosures across the industry. The proposal greatly expands the amount of information that must be disclosed by financial professionals to their clients. However, the proposal should be more effectively tailored to be effective.

The proposed rule requires the advisor to disclose all direct and indirect compensation for the recommended financial products, as well as the other competing products that could be offered as an alternative, and projections for these costs at 1, 5, and 10 year intervals. With this language, the Department mistakes providing larger amounts of information to consumers, with providing good and useful information to consumers. There are tens of thousands of mutual funds in the market, and a major investment advice firm might offer thousands of fund options to a client. Providing information about thousands of options would overwhelm any ordinary person. The forward projections of costs may also run afoul of securities laws. The Department should be mindful of what information would be most useful to an ordinary investor so that it can be provided in a meaningful way.

Transition Rules

The proposal is unclear regarding how financial advisors should transition to the new rule and includes an aggressive 8-month timeline. Bringing each investment account into compliance with the new regime that requires a contract between the customer and advisor will be a labor-intensive process. An advisory firm with millions of IRAs under their umbrella would need to process tens of thousands of contracts each day to bring them into compliance before the deadline. Furthermore, the proposal is unclear regarding what will happen to those customers who have yet to enter into that contract before the deadline. Will investment advisors be permitted to continue to service these accounts? Should those millions of accounts receive a special grandfathered status until the transition paperwork can be completed? These are essential questions to address.

From a broader view, the initial proposed rule would require a major redesign of large lines of business for so many investment advisors. These advisory firms need to begin their planning for the future far in advance. It would be impossible for businesses of this size to implement such sweeping changes upon the release of the final rule. If these changes cannot be effectively implemented within the required time frame, there will be major disruption not just to the industry, but to the millions of low and middle income Americans saving for retirement. The Department should engage with the stakeholders regularly so that they can effectively plan their future operations model before the final rule is released. I encourage the Department to set a timeline that better reflects the complexities of transitioning to this new framework.

Thank you for your attention this matter. I wish you the best in your work to ensure more Americans can save for retirement

Sincerely,

Claire McCaskill
United States Senator