Statement of Samuel B. Edwards and Joseph Peiffer
On behalf of the Public Investors Advocate Bar Association (PIABA)
Before the Employee Benefits Security Administration
United States Department of Labor

Hearing on Improving Investment Advice for Workers & Retirees

September 3, 2020

Thank you for the opportunity to speak here today. My name is Sam Edwards and I am the current president of PIABA, the Public Investors Advocate Bar Association. PIABA is an international bar association whose mission is to represent wronged investors and promote the interests of all public investors, which we do by working with legislators and regulators to craft the best laws and rules to protect investors, while also advocating for public education regarding investment fraud and industry misconduct. I also have with me Joe Peiffer, who is a past president of PIABA, member of our Board of Directors, and one of our members who was most heavily involved in working with the Department of Labor (the "Department") when the Department issued its prior fiduciary rule.

PIABA's attorneys have represented tens of thousands of investors from all over the country – who are often retirees – and who have been harmed by poor, and typically conflicted, investment advice. PIABA members have seen firsthand the impact that weak standards can have on the hard earned retirement savings of workers and retirees. PIABA has two chief concerns about the Department's proposed rule. First, PIABA urges the Department to reconsider its reinstatement of the 1975 Regulation as applying the five-part test to determine whether an adviser is a fiduciary. The regulation, if implemented, will result in ERISA's fiduciary obligations applying to very few of the advisers who investors rely upon. Second, PIABA believes the new regulation, to the extent it would apply to any adviser or brokerage firm, weakens the fiduciary standard, especially as it relates to the proposed prohibited transaction exemption. If these rules are implemented, they will negatively impact workers and retirees and, essentially repeal ERISA's fiduciary duty.

The Department itself has recognized that many who provide investment advice do not meet the five-part test, and as a result, would not be deemed to be investment advice fiduciaries, despite the "critical role they play in guiding plan and IRA investments."[1]

Take for example the case involving Jack, a school teacher, who had been saving for his retirement through automatic withdrawals from his paycheck every two weeks for almost twenty five years. Jack had saved approximately $150,000, which his broker removed from Jack's account in two transactions, ultimately investing the money in an overseas hedge fund run by the

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[1] Dep't of Labor, Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20,945, 20,946 (Apr. 8, 2016).

broker. Given that the investments were made through two transactions, it is a question of fact whether the broker would be deemed to be giving advice on a regular basis. As a result, even though Jack completely lost his hard-earned retirement savings, his broker may not be considered to be an Investment Advice Fiduciary.

Even if there is the chance that a brokerage firm would otherwise meet the test, we have seen brokerage firms use carefully tailored language in their account agreements to ensure that they do not meet the five-part test. For example, Morgan Stanley's IRA account agreement states that it "will not provide investment advice that will serve as a primary basis for the investment decisions of the Participant's Account," and, then, goes on to explicitly state that it will not be deemed a fiduciary under either the Internal Revenue Code or ERISA.[2] Wells Fargo buries in its IRA agreement language that it will not "provide investment advice or recommendations that the Participant (or his duly authorized representative) will use as a primary basis for investment decisions for the IRA."[3] Similarly, LPL Financial's Retirement Plan Agreement contains language stating that "You further acknowledge and agree that all investment decisions with respect to the Plan will be based on your independent judgment and that any information, research and/or recommendations provided by LPL or your Representative are not the primary basis for the Plan's investment decisions."[4]

Merrill Lynch's IRA Agreement says "We provide no advice on the investment consequences involving your IRA, unless provided under separate agreement. Except as provided under such separate agreement, we will not have discretionary authority or control with respect to the investment of your IRA assets and will not render advice that is individualized for your IRA under any mutual agreement, arrangement or understanding that the advice will serve as a primary basis for your IRA investment decisions."[5] This language is included under a section of the account agreement entitled, "Limitation of our liability" and is clearly meant to avoid the application of ERISA to IRA accounts at Merrill Lynch.

Edward Jones's IRA Agreement acknowledges that it may provide "information about financial products as well as investment research, investment recommendations, financial assessment tools, investor education, advice incidental to such services, and other services to enable [an

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[2] Morgan Stanley, Individual Retirement Plan Agreement, Article III, 3.1 Direction By Participant (available at https://www.morganstanleyclientserv.com/publiccontent/msoc/pdf/acctdocs4.pdf) (last viewed August 28, 2020).

[3] Wells Fargo Bank N.A., Traditional IRA Custodial Agreement, Section II, Article VIII, 5. Investments, (e) Investment Advisory Services (available at https://wellsfargofunds.com/assets/edocs/form/traditional-ira-and-roth-ira-custodial-agreements-and-disclosures.pdf) (last viewed August 28, 2020).

[4] LPL Financial LLP, Retirement Plan Brokerage Account Agreement, The Role Of LPL Financial, 1. Brokerage Services (available at https://www.lpl.com/content/dam/lpl-www/documents/disclosures/AP-RP-Brokerage.pdf) (last viewed August 28, 2020).

[5] Merrill Lynch, Traditional Individual Retirement Account Custodial Agreement, Section 9: Limitation of our Liability (available at https://olui2.fs.ml.com/publish/content/application/pdf/GWMOL/TraditionalIRACustodialAgreementDisclosure.pdf) (last viewed August 28, 2020).

investor] to make [] investment decisions."[6] Notwithstanding such services, Edward Jones, like Merrill Lynch, asks its customers to agree that "i) Edward Jones and my financial advisor are not serving as fiduciaries and ii) Edward Jones and my financial advisor are not rendering advice on an ongoing or regular basis."[7]

Investment firms will continue to use this language buried deep in complicated IRA and Plan agreements to make investors unknowingly agree that the firms should not be held to fiduciary obligations that are properly owed to workers and retirees. Without being held to a true fiduciary standard, investment professionals will continue to seek to engage in the misconduct that allows those firms to profit at the expense of workers and retirees. Collectively, just the handful of brokerage firms mentioned above manage hundreds of billions in retirement assets. That is a lot of hard-earned savings the Department will unnecessarily put at risk.

Take for example Javier and Carmen. The couple attended a dinner hosted by a local insurance broker, which was advertised to be a 75-minute presentation that would allow its attendees to increase their social security income. The couple was on the verge of retirement, Javier as sheet metal worker and Carmen having spent her career working in interior design, as a florist, and as a secretary. Through their hard work and diligence, Javier and Carmen had saved $140,000. Instead of helping with social security income, the broker invested their retirement savings into a portfolio of insurance contracts and an investment that was purported to be an assignment of pension income streams to third parties. Both investments paid the broker large commissions. However, neither was appropriate for Javier and Carmen, who ended up losing all of their retirement savings in these investments. The Department should be doing everything it can to ensure that this type of conduct is prohibited. Yet, this conduct is arguably not even captured by the regulation.

There are other examples of workers and retirees being harmed by bad and conflicted investment advice, advice that will never be captured by Department oversight under these changes. For example, Greg had been saving for his retirement and, looking for investment advice, he turned to an adviser who has a local radio show. The adviser touted that he was a well-recognized retirement planning authority, and that he was one of the top three financial consultants in the country. The adviser recommended that Greg invest his IRA in two private placements, describing them as secure and relatively low risk. However, it turned out that both investments were not as they had been represented, and Greg has lost his retirement savings, almost $200,000. Here again, it is unclear whether the adviser will meet the five part test necessary to be deemed an Investment Advice Fiduciary. Was the advice on a regular basis? Was it pursuant to a mutual agreement, arrangement, or understanding that it would serve as the primary basis for the investment decision? Or did the broker explicitly disclaim any such agreement or understanding in the account agreement?

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[6] Edward Jones, Traditional Individual Retirement Account Custodial Agreement, Article VIII, 6. Powers, Duties and Obligations of Edward Jones (available at https://www.edwardjones.com/images/self-directed-traditional-ira-packet.pdf) (last viewed August 28, 2020).

[7] *Id.*

The simple reality is that reinstating the five-part test will result in the fiduciary obligation being completely avoided by almost anyone who wants to avoid it, rendering the ERISA fiduciary obligation meaningless. Moreover, even assuming a broker or adviser is captured by the regulation, the Department is proposing to weaken the standard of care that would be owed to workers and retirees. My colleague Joe Peiffer is going to address this second point from PIABA's perspective.

Hello, my name is Joe Peiffer and I've devoted both my law practice and adult life to representing investors and retirees. I'm proud to have represented thousands of retirees in cases against their brokers and brokerage firms in FINRA arbitration, in several ERISA class actions against large financial services firms, and against insurance agents masquerading as financial advisers. I have twice served as the chairman of the Business Torts Section of the American Association for Justice, served as the President of PIABA, currently sit on the Board of Directors of PIABA, served on the FINRA Taskforce, testified extensively on behalf of the fiduciary rule, and I have even testified at the Department on the very topic at hand.

Whenever I have an opportunity to speak for investors, I feel compelled to talk about the retirees of a major oil and gas company in Louisiana who lost most of their life savings to a conflicted broker. Some were left with so little that I hosted a few of them in my home during the trial and my extended family graciously opened their doors to others. When someone walks in our doors, typically, they have been absolutely devastated. When I say devastated, I think of a man who had to rent a room from his ex-wife and countless others who have either contemplated or attempted suicide. My vocation has truly become my avocation.

This summer, as infection rates started spiking again and COVID-19 death rates soared, the SEC began the implementation of its controversial alternative for the fiduciary standard with the misleading name "Regulation Best Interest." The new SEC rule doesn't just rewrite FINRA's flawed "suitability standard," it creates a safe harbor that allows financial advisers to not work in their client's best interest as long as they disclose their conflict. What good is a disclosure in a packet of documents like a house closing going to do other than give bad advisers a defense to their conflicted conduct?

By basing the Impartial Conduct Standards on the SEC's Regulation Best Interest, the Department is abdicating its responsibility to ensure that retirement savings are protected. The goal of the Department should not be to unify the regulation of retirement investments, thereby lowering the standard of conduct expected by those who provide advice to retirement investors. Rather, the goal of the Department should be to ensure that those providing advice to retirement investors are held to the highest fiduciary standards.

PIABA knows from experience the real result of not holding those who give investment advice for a fee to a fiduciary standard, especially for our retired citizens. Let me tell you the recent story of Millicent and her family. When I first met Millicent and her sons, she was a 91-year-old widow living in a nursing home in Boca Raton, Florida. Her sons were horrified to learn that before she became incapacitated, their mother had been dealing with a disgraced financial adviser. The adviser had been the subject of 8 customer disputes regarding his unsuitable

investment advice and sales practice violations. He was also the subject of 4 regulatory events, the final of which resulted in him being barred from FINRA in May 2019.

Millicent was told to invest in high risk, illiquid, but most importantly, high commission products. Millicent's interests were clearly not considered, but rather, only the adviser as these unsuitable investments paid him $200,000 in commissions. Tragically, last month, Millicent succumbed to COVID-19. Her sons are left scrambling to pick up the pieces. They do not know how to liquidate much of her portfolio and what these products are even worth, if anything. This is the type of misbehavior that the Department needs to protect against, not to provide exemptions that would allow those who our retirees depend on to avoid the consequences of their bad actions.

Workers and retirees deserve more, they deserve real protections. As PIABA said in its comment letter, the Department should not reinstate the 1975 Regulation. Rather, the Department should adopt a new regulation which eliminates the need to establish that investment advice has been given on a regular basis, or pursuant to a mutual agreement that the advice will serve as the primary basis for the investment decision. Any individual providing investment advice for a fee should be deemed an Investment Advice Fiduciary and held to the highest fiduciary standards. To the extent the Department establishes a class exemption, such an exemption should not lower the fiduciary obligations of Investment Advice Fiduciaries. Retirement investors deserve to have their retirement savings protected, as was intended by the enactment of ERISA. PIABA urges the Department to adopt standards that go beyond those adopted by the Commission in the enactment of Regulation Best Interest, which the Commission itself conceded was not a fiduciary standard.