

The Employee Retirement Income Security Act of 1974: An Outdated Regulatory Framework for Retirement Investors

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ABSTRACT: Major changes in the retirement plan industry justify further scrutiny of those who provide investment advice because retirement savers are more reliant on them when making investment decisions. However, investment professionals are held to different standards of care when offering advice. Investment advisers adhere to a fiduciary standard, which requires them to act in the best interests of their client when providing investment advice. In contrast, broker-dealers are subject to the much lower standard of suitability, which only requires broker-dealers to provide suitable investment advice. Unfortunately, the suitability standard has allowed broker-dealers to provide advice despite having conflicts of interest. Investors are harmed as a result. The Employee Retirement Income Security Act of 1974 (“ERISA”) was enacted to protect retirement plans, but much of the investment advice given today falls out of ERISA’s scope. Both the U.S. Department of Labor and the U.S. Securities and Exchange Commission have attempted reforms in order to provide further protection, but have fallen short. Therefore, Congress must amend ERISA to impose a fiduciary standard on broker-dealers to minimize conflicted advice for ordinary people attempting to save and invest for retirement.

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I. INTRODUCTION

Congress passed the Employee Retirement Income Security Act of 1974 (“ERISA”) to protect private employee retirement pensions.¹ ERISA provided much needed reform because of the absence of any regulation to prevent the misuse of pension plan funds.² The landscape of retirement plans has drastically changed in ways drafters of ERISA could not likely have imagined. When ERISA was enacted, defined benefit plans³ or traditional pensions were the primary retirement plan.⁴ However, employers have moved away from traditional pension plans to 401(k)s and Individual Retirement Accounts (“IRA(s)”)⁵ Retirement is no longer as certain as it once was because the burden of saving and investing for retirement has shifted from employers to individual participants.⁶ As a result, retirement investors are increasingly dependent upon the advice of investment professionals.⁷ However, investment professionals are not all subject to the same standards of care when rendering investment advice.⁸ Consequently, the need for regulation over how these entities behave and represent themselves to financial consumers has grown.⁹ However, ERISA is not equipped with addressing these recent developments, leaving retirement investors largely unprotected.¹⁰ Reforms by both the U.S. Department of Labor (“DOL”) and the U.S. Securities and

1. Rebecca J. Miller et al., *ERISA: 40 Years Later*, J. ACCT. (Sept. 1, 2014), <https://www.journalofaccountancy.com/issues/2014/sep/erisa-20140881.html> [<https://perma.cc/SVB5-7WCE>].

2. *Id.*

3. A defined benefit plan is an employer-funded plan that guarantees employees a monthly benefit at retirement. *Types of Retirement Plans*, U.S. DEP’T LABOR, <https://www.dol.gov/general/topic/retirement/typesofplans> [<https://perma.cc/7LUZ-72HP>] [hereinafter *Retirement Plans*].

4. Miller et al., *supra* note 1.

5. EXEC. OFFICE OF THE PRESIDENT OF THE U.S., *THE EFFECTS OF CONFLICTED INVESTMENT ADVICE ON RETIREMENT SAVINGS* 5 (Feb. 2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_coi_report_final.pdf [<https://perma.cc/BJ53-YGTT>].

6. See James McWhinney, *The Demise of the Defined-Benefit Plan*, INVESTOPEDIA, <https://www.investopedia.com/articles/retirement/06/demiseofdbplan.asp> [<https://perma.cc/5JMQ-RLCM>] (last updated June 25, 2019) (explaining how under defined-benefit plans, an employee knew exactly how much benefit he or she would receive in retirement, while the only certainty with a defined-contribution plan is how much the employee is contributing to the plan).

7. Jennifer Watkins, *Defined Benefit vs Defined Contribution: The Basics*, NAT’L PUB. PENSION COAL. (Aug. 14, 2017), <https://protectpensions.org/2017/08/14/defined-benefit-vs-defined-contribution-the-basics-2> [<https://perma.cc/FPC4-EVNG>].

8. Wes Moss, *Fiduciary vs. Suitability: Why You Need to Know the Difference*, BALANCE, <https://www.thebalance.com/difference-between-fiduciary-and-suitability-4010117> [<https://perma.cc/gDWU-ZCHF>] (last updated Aug. 4, 2018).

9. For example, the Department of Labor has promulgated new regulations for the definition of the term “fiduciary” and the conflict of interest rule that were both originally codified in ERISA. 29 U.S.C. § 1002(21)(A) (2012); see Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20,946 (Apr. 8, 2016) (codified at 29 C.F.R. §§ 2510.3-21, 2550.408(b) (2019)).

10. *Infra* Part III.

Exchange Commission (“SEC”) to accurately reflect the realities of the current retirement marketplace have fallen short.¹¹

This Note argues that Congress should propose an amendment to ERISA that would impose a fiduciary standard on broker-dealers who provide investment advice for all retirement plans. Part II provides an overview of the historical development of private pension plans, the emergence of ERISA as federal protection for private pension plan beneficiaries, and recent developments by the DOL and SEC to address retirement market changes. Part III analyzes the problems associated with ERISA’s inability to protect investors and the SEC’s ineffective proposed solution. These problems stem from the fact that most investment advice given today is outside the scope of ERISA due to a shift away from employer-based retirement plans and increased dependence on investment professionals who share different standards of care. Part IV proposes that Congress amend ERISA and apply the highest standard of care, a fiduciary standard, to broker-dealers not previously subject to such a standard across all retirement accounts. Part V concludes.

II. BACKGROUND

In order to understand the need to protect retirement savings, it is necessary to explore how the idea of retirement first arose and developed over time. Therefore, Section II.A discusses where the idea of retirement originated. Section II.B details the rise of private pension plans in the United States. Section II.C addresses the mismanagement and abuse of funds by plan managers that accompanied the emergence of private pension plans, leading to the enactment of ERISA. Section II.D provides an overview of ERISA’s statutory structure. Section II.E examines how shortly after ERISA was enacted, the DOL created a test to further define fiduciary under Title I of ERISA. Section II.F introduces the DOL’s recent efforts to create a more encompassing definition of fiduciary under ERISA. Finally, Section II.G focuses on the Fifth Circuit Court of Appeals vacating the DOL’s rule. Additionally, this Section discusses the SEC’s proposed rule in the wake of the rejection of the DOL’s fiduciary rule.

A. ORIGINS OF RETIREMENT

The idea of retirement originates in military history.¹² Historians credit the Roman Empire for conceiving the idea of retirement income by offering military pensions to retired soldiers.¹³ Augustus Caesar incentivized them with

11. *Infra* Section II.G and Part III.

12. James Tehrani, *The History of Retirement Benefits*, WORKFORCE (June 21, 2016), <https://www.workforce.com/2016/06/21/the-history-of-retirement-benefits> [https://perma.cc/S86N-Z3HU].

13. *Id.*

a pension to prevent insurrection within the empire.¹⁴ Military pensions also have a historical place in the United States.¹⁵ During the American Revolutionary War, the colonies extended coverage to members of the militia.¹⁶ The Continental Congress established pensions for its army and navy that continued throughout the nineteenth century.¹⁷ Following the Civil War, hundreds of widows and disabled soldiers were provided generous pension plans.¹⁸ However, these benefit programs did not extend to the general population.¹⁹

B. THE RISE OF PRIVATE PENSION PLANS IN THE UNITED STATES

Until the late nineteenth century, the understanding was that people worked until they died or could no longer work.²⁰ Since life expectancy was so low, there was no need for retirement.²¹ However, in 1889, Germany became the first nation to adopt a government pension plan to financially support older Prussians.²² The idea of providing financial security to older people eventually caught on in Europe and the United States.²³ The American Express corporation created the first non-military, private, employer-provided pension plan in 1875.²⁴ Banking and railroads were among the first industries

14. Vauhini Vara, *The Real Reason for Pensions*, NEW YORKER (Dec. 4, 2013), <https://www.newyorker.com/business/currency/the-real-reason-for-pensions> [<https://perma.cc/B27Q-8GQZ>].

15. See ROBERT L. CLARK ET AL., PENSION RESEARCH COUNCIL OF THE WHARTON SCH. OF THE UNIV. OF PA., A HISTORY OF PUBLIC SECTOR PENSIONS IN THE UNITED STATES 2 (2003), available at <http://pensionresearchcouncil.wharton.upenn.edu/wp-content/uploads/2015/09/0-8122-3714-5-1.pdf> [<https://perma.cc/L2YP-RHY4>] (finding that even before America's founding, pensions were provided for disabled men injured from conflicts with Native Americans).

16. *Id.*

17. *Id.* at 3.

18. *Historical Background and Development of Social Security: Civil War Pensions: America's First "Social Security" Program*, SOC. SEC. ADMIN., <https://www.ssa.gov/history/briefhistory3.html> [<https://perma.cc/AYT9-3NG6>].

19. *Id.*

20. Seattle Times Staff, *A Brief History of Retirement: It's a Modern Idea*, SEATTLE TIMES, <https://www.seattletimes.com/nation-world/a-brief-history-of-retirement-its-a-modern-idea> [<https://perma.cc/848Q-REGD>] (last updated Dec. 31, 2013, 6:31 PM).

21. Chris Wilmerding, *How Retirement Was Invented*, THAYER PARTNERS, LLC (Mar. 23, 2016, 9:30 AM), <https://www.thayerpartnersllc.com/blog/how-retirement-was-invented> [<https://perma.cc/4SU2-V6T2>].

22. See *id.* (describing Otto von Bismarck's view that those who could no longer work due to their old age should be financially cared for by the state); see also Seattle Times Staff, *supra* note 20 (describing the mentality before the late nineteenth century was to "[w]ork until you die—or until you can't work anymore"); Mary-Lou Weisman, *The History of Retirement, from Early Man to A.A.R.P.*, N.Y. TIMES (Mar. 21, 1999), <https://www.nytimes.com/1999/03/21/jobs/the-history-of-retirement-from-early-man-to-aarp.html> [<https://perma.cc/LR5F-KF7W>] (noting that Otto von Bismarck "established the precedent that government should pay people for growing old").

23. Seattle Times Staff, *supra* note 20.

24. ROBERT L. CLARK ET AL., *supra* note 15, at 5.

to provide employee pensions.²⁵ Pension benefits were often paid from annual revenues of companies, but could be severely underfunded or nonexistent if the company went bankrupt.²⁶ Congress began to recognize the importance of pensions and subsequently passed the Internal Revenue Acts of 1921 and 1926 to provide preferential tax treatment to contributions to pension plans.²⁷ The Acts allowed employers to deduct pension-plan contributions from corporate income²⁸ and ensured that taxes would be deferred until pensions were distributed.²⁹

Unfortunately, by the Great Depression, many private pension plans were bankrupt due largely to inadequate management of funds.³⁰ However, these circumstances ultimately led to the enactment of the Social Security Act in 1935 and turned worker attention even more to the need for old-age security.³¹ The Social Security Act provided a floor for workers that other forms of retirement income security, particularly private pensions, could supplement.³² During World War II, pension benefits were exempt from wartime wage controls, which allowed employers to attract workers with higher pension benefits instead of higher wages.³³ In the 1940s, the federal courts held that pensions should be considered in collective bargaining between labor unions and employers.³⁴ The combination of these factors led to a rapid expansion of private pension plans.³⁵ Between 1940 and 1960, the number of private pension plan participants “increased from 3.7 million to 19 million, or to nearly 30 percent of the labor force.”³⁶

25. Melissa Phipps, *The History of the Pension Plan*, BALANCE, <https://www.thebalance.com/the-history-of-the-pension-plan-2894374> [<https://perma.cc/LQ9W-H7LW>] (last updated Jan. 28, 2019).

26. PATRICK PURCELL & JENNIFER STAMAN, CONG. RESEARCH SERV., RL34443, CRS REPORT FOR CONGRESS: SUMMARY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA) 2 (2008).

27. Staff Report, *Legislative History of Employee Benefits*, WORKFORCE (Sept. 1, 1999), <https://www.workforce.com/1999/09/01/legislative-history-of-employee-benefits> [<https://perma.cc/D4EA-EP9L>].

28. *History of EBSA and ERISA*, U.S. DEP'T LABOR, <https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/history-of-ebsa-and-erisa> [<https://perma.cc/NSB4-AM9X>].

29. Staff Report, *supra* note 27.

30. STAFF OF S. SPECIAL COMM. ON AGING, INFORMATION PAPER ON THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: THE FIRST DECADE SENATE, S. PRT. 98-221, at i, 3 (Comm. Print 1984) [hereinafter INFORMATION PAPER].

31. *Id.*

32. Kathryn L. Moore, *An Overview of the U.S. Retirement Income Security System and the Principles and Values It Reflects*, 33 COMP. LAB. L. & POL'Y J. 5, 7 (2011).

33. PURCELL & STAMAN, *supra* note 26, at 2.

34. *Id.*

35. *Id.*

36. Lisa Beyer, *The Rise and Fall of Employer-Sponsored Pension Plans*, WORKFORCE (Jan. 24, 2012), <https://www.workforce.com/2012/01/24/the-rise-and-fall-of-employer-sponsored-pension-plans> [<https://perma.cc/8QNE-DW9V>].

C. ENACTMENT OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT

As private pension plans grew in the mid-twentieth century, so did the propensity to misuse pension benefits at the expense of employees.³⁷ Congress began investigating potential abuses in the 1950s and found the growth had led to all kinds of abuse and mismanagement.³⁸ As a result, Congress enacted the 1958 Welfare and Pension Plans Disclosure Act (“WPPDA”), which required employers to disclose how pension plan benefits were managed and used.³⁹ The final version of the law, after passing through the House of Representatives, was much weaker than the original Senate version and according to President Eisenhower “would have to be improved.”⁴⁰ Despite its shortcomings, the Act’s broad coverage of plans and selection of the Department of Labor as the administering agency was significant.⁴¹ Advocates hoped that with more transparency, employers or unions would be less tempted to misuse workers’ pension funds.⁴²

Despite the new law, the DOL continued to advocate for stronger amendments.⁴³ Congress amended WPPDA in 1962, restoring the Department of Labor’s enforcement provisions that the House stripped in 1958.⁴⁴ President Kennedy also created the Committee on Corporate Pension Funds to “review . . . the implications of the growing retirement and welfare funds”⁴⁵ Concerns over the security of pension benefits heightened when the Studebaker-Packard automobile company failed in 1963.⁴⁶ The company could not give its 7,000 workers the benefits they were promised due to an inadequately managed pension plan.⁴⁷ The Studebaker bankruptcy gave credibility to President Kennedy’s Committee, and highlighted the continuing need to protect worker pensions.⁴⁸ However, the 1965

37. PURCELL & STAMAN, *supra* note 26, at 3.

38. Employees relying on a pension could find it underfunded, vesting schedules were extremely long (up to 30 years) before retirees could take advantage of the benefits, and embezzlement of funds was common. Justin Owens, *Defined Benefit Plans: A Brief History*, RUSSELL INV. 1, 3 (Nov. 2014), <https://russellinvestments.com/-/media/files/us/insights/institutions/defined-benefit/defined-benefit-plans-a-brief-history.pdf> [<https://perma.cc/GW5E-YTEG>].

39. See Julia Kagan, *Welfare and Pension Plans Disclosure Act (WPPDA)*, INVESTOPEDIA, <https://www.investopedia.com/terms/w/welfare-and-pension-plans-disclosure-act.asp> [<https://perma.cc/B6HC-77N7>] (last updated June 7, 2018) (mandating that employers and labor unions provide the government with a detailed description of plan administration and financial reports).

40. INFORMATION PAPER, *supra* note 30, at 6.

41. *Id.* at 7.

42. PURCELL & STAMAN, *supra* note 26, at 3.

43. INFORMATION PAPER, *supra* note 30, at 7.

44. *Id.*

45. *Id.* at 8.

46. Beyer, *supra* note 36.

47. *ERISA History*, JURIST (Oct. 4, 2013, 12:01 PM), <https://www.jurist.org/archives/feature/erisa-history> [<https://perma.cc/ZX4B-MT85>].

48. *Id.*

Committee's report "dismissed . . . the need for Federal fiduciary standards."⁴⁹ In the same year, the Senate Permanent Subcommittee on Investigations found that the WPPDA's disclosure requirements, while well intended, were not seriously deterring the abuse of employee benefit funds.⁵⁰

Senator Jacob K. Javits, considered the father of ERISA,⁵¹ introduced the first pension reform bill to impose fiduciary standards of care on employee pension funds.⁵² This sparked a back and forth between the Johnson Administration, the DOL, and Congress, on the proper legislation to address fiduciary standards for pension plans and pension reform overall.⁵³ In 1967, Senator Javits introduced a comprehensive pension reform bill, yet with the election of Richard Nixon, reform came to a halt.⁵⁴ After continued discussions among committees, Senator Javits introduced a joint bill that replaced his original proposal.⁵⁵ Prior to that Bill, pension reform legislation was exclusively a labor issue.⁵⁶ However, due to the financial elements involved in pension administration, such as private pension plans benefiting from favorable tax treatment under the Internal Revenue Code, the Senate Finance Committee became involved.⁵⁷

Finally, in 1974, Congress passed ERISA, which included elements produced by the House and Senate Labor Committees, the House Ways and Means Committee, and the Senate Finance Committee.⁵⁸ ERISA delegated power between the DOL, the Internal Revenue Service, and the Pension Benefit Guaranty Corporation.⁵⁹

D. STATUTORY FRAMEWORK OF ERISA

ERISA contains various provisions intended to protect the benefits of plan participants. Section II.D.1 examines plans covered by ERISA, while Section II.D.2 discusses plans that have become widespread post-ERISA and are thereby not covered by ERISA's protections. Section II.D.3 highlights relevant provisions of ERISA for this Note.

49. INFORMATION PAPER, *supra* note 30, at 10.

50. *Id.*; see also G. Robert Blakey, *Welfare and Pension Plans Disclosure Act Amendments of 1962*, 38 NOTRE DAME LAW. 263, 285 (1963) (finding that the criticism of the WPPDA stemmed from its inadequate disclosure provisions because they did not provide full and complete disclosure).

51. Rob Kozlowski, *Jacob K. Javits*, PENSIONS & INV. (Oct. 27, 2003, 12:00 AM), <http://www.pionline.com/article/20031027/PRINT/310270749/jacob-k-javits> [https://perma.cc/J727-3WPV].

52. INFORMATION PAPER, *supra* note 30, at 12.

53. *Id.* at 11.

54. *Id.* at 14–15.

55. *Id.* at 20.

56. PURCELL & STAMAN, *supra* note 26, at 3.

57. *Id.*

58. *Id.*

59. David A. Pratt, *Focus On . . . Lawsuits Challenging the Department of Labor's Fiduciary Rule*, 24 J. PENSION BENEFITS 4, 4 (2016).

1. ERISA Covered Plans

ERISA governs two types of pension plans: defined benefit plans and defined contribution plans.⁶⁰ Defined benefit plans are funded by the employer and promise a specific monthly benefit upon retirement.⁶¹ This kind of plan is commonly referred to as a pension.⁶² This amount can be based on the employee's salary, years of service, and other factors.⁶³ Most importantly, the employer bears the investment risk of ensuring the benefits are paid to the retired employee.⁶⁴ Defined benefit plans were dominant from the 1930s to the mid-1970s.⁶⁵ By the 1990s, defined contribution plans had largely replaced defined benefit plans.⁶⁶

Defined contribution plans do not guarantee a specific benefit amount at retirement,⁶⁷ but rather employees' retirement benefits depend on the money they contribute over time and the investments that accumulate on those funds.⁶⁸ Under defined contribution plans, individual workers take a more active role in managing their retirement.⁶⁹ Since most employees are not financial planning experts, they rely on financial professionals to oversee their plans and invest their funds.⁷⁰ The employee entirely carries the risk.⁷¹ The most common type of defined contribution plan is the 401(k) plan.⁷² Under 401(k)s, plan participants are responsible for selecting individual investments from a variety of investment options.⁷³ A "defining feature" of the 401(k) plan is that "[t]axes on these contributions are deferred until the money is withdrawn."⁷⁴

60. *Retirement Plans*, *supra* note 3.

61. *Id.*

62. Time Staff, *What Is the Difference Between a Defined Benefit Plan and a Defined Contribution Plan?*, MONEY, <http://time.com/money/collection-post/2791222/difference-between-defined-benefit-plan-and-defined-contribution-plan> [<https://perma.cc/XW6J-EZ37>].

63. *Retirement Plans*, *supra* note 3.

64. *Id.*

65. Samuel Estreicher & Laurence Gold, *The Shift from Defined Benefit Plans to Defined Contribution Plans*, 11 LEWIS & CLARK L. REV. 331, 331 (2007).

66. *Id.*

67. ICI MUT., ERISA LIABILITY: A GUIDE FOR INVESTMENT ADVISERS AND THEIR AFFILIATES 6–7 (Mar. 2010), https://www.ici.org/pdf/13_seclaw_05c.pdf [<https://perma.cc/RYW5-VY58>] [hereinafter A GUIDE FOR INVESTMENT ADVISERS].

68. *Id.* at 7.

69. Watkins, *supra* note 7.

70. *Id.*

71. A GUIDE FOR INVESTMENT ADVISERS, *supra* note 67, at 7.

72. PURCELL & STAMAN, *supra* note 26, at 5–6. The 401(k) plan was created by the Revenue Act of 1978. *Id.*

73. A GUIDE FOR INVESTMENT ADVISERS, *supra* note 67, at 7.

74. PURCELL & STAMAN, *supra* note 26, at 6; see also Amy Bell, *Understanding Your 401(k) and All Its Benefits*, INVESTOPEDIA, <https://www.investopedia.com/articles/investing/102216/understanding-401ks-and-all-their-benefits.asp> [<https://perma.cc/LA7N-3EGN>] (last updated Nov.

2. Plans Not Covered by ERISA

“In 1974, Congress created the Individual Retirement Account (IRA)” for retirees “who did not participate in an employment-based retirement plan.”⁷⁵ Traditional IRAs share a common benefit with 401(k)s in that individuals do not pay taxes on the contributions to the account until they are withdrawn at retirement.⁷⁶ However, with a Roth IRA, individuals pay taxes on that money before-hand so when funds are withdrawn no taxes are imposed.⁷⁷ As long as IRAs are created by individuals and not an employer, they are not ERISA qualified.⁷⁸ There is also the IRA rollover where individuals can move their funds from an employer-sponsored 401(k) plan to an IRA when they change jobs or decide to retire.⁷⁹ There are several incentives to rolling over benefits to an IRA.⁸⁰ However, the main disadvantage is that individuals who roll over their benefits are no longer subject to the protections offered by ERISA’s fiduciary standards.⁸¹

3. Relevant Provisions of ERISA

ERISA is an extensive federal law comprised of several provisions that provide for the enforcement and oversight of retirement plans. As a result, this Note does not seek to address all provisions of ERISA. Section II.D.3.i focuses on Title I of ERISA, particularly looking at the fiduciary standards of care ERISA requires of retirement plan managers. Section II.D.3.ii discusses certain transactions prohibited under ERISA.

2, 2018) (“Most people earn a smaller income after retirement than when they were working, which places them in a lower tax bracket.”).

75. Moore, *supra* note 32, at 34.

76. Lorie Konish, *Roth vs. Traditional IRAs: How to Decide Where to Put Your Money*, CNBC, <https://www.cnbc.com/2018/07/30/roth-vs-traditional-iras-how-to-decide-where-to-put-your-money.html> [<https://perma.cc/6ZFV-225L>] (last updated July 30, 2018, 3:10 PM).

77. Eva Sadej, *Rollover, Traditional, And Roth IRAs: Money In, Money Out*, BLUELEAF, <https://www.blueleaf.com/articles/rollover-traditional-roth-ira> [<https://perma.cc/ECV9-6DSK>].

78. Pratt, *supra* note 59, at 4.

79. Frank Armstrong III, *Pitfalls of the 401(k) Rollover*, FORBES (May 23, 2016, 12:13 PM), <https://www.forbes.com/sites/frankarmstrong/2016/05/23/pitfalls-of-the-401k-rollover-2> [<https://perma.cc/CR2U-GTNE>].

80. When an individual’s employment ends, whether due to retirement or pursuing a new job, the option is available to take money out of an employer-sponsored 401(k) plan. However, if an individual takes the money to a regular bank account, all the tax benefits from the 401(k) are lost. A rollover IRA allows investors to preserve the tax-deferred benefits. Additionally, IRAs provide a much larger universe of investing options compared to 401(k)s. Dan Caplinger, *What is a Rollover IRA?*, MOTLEY FOOL (Apr. 21, 2017, 1:07 PM), <https://www.fool.com/retirement/iras/2017/04/21/what-is-a-rollover-ira.aspx> [<https://perma.cc/ESP5-6HPY>].

81. David Pratt, *Points to Remember: IRA Rollovers*, 33 A.B.A. SEC. TAX’N NEWSQUARTERLY 8, 8 (May 2, 2014), https://www.americanbar.org/content/dam/aba/publishing/aba_tax_times/14spr/ptr-ira-rollovers.authcheckdam.pdf [<https://perma.cc/497C-87JX>].

i. Fiduciary Standards Under Title I of ERISA

Under ERISA, employers are not required to establish pension plans.⁸² However, should they establish plans, they must meet certain minimum standards.⁸³ The DOL administers Title I of ERISA, which primarily addresses Congress's original concerns about private pension plan mismanagement and abuse.⁸⁴ The provisions within Title I cover most private-sector pension plans.⁸⁵ In order to protect employee benefit plan beneficiaries, Title I of ERISA imposes fiduciary standards of care on those who manage and oversee the plans.⁸⁶ Under § 1002(21)(A),

[A] person is a fiduciary with respect to a plan . . . [if:] (i) he exercises any discretionary authority or . . . control respecting management of such plan or . . . its assets, (ii) he renders investment advice for a fee or other compensation, . . . with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or . . . responsibility in the administration of such plan.⁸⁷

Section 1104(a) establishes the duties that fiduciaries owe to plan participants.⁸⁸ It imposes a prudent man standard of care,⁸⁹ in which the primary responsibility of fiduciaries is to run the plan “solely in the interest of the participants and beneficiaries” and “for the exclusive purpose of providing benefits” and paying plan expenses.⁹⁰ Fiduciaries must also diversify plan investments “to minimize the risk of large losses,”⁹¹ and follow the terms of the plan documents.⁹²

ii. Prohibited Transactions Under Title I and Title II

ERISA prohibits fiduciaries from engaging in certain transactions that could bring harm to a pension plan.⁹³ Specifically, Title I, § 406(a) “bars

82. *Retirement Plans*, *supra* note 3.

83. *Id.*

84. IRA Financial Staff, *Solo 401(k) History—How it Began, How You Benefit*, IRA FIN. GRP.: BLOG, <http://www.irafinancialgroup.com/learn-more/account-setup/the-history-of-the-solo-401k-plan> [https://perma.cc/UKN9-G7PT].

85. *Id.*

86. 29 U.S.C. § 1002(21)(A) (2012).

87. *Id.*

88. *Id.* § 1104.

89. The heart of the prudent man standard of care is that fiduciaries act “with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.” *Id.* § 1104(a)(1)(B).

90. *Id.* § 1104(a)(1)(A).

91. *Id.* § 1104(a)(1)(C).

92. *Id.* § 1104(a)(1)(D).

93. PURCELL & STAMAN, *supra* note 26, at 31.

certain transactions between a plan and a party in interest.”⁹⁴ “Section 406(b) prohibits certain transactions between a plan and a plan fiduciary.”⁹⁵ ERISA § 1108 provides exemptions to the prohibited transactions.⁹⁶ Pension plans are also subject to Title II’s prohibited transaction rules under § 4975 of the Internal Revenue Code.⁹⁷ The Code prohibits certain transactions between a plan and a disqualified person.⁹⁸ Under § 4975(a), individuals must pay an excise tax.⁹⁹ Section 4975(c) describes what kinds of transactions are prohibited.¹⁰⁰ The Code provides exemptions as long as requirements are met under § 4975(d).¹⁰¹ ERISA’s prohibited transaction rules do not apply to IRAs, but the Code’s rules do.¹⁰² The rules were intended to prevent plan fiduciaries from self-dealing and acting on conflicts of interest¹⁰³ with respect to a plan.¹⁰⁴

E. THE DEPARTMENT OF LABOR’S 1975 FIVE-PART TEST

One year after the enactment of ERISA, the DOL issued a five-part test under ERISA § 3(21)(ii) to determine under what circumstances a fiduciary “provid[es] . . . investment advice.”¹⁰⁵ At the time of the DOL regulation, the majority of private employer-pension plans were professionally managed and

94. See *id.* at 31 n.138 (explaining that ERISA defines “party in interest” broadly).

95. *Id.* at 32.

96. 29 U.S.C. § 1108.

97. *Id.* § 4975.

98. *Retirement Plan Investment FAQs*, IRS, <https://www.irs.gov/retirement-plans/retirement-plan-investments-faqs> [<https://perma.cc/6MDZ-3LBE>] (last updated June 19, 2019).

99. 29 U.S.C. § 4975(a).

100. *Id.* § 4975(c).

101. *Id.* § 4975(d).

102. Pratt, *supra* note 59, at 5.

103. Conflicts of interest as used in this Note are “defined as a conflict between the private interests and the official responsibilities of a person in a position of trust.” *Conflicts of Interest: Overview*, CFA INST., <https://www.cfainstitute.org/en/advocacy/issues/conflicts-of-interest> [<https://perma.cc/XY9X-35ZH>].

In the case of an investor and financial professional, conflicts of interest arise where the professional puts his or her interests before the investor. As a result, conflicts of interest are harmful because they allow financial advisers to personally benefit at the expense of investors. Brian Preston, *Conflicts of Interest in Financial Services: How Every Investor Can Learn to Spot Them*, MONEY GUY SHOW (Mar. 31, 2017), <https://www.moneyguy.com/2017/03/conflicts-of-interest-in-financial-services-how-every-investor-can-learn-to-spot-them> [<https://perma.cc/WDH9-XV6D>].

104. U.S. DEP’T OF LABOR, EXEMPTION PROCEDURES UNDER FEDERAL PENSION LAW 5 (2011), <https://www.dol.gov/sites/dolgov/files/legacy-files/ebsa/about-ebsa/our-activities/resource-center/publications/exemption-procedures-under-federal-pension-law.pdf> [<https://perma.cc/2WLQ-ATXT>].

105. SUSAN P. SEROTA & KATHLEEN D. BARDUNIAS, PILLSBURY WINTHROP SHAW PITTMAN LLP, TAKE TWO: DOL REPROPOSES CHANGES TO DEFINITION OF FIDUCIARY FOR ERISA PLANS AND IRAS 2 (May 8, 2015), <https://www.pillsburylaw.com/images/content/6/5/v2/65729/AdvisoryMay2015ECBTakeTwoDOLReproposesChangestoDefinitionofFiduc.pdf> [<https://perma.cc/MRJ3-FPMW>].

not participant directed, and IRAs had just been authorized.¹⁰⁶ The five-part test provided that for investment advice to be

subject to the fiduciary rules, the adviser must (1) provide advice as to the value of securities or other property, (2) on a regular basis, (3) pursuant to a mutual agreement or understanding with the plan or plan fiduciary that (4) the advice will serve as a primary basis for investment decisions, and (5) the advice is individualized to the particular needs of the plan or IRA.¹⁰⁷

F. THE DEPARTMENT OF LABOR'S REFORM OF ERISA

Before addressing the DOL's attempts at reform of ERISA, it is important to first understand the types of relationships around investment advice. Therefore, Section II.F.1 discusses two main types of financial professionals who render investment advice, their compensation structures, and the different standards of care that regulate them. Section II.F.2 addresses why the DOL found these different standards problematic, and why ERISA's fiduciary standards needed reform. Section II.F.3 explains the background for why the DOL sought to reform ERISA's fiduciary standards. Section II.F.4 provides the DOL's proposed new fiduciary standard.

1. Registered Investment Advisers vs. Broker-Dealers

Retirement savers are able to obtain investment advice from a variety of sources, including two major groups of professionals: registered investment advisers ("RIAs") and broker-dealers.¹⁰⁸ Investment advisers render investment guidance taking into account each individual client's goals.¹⁰⁹ They are subject to a fiduciary duty to act in the best interest of their clients under the Investment Advisers Act of 1940.¹¹⁰ Inherent in the fiduciary standard is owing duties of care, loyalty, and good faith.¹¹¹ The fiduciary standard is important because it is "the highest obligation one can . . . owe another . . . under American law."¹¹² Advisers must place clients' interests above their own.¹¹³ In addition, they must ensure advice is based on "accurate

106. *Id.*

107. *Id.*

108. EXEC. OFFICE OF THE PRESIDENT OF THE U.S., *supra* note 5, at 6.

109. Zaw Thiha Tun, *Investment Advisor Versus Broker*, INVESTOPEDIA, <https://www.investopedia.com/articles/investing/071515/investment-advisor-versus-broker-how-they-compare.asp> [<https://perma.cc/U5KB-NMF9>] (last updated July 11, 2019).

110. J. Tyler Kirk, *A Federal Fiduciary Standard Under the Investment Advisers Act of 1940: A Refinement for the Protection of Private Funds*, 7 HARV. BUS. L. REV. ONLINE 19, 20 (2016).

111. *Breach of Fiduciary Duty*, LAX NEVILLE ATTORNEYS AT LAW, <https://www.laxneville.com/breach-of-fiduciary-duty.html> [<https://perma.cc/54NK-4NPR>].

112. Joshua Kennon, *What Is a Broker-Dealer?*, BALANCE, <https://www.thebalance.com/what-is-a-broker-dealer-4067290> [<https://perma.cc/7NXX-9SWM>] (last updated June 25, 2019).

113. Moss, *supra* note 8.

and complete information.”¹¹⁴ Advisers must avoid conflicts of interest, and disclose any potential conflicts of interest to placing the client’s interests first.¹¹⁵ Investment advisers are paid either a flat fee for investment advice, or a percentage of the assets they manage.¹¹⁶

Brokers-dealers, on the other hand, are in the business of buying and selling securities for its firm’s own account or on behalf of clients.¹¹⁷ RIAs are subject to regulation under the Investment Adviser’s Act of 1940, whereas the Securities Exchange Act of 1934 defines and regulates broker-dealers.¹¹⁸ Broker-dealers are subject to the much lower standard of care of “suitability.”¹¹⁹ The suitability standard requires a broker to make recommendations that are suitable to the client, but does not require them to act in the best interests of the client.¹²⁰ The suitability standard is more likely to allow a broker-dealer to act on conflicts of interest, the most obvious one having to do with fees.¹²¹ Broker-dealers have a different compensation structure compared to investment advisers that is commission based.¹²² Broker-dealers earn their income based on products sold or accounts opened.¹²³ Thus, the more transactions a broker-dealer closes, the more he gets paid.¹²⁴ Under the suitability standard, even if the broker-dealer receives a higher commission, as long as the product is suitable, the broker-dealer can sell it to a client.¹²⁵ As a result, broker-dealers recommend higher priced

114. *Id.*

115. Ryan Furhmann, *Suitability vs. Fiduciary Standards: What’s the Difference?*, INVESTOPEDIA, <https://www.investopedia.com/articles/professionaleducation/11/suitability-fiduciary-standards.asp> [<https://perma.cc/VTM4-9LC9>].

116. Barclay Palmer, *Fee-Based vs Commission-Based: Which Type of Advisor Is Better?*, INVESTOPEDIA, <https://www.investopedia.com/articles/basics/04/022704.asp> [<https://perma.cc/Q85W-8L3Z>] (last updated May 3, 2019).

117. Will Kenton, *Broker-Dealer*, INVESTOPEDIA, <https://www.investopedia.com/terms/b/broker-dealer.asp> [<https://perma.cc/Q2WP-7W6T>] (last updated Mar. 29, 2019).

118. Will Kenton, *Securities Exchange Act of 1934*, INVESTOPEDIA, <https://www.investopedia.com/exam-guide/finra-series-6/securities-industry-regulations/securities-act-1934.asp> [<https://perma.cc/CG68-EQJE>] (last updated Mar. 12, 2019).

119. David Serchuk, *Suitability: Where Brokers Fail*, FORBES (June 24, 2009, 6:00 AM), <https://www.forbes.com/2009/06/23/suitability-standards-fiduciary-intelligent-investing-brokers.html> [<https://perma.cc/V9GB-H75C>].

120. Peter Lazaroff, *The Difference Between Fiduciary and Suitability Standards*, FORBES (Apr. 6, 2016, 12:48 PM), <https://www.forbes.com/sites/peterlazaroff/2016/04/06/the-difference-between-fiduciary-and-suitability-standards> [<https://perma.cc/2VBB-JSBK>].

121. Furhmann, *supra* note 115.

122. Barclay Palmer, *Fee-Based vs Commission-Based: Which Type of Advisor is Better?*, INVESTOPEDIA, <https://www.investopedia.com/articles/basics/04/022704.asp> [<https://perma.cc/3NC3-985P>] (last updated May 3, 2019).

123. *Id.*

124. *Id.*

125. Furhmann, *supra* note 115.

products instead of competing products that may be at a lower cost or products better suited for a client's investment goals.¹²⁶

2. An Outdated Fiduciary Standard Under ERISA

In the eyes of the DOL, the problem was twofold.¹²⁷ First, when the DOL created its five-part test, it was a “very different context and investment advice marketplace.”¹²⁸ The test was adopted prior to the emergence of 401(k) plans, the widespread use of IRAs, and the now common rolling over of plan assets from ERISA protected plans to IRAs.¹²⁹ Plan participants are now required to make investment decisions for their own accounts, and to rely more heavily on investment advice.¹³⁰ Second, due to the narrow scope of the 1975 regulation, many investment professionals (such as broker-dealers) are not required to adhere to the fiduciary standards or prohibited transactions of ERISA—despite their crucial role in influencing retirees’ investment decisions.¹³¹ They have the ability to act more easily on conflicts of interest and give improper advice that would otherwise be prohibited under ERISA.¹³² It was easy for these financial professionals to establish that a part of the 1975 test was not met, excluding them from fiduciary status.¹³³ For example, advising clients to roll over assets to an IRA would not satisfy the test because it was not advice given on a regular basis but rather constituted a one-time transaction.¹³⁴ As a result, the DOL sought to abandon the 1975 test and promulgate a new rule.

3. The Contentious Issue of Fiduciary Duty

In the aftermath of the 2008 financial crisis, Congress found that the financial industry needed significant reform, leading to the enactment of the Dodd-Frank Act in July of 2010.¹³⁵ Among the many reforms, the Act gave the SEC authority to implement a universal fiduciary standard for retail investment advice.¹³⁶ In conjunction with this more expansive reform, the

126. *Id.*

127. Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20,946 (Apr. 8, 2016) (codified at 29 C.F.R. §§ 2510.3-21, 2550.408(b) (2019)).

128. *Id.*

129. *Id.*

130. Pratt, *supra* note 59, at 5.

131. *Id.*

132. *Id.*

133. Thomas J. Sigmund, *The New Labor Department Fiduciary Rules and IRA Rollovers*, J. FIN. SERV. PROFESSIONALS 82, 84 (2017), http://www.financialpro.org/pubs/subs/Journal/Docs/2017/JFSP0117_82-90.pdf [<https://perma.cc/K22W-SQ4N>].

134. *Id.* at 84–85.

135. Mark Schoeff Jr., *Historical Timeline of Fiduciary Duty for Financial Advice*, INVESTMENTNEWS (Apr. 5, 2016, 2:42 PM), <https://www.investmentnews.com/article/20160405/FREE/160409960/historical-timeline-of-fiduciary-duty-for-financial-advice> [<https://perma.cc/45RE-PX67>].

136. *Id.*

Labor Department proposed a rule to redefine and expand fiduciary standards under ERISA.¹³⁷ However, the DOL withdrew its rule due to backlash by the financial industry.¹³⁸ In January of 2011, the SEC staff issued a report, required by the Act, with recommendations to establish a uniform fiduciary standard.¹³⁹ Unfortunately, like the DOL's attempt at reform of ERISA, the implementation of a universal fiduciary standard fizzled.¹⁴⁰ The DOL's actions to withdraw its rule was largely due to industry pressure and the Republican Party regaining control of the House of Representatives after the 2010 midterm elections.¹⁴¹ The Republicans urged the SEC to refrain from imposing a universal fiduciary standard.¹⁴² They argued how the standard would fare with the fiduciary rule for retirement accounts still under consideration by the DOL.¹⁴³ Despite the setbacks, in 2015 President Obama directed the DOL to re-propose its fiduciary rule to provide at least some additional protection to retirees.¹⁴⁴ As expected, many criticized the new proposed fiduciary rule, yet the DOL released its final rule in April of 2016, six years after its initial proposal.¹⁴⁵

4. The Department of Labor's New Fiduciary Standard

The DOL has the authority to regulate the quality of financial advice regarding retirement accounts under ERISA.¹⁴⁶ Furthermore, the 40-year-old ERISA rules needed reform. As a result, the DOL's new rule broadened the definition of fiduciary investment advice by bringing more financial professionals under the established "fiduciary standard" that already applied to investment advisers.¹⁴⁷ The new rule required these newly covered professionals to act in the best interests of their clients by putting their clients'

137. *See id.*

138. *Id.*

139. *See* SEC, STUDY ON INVESTMENT ADVISERS AND BROKER-DEALERS i, ii (Jan. 2011), <https://www.sec.gov/news/studies/2011/913studyfinal.pdf> [<https://perma.cc/PU7S-K3J5>] (recommending a standard that would apply to both investment advisers and broker-dealers who provided "investment advice about securities to retail customers" and would be consistent with the current standard applied to investment advisers).

140. Schoeff, *supra* note 135.

141. *U.S. House Passes Bill to Delay Fiduciary Rules at SEC, Labor Dept.*, REUTERS (Oct. 29, 2013, 4:53 PM), <https://www.reuters.com/article/us-house-bill-fiduciary/us-house-passes-bill-to-delay-fiduciary-rules-at-sec-labor-dept-idUSBRE99S1CE20131029> [<https://perma.cc/CZH5-ASMF>].

142. *Id.*

143. *Id.*

144. Schoeff, *supra* note 135.

145. *Id.*

146. Mitchell Grant, *Everything You Need to Know About the DOL Fiduciary*, INVESTOPEDIA, <https://www.investopedia.com/updates/dol-fiduciary-rule> [<https://perma.cc/3LPQ-V4NZ>] (last updated July 19, 2019).

147. Sharon Epperson, *How the Fiduciary Rule Works*, CNBC, <https://www.cnbc.com/2016/04/05/how-the-fiduciary-rule-works.html> [<https://perma.cc/6YTU-GY5N>] (last updated Apr. 14, 2016, 12:39 PM).

interests first.¹⁴⁸ The rule modified existing rules and created “new prohibited transaction exemptions under ERISA and the Internal Revenue Code.”¹⁴⁹ Prior to the rule, the sale of annuity products fell under Prohibited Transaction Exemption 84-24¹⁵⁰ and “was heavily relied upon by fiduciaries.”¹⁵¹ Under the new rule, as it related to IRAs, the exemption removed both variable annuities and fixed indexed annuities from its protection.¹⁵² The DOL’s new rule also issued the Best Interest Contract Exemption (“BICE”).¹⁵³ The exemption allowed certain financial professionals who fell under the new definition to receive compensation that would otherwise violate prohibited transactions under ERISA¹⁵⁴ as long as they disclosed any conflicts of interest and put clients’ best interests first.¹⁵⁵

Although the new DOL rule affected ERISA plans, it had a more complex and significant impact on IRAs and IRA rollovers.¹⁵⁶ The DOL rule was narrow in that it only applied to investment advice for retirement accounts.¹⁵⁷

G. THE DEMISE OF THE DOL’S RULE AND THE SEC’S ATTEMPT TO FILL THE VOID

Unfortunately, the DOL’s new fiduciary rule was short-lived.¹⁵⁸ The Fifth Circuit Court of Appeals vacated the rule on March 15, 2018, and issued a mandate finalizing its decision.¹⁵⁹ The Fifth Circuit held that the DOL’s

148. Grant, *supra* note 146.

149. Sigmund, *supra* note 133, at 83.

150. *Id.* at 85.

151. *Id.*

152. Pratt, *supra* note 59, at 4. An annuity is a financial product that pays out a stream of income to an individual. Annuities are created and sold by financial institutions that accept and invest contributions from individuals that they then payout upon annuitization. Fixed annuities provide regular payments. Variable annuities provide unpredictable payments depending “on the performance of the underlying investments.” Claire Boyte-White, *The Main Types of Annuities Made Easy*, INVESTOPEDIA, <https://www.investopedia.com/ask/answers/093015/what-are-main-kinds-annuities.asp> [<https://perma.cc/LW4L-VXEJ>] (last updated July 27, 2019).

153. Sigmund, *supra* note 133, at 86.

154. Jake Frankenfield, *Best-Interest Contract Exemption (BICE)*, INVESTOPEDIA, <https://www.investopedia.com/terms/b/bestinterest-contract-exemption-bice.asp> [<https://perma.cc/M4MK-VYQL>] (last updated July 6, 2018).

155. Marjorie M. Glover & Rachel M. Kurth, *Introduction to the Department of Labor’s New Proposed Fiduciary Rule*, 41 EMP. REL. L.J., Autumn 2015, at 57.

156. Sigmund, *supra* note 133, at 82–83.

157. Epperson, *supra* note 147.

158. Melanie Waddell, *5th Circuit Issues Order to Kill DOL Fiduciary Rule*, THINKADVISOR (June 21, 2018, 12:54 PM), <https://www.thinkadvisor.com/2018/06/21/5th-circuit-orders-dol-fiduciary-rule-vacated> [<https://perma.cc/37JR-44WX>].

159. The Fifth Circuit Court of Appeals determined that the DOL exceeded its authority in implementing a new definition of fiduciary and vacated the rule with a 2-1 majority. *Chamber of Commerce of the U.S. v. U.S. Dep’t of Labor*, 885 F.3d 360 (5th Cir. 2018). The court reasoned that the DOL’s new definition of “fiduciary” conflicted with the plain text of ERISA’s § 3(21)(A)(ii) and the common law meaning of fiduciary. *Id.* at 379. It also applied step two of *Chevron* deference, a judicial doctrine where the court will defer to agency interpretations of statutes if the intent of Congress is not clearly expressed and the agency’s interpretation is a

fiduciary rule conflicted with the text of § 3(21)(A)(ii) of ERISA.¹⁶⁰ The court discussed the common law meaning of “fiduciary,” and concluded that Congress had adopted that view into the language of the statute.¹⁶¹ The court further held that even if the definition did not conflict with the statute’s language, the DOL’s rule was not reasonable, and thereby not entitled to *Chevron* deference.¹⁶² Furthermore, the court cited several problems with the DOL’s rule, but concluded that the biggest issue was that the DOL exceeded its statutory authority.¹⁶³ The court held that the DOL’s actions in promulgating the new fiduciary rule were “arbitrary and capricious” under the Administrative Procedure Act, rendering them unlawful.¹⁶⁴ The DOL received a significant blow as a result of the Fifth Circuit’s decision, yet chose not to defend their rule through an appeal¹⁶⁵ because of a new presidential administration.

Shortly after the Fifth Circuit’s ruling, the SEC expressed interest in establishing its own rule, especially since it was given authorization under the Dodd-Frank Act.¹⁶⁶ Unlike the DOL’s rule, the SEC’s proposed regulations applied to both non-retirement and retirement accounts.¹⁶⁷ In April 2018, the SEC proposed the new standard under the Securities Exchange Act of 1934: the “Regulation Best Interest.”¹⁶⁸ Under the proposed rule, when a broker-

permissible interpretation of the statute. *Id.* at 379–88. The Fifth Circuit gives an extensive list of reasons why the fiduciary rule was an unreasonable interpretation and fails under *Chevron* deference and was “arbitrary and capricious” under the Administrative Procedure Act. *Id.*

160. *Id.* at 379; see also *Fifth Circuit Vacates DOL Fiduciary Rule*, GROOM LAW GROUP (Mar. 22, 2018), <https://www.groom.com/resources/fifth-circuit-vacates-dol-fiduciary-rule> [<https://perma.cc/L8XL-GXXY>] (explaining further the ramifications *Chamber of Commerce of the U.S.*).

161. *Chamber of Commerce of the U.S.*, 885 F.3d at 379; see also *Fifth Circuit Vacates DOL Fiduciary Rule*, *supra* note 160.

162. *Chamber of Commerce of the U.S.*, 885 F.3d at 379–88; see also *Fifth Circuit Vacates DOL Fiduciary Rule*, *supra* note 160.

163. *Chamber of Commerce of the U.S.*, 885 F.3d at 397; see also Susan P. Serota et al., *The Future of the ERISA Fiduciary Rule*, PILLSBURY WINTHROP SHAW PITTMAN LLP (Apr. 11, 2018), <https://www.pillsburylaw.com/en/news-and-insights/dol-fiduciary-rule-fifth-circuit.html> [<https://perma.cc/PX2C-4F8M>].

164. *Chamber of Commerce of the U.S.*, 885 F.3d at 388; see also *Fifth Circuit Vacates Controversial DOL Fiduciary Rule*, MCGUIREWOODS (Mar. 19, 2018), <https://www.mcguirewoods.com/client-resources/Alerts/2018/3/Fifth-Circuit-Vacates-Controversial-DOL-Fiduciary-Rule> [<https://perma.cc/W5TE-RXL5>].

165. WealthManagement.com Staff, *Ding Dong—The Fiduciary Rule is Officially Dead*, WEALTHMANAGEMENT.COM (June 14, 2018), <https://www.wealthmanagement.com/industry/ding-dong-fiduciary-rule-officially-dead> [<https://perma.cc/BUN8-B3UH>].

166. Lorie Konish, *Investor Protection Rule is Dead*, CNBC, <https://www.cnbc.com/2018/06/21/investor-protection-rule-is-dead.html> [<https://perma.cc/AGT2-2TRE>] (last updated June 21, 2018, 3:30 PM).

167. Adam Bergman, *Impact on Self-Directed IRAs of SEC Fiduciary Rule Proposals*, FORBES (Apr. 20, 2018, 3:22 PM), <https://www.forbes.com/sites/greatspeculations/2018/04/20/impact-of-self-directed-iras-on-sec-fiduciary-rule-proposals> [<https://perma.cc/VKQ4-UA4E>].

168. Regulation Best Interest, 83 Fed. Reg. 21,574 (May 9, 2018) (to be codified at 17 C.F.R. pt. 240).

dealer recommends a security or investment strategy to a client, they are required to “act in the best interest of the retail customer . . . without placing [his or her own] interest . . . ahead of the interest of the retail customer.”¹⁶⁹ However, this best interest standard is not the same fiduciary standard applicable to RIAs.¹⁷⁰ Furthermore, even though the rule introduces a “best interest” standard, it does not define it.¹⁷¹ The SEC’s new standard can be best understood through its three main components: disclosure, care, and conflict management.¹⁷²

The SEC seeks to implement its new rule with enhanced disclosure requirements.¹⁷³ The proposal attempts to address investors’ confusion about their relationship with their financial professionals by requiring a four-page disclosure document (Form CRS).¹⁷⁴ The document would explain the difference between investment advisers and brokers, the legal standards of conduct, fees, and conflicts associated with a recommendation.¹⁷⁵ Under the care obligation, broker-dealers are required to exercise reasonable diligence, care, skill, and prudence in making recommendations.¹⁷⁶ Most importantly, broker-dealers only need “a reasonable basis to believe the recommendation is in the best interest of a particular retail customer.”¹⁷⁷ The conflict of interest obligation requires a broker dealer to “[e]stablish, maintain and enforce written policies and procedures designed to identify, and disclose or eliminate, material conflicts of interest that are (i) associated with recommendations and (ii) arise from financial incentives associated with such recommendations.”¹⁷⁸

The rule also prohibits “certain broker-dealers and their financial professionals from using the terms ‘adviser’ or ‘advisor’” when they present themselves to clients, to prevent them from misleading clients into thinking

169. *Id.* at 21,575.

170. The SEC has made clear it is “not proposing a uniform fiduciary standard.” *Id.* at 21,586.

171. Edward J. Johnsen & Bradley E. Phipps, *SEC Proposes “Regulation Best Interest” Rule Package, Including New Disclosure Form and Investment Adviser Conduct Interpretation*, DLA PIPER (Apr. 24, 2018), <https://www.dlapiper.com/en/us/insights/publications/2018/04/sec-proposes-regulation-best-interest> [https://perma.cc/PQE3-CHSP].

172. David F. Freeman, Jr. et al., *DOL’s Fiduciary Rule Vacated—But the Best Interest Concept Appears Here to Stay*, ARNOLD & PORTER (July 9, 2018), <https://www.arnoldporter.com/en/perspectives/publications/2018/07/dols-fiduciary-rule-vacated-but-the-best-interest> [https://perma.cc/ZR3H-CCWY].

173. Greg Iacurci, *SEC Advice Rule: Here’s What You Need to Know*, INVESTMENTNEWS (Apr. 19, 2018, 2:31 PM), <https://www.investmentnews.com/article/20180419/FREE/180419901/sec-advice-rule-heres-what-you-need-to-know> [https://perma.cc/F4Y9-4G2H].

174. Johnsen & Phipps, *supra* note 171.

175. *Id.*

176. Freeman et al., *supra* note 172.

177. *Id.*

178. Eliza Sporn Fromberg, *Goodbye, DOL Fiduciary Rule, And Hello, SEC Standards of Conduct?*, DAY PITNEY LLP (May 1, 2018), <https://www.daypitney.com/insights/publications/2018/05/01-goodbye-dol-fiduciary-rule-and-hello-sec> [https://perma.cc/7MD4-ASWM].

they are registered with the SEC and subject to fiduciary duties.¹⁷⁹ The SEC's rule would apply across all accounts while the DOL's previous rule only applied to retirement plans.¹⁸⁰ The SEC provided a 90-day public comment period for input on its new rule, which ended on August 7, 2018.¹⁸¹ The SEC will take the comments under consideration, and it has not declared a definitive date as to when a final rule would be announced.¹⁸²

III. RETIREMENT PLAN INDUSTRY CHANGES MAKE ERISA INEFFECTIVE AT PROTECTING RETIREMENT INVESTORS AND THE SEC'S PROPOSED SOLUTION FALLS SHORT

Congress enacted ERISA in response to the mismanagement and abuse of the private pension system.¹⁸³ However, the retirement landscape looked quite different compared to the market today.¹⁸⁴ Defined benefit plans, or traditional pension plans, which offered a guaranteed income stream in retirement, have dramatically declined.¹⁸⁵ Today, most employer-sponsored retirement plans that cover workers are defined contribution plans, such as 401(k)s.¹⁸⁶ In addition, many future retirees have shifted to non-employer based plans like IRAs and rolled over their funds from defined contribution plans to IRAs.¹⁸⁷ Unfortunately, ERISA itself is not designed to protect these investors.¹⁸⁸ As a result of these new plans, retirement savers are more

179. Press Release, SEC, SEC Proposes to Enhance Protections and Preserve Choice for Retail Investors in Their Relationships with Investment Professionals (Apr. 18, 2018), <https://www.sec.gov/news/press-release/2018-68> [<https://perma.cc/9W6X-HKHA>].

180. Ian Wenik, *The SEC's Fiduciary Rule Proposal, Made Simple*, CITYWIRE (Apr. 19, 2018, 1:45 PM), <https://citywireusa.com/professional-buyer/news/the-secs-fiduciary-rule-proposal-made-simple/a1112240> [<https://perma.cc/SZ7R-ZRBC>].

181. Mark Schoeff Jr., *SEC Publishes Advice Rule, Sets Aug. 7 Comment Deadline: The Proposal Package, Filled with Questions, Is Likely to Generate Hundreds of Letters*, INVESTMENTNEWS (May 9, 2018, 1:50 PM), <https://www.investmentnews.com/article/20180509/FREE/180509912/sec-publishes-advice-rule-sets-aug-7-comment-deadline> [<https://perma.cc/3DA5-DTZ6>].

182. Mark Schoeff Jr., *Clayton Declines to Set Timeline for Final SEC Advice Rule: Agency's Chairman Says 'We Have Work to Do,' Following Investor Roundtable in Baltimore*, INVESTMENTNEWS (Sept. 21, 2018, 1:38 PM), <https://www.investmentnews.com/article/20180921/FREE/180929975/clayton-declines-to-set-timeline-for-final-sec-advice-rule> [<https://perma.cc/27MG-KY5A>].

183. Mark M. Goldberg, *How the SEC Advice Rule Improves on the DOL Fiduciary Rule: The SEC Initiative Seeks to Raise Standards and Let Investors Understand the Motivations of Their Adviser, Without Limiting Choice*, INVESTMENTNEWS (May 29, 2018, 12:23 PM), <https://www.investmentnews.com/article/20180529/BLOG09/180529924/how-the-sec-advice-rule-improves-on-the-dol-fiduciary-rule> [<https://perma.cc/ANZ4-2JRS>].

184. *Id.*

185. Jordan Wathen, *Pensions Are Disappearing, Here's How to Save for Retirement: Here's Why Pensions are Slowly Disappearing in the United States*, MOTELY FOOL (June 5, 2018, 5:16 PM), <https://www.fool.com/investing/2018/06/05/pensions-are-disappearing-heres-how-to-save-for-re.aspx> [<https://perma.cc/UK8R-PM8Y>].

186. EXEC. OFFICE OF THE PRESIDENT OF THE U.S., *supra* note 5, at 2.

187. *Id.*

188. Goldberg, *supra* note 183.

dependent on financial professionals to assist them in choosing how to invest their money.¹⁸⁹ However, as discussed in Section II.F.1, with the combination of the suitability standard and the commission-based business model of broker-dealers, these financial professionals are particularly able to benefit upon conflicts of interest at the expense of consumers. Such conflicts of interest result in significant costs on investors.¹⁹⁰ According to one estimate by the White House Council of Economic Advisers, retirement savers lose \$17 billion a year from conflicted advice.¹⁹¹ The DOL attempted to address these issues by reforming ERISA, and by implementing a more expansive fiduciary standard to subject broker-dealers to a higher standard of care.¹⁹² Despite its efforts, the Fifth Circuit struck down the rule and the DOL did nothing to preserve it.¹⁹³

In addition to the outdated nature of ERISA, the SEC's proposed solution, the Regulation Best Interest rule, is ultimately not strict enough. First, the SEC rule does not create a uniform fiduciary standard that applies to all financial professionals,¹⁹⁴ but rather maintains separate standards between broker-dealers and investment advisers.¹⁹⁵ While there may once have been clear distinctions between investment advisers and broker-dealers so as to justify these different standards, these distinctions have blurred.¹⁹⁶ Broker-dealers are providing more services akin to those of investment advisers.¹⁹⁷ Also, they have presented themselves to clients as "financial advisers"¹⁹⁸ despite the fact that they are not subject to the same fiduciary

189. *Id.*

190. EXEC. OFFICE OF THE PRESIDENT OF THE U.S., *supra* note 5, at 3.

191. *Id.* at 20.

192. Brice Carter, *Can the DOL's Fiduciary Rule Protect Retirement Investors?*, FORBES (Jan. 3, 2018, 8:00 AM), <https://www.forbes.com/sites/forbesfinancecouncil/2018/01/03/can-the-dols-fiduciary-rule-protect-retirement-investors> [<https://perma.cc/8P8F-CAA2>].

193. WealthManagement.com Staff, *supra* note 165.

194. Iacurci, *supra* note 173.

195. Schoeff, *supra* note 182.

196. In theory, broker-dealers and investment advisers have distinct responsibilities. Brokers conduct transactions in securities on behalf of a client. Dealers buy and sell securities for their own account. Investment advisers provide advice to others about securities. These distinctions date back to the early twentieth century, but since the 1990's, the financial market has become more complex. Investors no longer have a clear understanding of the obligations and functions of their financial professionals. Alistair Barr, *Investment Advisers, Brokers Blurred, Rand Says*, MARKETWATCH (Jan. 3, 2008, 3:00 PM), <https://www.marketwatch.com/story/lines-between-investment-advisers-brokers-blurred-rand-says> [<https://perma.cc/X4TL-K7VC>].

197. See Timothy Noah, *Does Your Broker Love You?*, SLATE (Jan. 24, 2011, 7:33 PM), <https://slate.com/business/2011/01/brokers-astonishingly-have-no-fiduciary-duty-to-their-clients-maybe-they-should.html> [<https://perma.cc/2CK3-EgBH>] (explaining that brokers now advise clients about what securities to buy and investment advisers buy securities for clients they recommend; however, the issue remains that the two groups have different legal responsibilities to clients).

198. Mitch Tuchman, *New SEC Rule to Protect Investors Actually Safeguards Wall Street's Profit Pipeline*, MARKETWATCH (May 8, 2018, 11:17 AM), <https://www.marketwatch.com/story/new->

standard as advisers. Although the SEC addresses the second problem in its proposed rule, it fails to address the core issue that broker-dealers are not subject to a fiduciary standard. Despite the SEC using a best interest standard, it does not hold the same weight as the DOL's rule because it lacks the legal fiduciary obligations. Also, the SEC does not define best interest,¹⁹⁹ which creates the potential to confuse investors or provide them with a false sense of security.²⁰⁰ The SEC even admits that the fiduciary duty owed by an investment adviser "is similar to, but not nearly the same as, the proposed obligations of broker-dealers under the proposed Regulation Best Interest."²⁰¹

Second, the SEC puts too much emphasis on disclosure. While conflicts of interest arise more commonly under the suitability standard and disclosing those conflicts of interest to clients may help, disclosure is not enough on its own to protect clients.²⁰² Although the SEC limits disclosure to four pages, and certain information would be of value to investors, it has the potential to bury key details for the client.²⁰³ The DOL required, in certain situations, that investors sign documentation stating explicitly that they understood the role of their financial adviser, conflicts of interest, and compensation model.²⁰⁴ The SEC's proposed rule has no such requirement, and it is unclear how the SEC would enforce disclosures of conflicts of interest.²⁰⁵ Disclosure would make consumers more informed about their decisions, yet the concern is how they react to disclosures of conflicts of interest.²⁰⁶ Studies show that consumers believe their financial advisers are working for their benefit, even if conflicts of interest are disclosed.²⁰⁷ While individuals want to make good financial

sec-rule-to-protect-investors-actually-safeguards-wall-streets-profit-pipeline-2018-05-08 [https://perma.cc/G2U6-JB54].

199. Darla Mercado, *Here's What You Need to Know About This New 'Investor Protection' Rule*, CNBC (Aug. 8, 2018, 11:07 AM), <https://www.cnbc.com/2018/08/08/what-you-need-to-know-about-this-new-investor-protection-rule.html> [https://perma.cc/XJB4-XMQN].

200. Kenneth Corbin, *Dear SEC, No One Wants to Read 4-Page Disclosures*, FINANCIALPLANNING (June 19, 2018, 11:24 AM), <https://www.financial-planning.com/news/aarp-fsi-charles-schwab-agree-secs-form-crs-disclosure-could-confuse-clients> [https://perma.cc/352H-S8D5].

201. David John Marotta, *New SEC Advice Rule Abandons Fiduciary Standard for Brokers*, FORBES (May 28, 2018, 9:00 AM), <https://www.forbes.com/sites/davidmarotta/2018/05/28/new-sec-advice-rule-abandons-fiduciary-standard-for-brokers/#3452c1302600> [https://perma.cc/CNS2-gDP9].

202. See *supra* Section II.F.1 (describing how the suitability standard allows for broker-dealers to recommend products that are not necessarily in the best interest of the client to get a higher commission).

203. See Corbin, *supra* note 200.

204. Michael Joyce, *The SEC's Best Interest Rule Doesn't Go Far Enough*, WEALTHMANAGEMENT.COM (Sept. 21, 2018), <https://www.wealthmanagement.com/regulation-compliance/sec-s-best-interest-rule-doesn-t-go-far-enough> [https://perma.cc/9C63-JE55].

205. *Id.*

206. ANGELA A. HUNG ET AL., DEP'T LABOR, RR-1270-DOL, EFFECTIVE DISCLOSURES IN FINANCIAL DECISIONMAKING: FINAL REPORT i, 6 (July 2015), <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/proposed-regulations/1210-AB32-2/effective-disclosures-in-financial-decision-making.pdf> [https://perma.cc/RJ64-QW76].

207. *Id.*

decisions, many cannot because they are financially illiterate.²⁰⁸ As a result, having the safeguard of a fiduciary standard is necessary to protect those who do not know what they are doing with their money.

More importantly, the disclosure requirements, without more stringent fiduciary obligations, allow broker-dealers to continue to act on conflicts of interest as long as the broker-dealer discloses the conflict. History itself has shown that mere disclosure is not enough.²⁰⁹ Under the WPPDA, the predecessor to ERISA, Congress found that disclosure was not preventing abuses of pension plans.²¹⁰ As a result, Congress purposely established fiduciary standards in ERISA in addition to disclosure to provide stronger protections to investors.²¹¹

The SEC's rule also fails to prohibit some of the worst conflicts of interest, including sales contests and bonuses²¹² that encourage broker-dealers to push certain products.²¹³ These schemes encourage broker-dealers to give biased advice because the product may not be in the best interest of the client, but nonetheless benefit the broker-dealer.

With the fiduciary rule vacated and the DOL's resistance to fight for its own rule, it is back to square one. Despite the SEC's efforts to step in, its proposed rule is not stringent enough to protect retirement savers. The efforts of both agencies also show that ERISA itself is not prepared to account for the drastic changes that have transformed the retirement savings industry.

IV. CONGRESS SHOULD AMEND ERISA TO ENSURE THE SEC ENFORCES A STRONGER STANDARD OF CARE ON BROKER-DEALERS

This Part advocates that Congress, rather than the administrative agencies, should amend ERISA to implement a fiduciary rule that would apply to broker-dealers with respect to retirement accounts. Section IV.A argues that a fiduciary standard should apply to broker-dealers, and describes the

208. Dani Pascarella, *4 Stats that Reveal How Badly America Is Failing at Financial Literacy*, FORBES (Apr. 3, 2018, 11:55 AM), <https://www.forbes.com/sites/danipascarella/2018/04/03/4-stats-that-reveal-how-badly-america-is-failing-at-financial-literacy/#7c1o64bf2bb7> [https://perma.cc/LMD5-AY8P] (finding 2/3 of Americans cannot pass a basic financial literacy test).

209. See *supra* Section II.C (discussing how ERISA replaced the WPPDA because of its weaknesses with inadequate disclosures and the need for fiduciary standards).

210. See *supra* Section II.C.

211. Kagan, *supra* note 39.

212. Product-based sales contests and bonuses provide broker-dealers with lucrative benefits based on the total production of sales of securities. However, these schemes create the wrong incentives for brokers by leading them to focus more on selling as many products to clients as they can no matter the quality to meet their quota. See Rita Raagas De Ramos, *Broker-Dealers Rebuked for "Web of Toxic Incentives" in Congressional Hearing on Reg BI*, FINANCIAL ADVISOR (Mar. 15, 2019), https://financialadvisoriq.com/c/2226863/269083/broker_dealers_rebuked_toxic_incentive_congressional_hearing?referrer_module=topicBox&module_order=5 [https://perma.cc/LQA2-9SFR].

213. Stephen W. Hall, *SEC "Best Interest" Proposed Rule Falls Short of Protecting Investors*, BETTER MARKETS (Aug. 30, 2018), <https://bettermarkets.com/blog/sec-%E2%80%99Cbest-interest%E2%80%9D-proposed-rule-falls-short-protecting-investors> [https://perma.cc/TG7H-YHKE].

new requirements under the proposed standard. Section IV.B argues why the proposed fiduciary standard is the best protection for retirement savers. Finally, Section IV.C describes why Congress should delegate enforcement of the new standard to the SEC. This Note does not attempt to provide a solution that would regulate the entire financial investment advice industry. It is exclusive to the management of retirement accounts and, more specifically, to those who render investment advice for retirement accounts.

A. *CONGRESS SHOULD IMPOSE A FIDUCIARY STANDARD ON BROKER-DEALERS WHO PROVIDE INVESTMENT ADVICE ON RETIREMENT ACCOUNTS*

The best solution to the problems that ERISA and the SEC have failed to address is for Congress to legislatively mandate a higher standard for broker-dealers who render investment advice on retirement accounts. Section IV.A.1 explains that, as a fiduciary, broker-dealers would be required to act in the best interests of their clients, and to make investment recommendations that further a client's financial goals. Section IV.A.2 argues for heightened disclosure requirements under the proposed standard. Section IV.A.3 argues that, to meet the obligations as a fiduciary, broker-dealers must be comprehensive and transparent in the presentation of their research and of investment recommendations. Key to all the requirements is increased engagement and communication with clients in the investment process. Section IV.A.4 provides the proposed language of the amendment to ERISA.

1. *Acting in the Client's Best Interest*

As fiduciaries under the new standard, broker-dealers would be required to act in the best interests of the client. Unlike the SEC proposed rule, Congress would declare a clear definition of the best interest fiduciary standard where clients' interests are put first and ahead of the interests of their financial adviser. As fiduciaries under the new standard, broker-dealers would be legally obligated to act in the best interests of their clients. They would be required at the outset to explain what this standard means so clients understand that the people they rely on for investment advice are held to the highest standard of care. Broker-dealers would also be required to provide investment recommendations that have a clear connection to a client's financial goals. As a result, a preliminary meeting between the broker-dealer and investor should be held where the main focus of the meeting is a discussion of the client's short- and long-term financial goals.

The best interest fiduciary standard and relevant investment recommendation requirement seek to address the problematic conflicts of interest that previous rules have attempted to mitigate, if not eliminate. Even though Congress cannot completely change the business model of broker-dealers, the goal of the new fiduciary standard would be to mitigate conflicts of interest as much as possible and prohibit the worst conflicts of interest. By requiring broker-dealers to act in the best interests of their clients and seek

out investments that further their client's financial goals, the temptation for conflicts of interest is reduced.

2. Heightened Disclosure Requirements

Disclosure alone, without a fiduciary standard, is not enough as proposed by the SEC and frankly has been tried before as discussed in Section II.C. Congress understood before enacting ERISA that those in charge of pension plans needed to be subject to more than just disclosure requirements, which is why they introduced fiduciary standards. While the retirement plan market may look different compared to the 1970s, the circumstances are not much different today with financial professionals overseeing retirement plans, and once again are taking advantage of investors and their retirement funds. As a result, under the new standard, the dual role of a fiduciary standard and more rigorous disclosure requirements would provide investors the necessary protections they need to save for retirement.

Under the new standard, initial disclosure would require the broker-dealer to have a conversation with the client in which the broker explains key information about the relationship between adviser and client. Such information would explain the standard of care required of the broker-dealer, the broker's payment structure, and information about conflicts of interest. The new standard would also require this information be reduced to a one-page document and given to the client after the initial conversation.

When recommending an investment opportunity to a client, the broker-dealer must disclose and explain any potential and actual conflicts with the client. For example, broker-dealers must explain the other lower-cost investments, and why they are recommending the higher-cost investment. Under the heightened disclosure requirements, the broker-dealer also would have to disclose the benefits, risks, and fees associated with a recommendation and in a way the client can understand. Broker-dealers must disclose these conflicts before the product is sold. Also, clients can request to withhold a transaction until they have had time to consider the disclosed information. Broker-dealers must record the client's request, require the client to sign the document, and store it in the client's file. The conversation about potential conflicts of interest should also be confirmed by a letter or document prepared by the broker-dealer, which is signed by the client as confirmation that the conversation was accurate. Adopting these procedures ensures that broker-dealers provide important information that is disclosed, thoroughly explained, and presented to clients in a way that is not overwhelming. As a result, investors can make truly informed decisions, and give consent, despite the existence of potential conflicts of interest.

The new standard would also prohibit the most obvious forms of conflicted advice like sales contests and quotas. Congress would be targeting conflicts of interest at their source by eliminating the problematic incentives

companies use to encourage broker-dealers to sell products to investors that are overpriced and underperform.

3. Comprehensive and Transparent Investment Recommendations

When broker-dealers are considering investment recommendations, they need to be comprehensive in their due diligence and present their analysis and data behind the investment recommendations to clients. Under the new standard, brokers would be obligated to consider all available information about potential investments. Furthermore, broker-dealers would meet the obligation of due diligence by having a firm understanding of the risks and benefits of an investment recommendation. To inform this understanding, broker-dealers should know the costs of the recommendation as well as the investment characteristics of the product or strategy—including any unique features such as liquidity, the potential for volatility, and the likely returns on the investment. Customer due diligence is also an important part to providing comprehensive investment recommendations, so broker-dealers should consider all relevant data about their clients, including age, income, their tax situation, and financial goals. Once a broker-dealer seeks to recommend a product, he must provide a due diligence report that describes the investment process. Broker-dealers should use the report as a tool to explain and engage the client in the analysis behind the recommendation. Broker-dealers should give clients enough time to absorb the information and therefore should receive it well before finalizing a transaction.

4. Proposed Language of Amendment to ERISA

This Note argues that Congress should enact an amendment to ERISA to impose a fiduciary standard on broker-dealers. The focus of the amendment would be to expand the definition of fiduciary in ERISA under § 3(21)(A)(ii). The following Section offers both the original statute and the proposed amendment. The current ERISA § 3(21)(A) provision provides:

Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.²¹⁴

²¹⁴. 29 U.S.C. § 1002(21)(A) (2012).

The proposed amendment seeks to bring broker-dealers under the new fiduciary definition by expanding what constitutes investment advice, and to apply the new fiduciary definitions to plans not previously covered under ERISA. The bolded text represents the clarifying language the amendment would introduce into the statute. The DOL lacked the authority to enforce its new definition of fiduciary under its rule, so the amendment provides express authority to the SEC to enforce the amended statutory language. The proposed Amendment to ERISA § 3(21)(A) provides:

Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to **both employer sponsored and non-employer retirement plans** to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice **(including but not limited to the management of a plan, recommendations on the purchase of securities on behalf of a client, other investment products, and rollovers from one plan to another)**, for a fee, **sale commission**, or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title. **The U.S. Securities and Exchange Commission shall enforce the definitions of fiduciary and investment advice.**

*B. CONGRESS SHOULD DELEGATE AUTHORITY TO ENFORCE THE
PROPOSED FIDUCIARY STANDARD TO THE U.S. SECURITIES
AND EXCHANGE COMMISSION*

When ERISA was first formulated, it was strictly a tax and labor law. However, the SEC should be involved. Under Congress's new amendment, the SEC would be the designated agency to regulate the fiduciary standard subject to broker-dealers. While the SEC's proposed rule did not provide the adequate protections for retirement savers, the agency itself has an important role in protecting retirement accounts.

First, as emphasized previously in Part III, the retirement landscape today is completely different than it was 40 years ago. In particular, it has become much less of a labor issue and more of a securities issue. A key characteristic of private pensions was the emphasis on the employer-employee relationship. Employers were in charge of managing and providing benefits to their employees upon retirement, but that is no longer the reality. Historically, this characteristic was the likely reason Congress had the DOL so intimately involved with regulating retirement plans. There was no need for people to educate themselves or get involved in their retirement savings because their

employers handled them. However, retirement plans have largely lost that employer-employee element, with the exception of 401(k)s, which are still established by employers. The retirement market is now investor driven and many use non-employer sponsored plans. Investors must make their own choices on how to invest their money in the securities market. Therefore, since the primary mission of the SEC is to protect investors,²¹⁵ and its domain is predominantly in regulating the securities market,²¹⁶ it has a crucial role in protecting these retirement investors.

Second, and most importantly, the current retirement landscape has caused investors to be increasingly more dependent on financial professionals. They need to make informed decisions about how to invest their money, which is largely based on advice from others who are likely more knowledgeable about the market than the average investor. Congress originally enacted the Investment Advisers Act of 1940 and the Securities Exchange Act of 1934 because the securities industry needed regulation, especially given its role in causing the Great Depression.²¹⁷ As already noted in Section II.F.1, those laws created different standards of care for financial professionals working in the securities industry. Despite being under different standards, both investment advisers and broker-dealers are under the oversight of the SEC.²¹⁸ Moreover, since the SEC already regulates the fiduciary standard subject to registered investment advisers, the SEC would be better equipped to enforce a fiduciary standard over broker-dealers, as required by Congress.

C. THE PROPOSED FIDUCIARY STANDARD IMPOSED BY CONGRESS WOULD PROVIDE THE STRONGEST PROTECTION TO RETIREMENT INVESTORS

As the well-intentioned efforts of the DOL and SEC have shown, the standards of care regulating broker-dealers must be improved. The proposed fiduciary standard above should replace the suitability standard currently applied to broker-dealers. As a society, we embrace the idea that doctors and lawyers act in the best interests of their patients or clients. Thus, retirement investors should not expect anything less from those who manage their money. The proposed fiduciary standard is superior to suitability because not only is the former the highest standard of care applied to investment professionals, but also it would legally require broker-dealers to act in their

215. *What We Do*, SEC, <https://www.sec.gov/Article/whatwedo.html> [<https://perma.cc/C2SY-7PWC>].

216. James Chen, *Securities and Exchange Commission (SEC): What is the Securities and Exchange Commission (SEC)?*, INVESTOPEDIA, <https://www.investopedia.com/terms/s/sec.asp> [<https://perma.cc/38TM-gK8H>] (last updated May 14, 2019).

217. Christine Lazaro, *The Future of Financial Advice: Eliminating the False Distinction Between Brokers and Investment Advisers*, 87 ST. JOHNS L. REV. 381, 387-94 (2013).

218. Chen, *supra* note 216.

clients' best interest.²¹⁹ The suitability standards does not require such obligations for broker-dealers. Moreover, the proposed fiduciary standard would require broker-dealers to find the best investments for their clients, while the suitability standard allows them to find only *suitable* investments.

In addition, as expressed in Section II.F.1, fiduciaries owe clients duties of loyalty and care, which means putting clients' interests above their own, and avoiding conflicts of interest. In contrast, the suitability standard does not provide enough protection to investors against conflicts of interest. If anything, the suitability standard encourages broker-dealers to act on conflicts because suitability provides more flexibility to brokers. They can recommend higher priced products as long as they are suitable to the client, which seems to be an easy standard to satisfy. Therefore, given the more stringent requirements, there is little doubt that the proposed fiduciary standard would provide greater protection to investors than the suitability standard.

The SEC's "best interest" or suitability plus standard also does not go far enough to improve on existing regulations. The SEC's rule is nothing more than a rebranding of the suitability standard for broker-dealers. While encouraging broker-dealers to act in the best interests of clients, it is not the same as acting in the best interests as a fiduciary under the proposed standard above. As expressed in Section IV.A.1, the proposed fiduciary standard provides a clear understanding of what constitutes "acting in the best interests" of clients. In contrast, by not specifying how brokers are supposed to act in their customer's best interest, the SEC's rule gives more power to the broker-dealers to decide and therefore a greater potential for the standard to be abused. As a result, the SEC's rule contains the same pitfalls as the suitability standard because it has the potential for clients to receive an investment recommendation that is not in their best financial interest.

In addition, as stated in Part III, the SEC declared that the obligations of broker-dealers under its proposed standard were not the same as those of fiduciary investment advisers. Thus, the SEC's rule maintains a dual standard system where broker-dealers operate under a lower standard of care when providing investment advice. In contrast, under the proposed fiduciary standard above, broker-dealers would work under the same fiduciary standards as investment advisers, along with the additional requirements of disclosure and transparency.

Unlike the SEC's rule, the proposed fiduciary standard above requires broker-dealers to put their client's interests above their own, and therefore leaves little room for conflicts of interest. The proposed standard also prohibits obvious conflicted advice that the SEC's rule does not. In the end, the SEC's "best interest" standard means nothing more than "suitable," and it

219. See *supra* Section II.F.1 (describing how fiduciaries owe the highest standard of care and are required to put a client's interest above their own).

is impossible to protect investors as compared to the proposed fiduciary standard above.

As expressed in Section II.F.1, broker-dealers are portraying themselves as advisers, and taking on more responsibilities that were once understood as provided only by investment advisers. Thus, the distinctions between investment advisers and broker-dealers that led to them being held to different standards of care are blurring. Since broker-dealers are expanding beyond simply selling products, and into the realm of providing more substantive investment advice, they should be held to just as high of a standard as investment advisers.

Finally, critics argue that a fiduciary standard applied to broker-dealers would have a devastating impact on the business of broker-dealers, but this is unfounded.²²⁰ In fact, the DOL's rule began to change how financial professionals do business.²²¹ It created a slowly emerging trend in the investment advice industry "away from commissions to fee-based pricing."²²² Part of this phenomenon is likely due to growing awareness among investors created by the DOL's fiduciary rule.²²³ Investors are more aware and "know there is a clear difference between suitability and fiduciary advice."²²⁴ Therefore, the law governing broker-dealers should align with what retirement savers expect of them when seeking investment advice.

V. CONCLUSION

ERISA is ineffective at protecting retirement benefits of workers because of fundamental changes in the retirement industry. ERISA was enacted when retirement plans were employer-based. Furthermore, due to the relationship between the employer and employee for retirement benefits, the Department of Labor was intimately involved. However, more workers are turning to plans that are not employer-based, and have become more dependent on investment advice from financial professionals. Since broker-dealers work under the lower standard of suitability rather than the fiduciary standard of

220. An empirical study was performed that found "no statistical differences [between states that apply a strict fiduciary standard and those that apply no fiduciary standard in providing] a broad range of products including those that provide commission compensation . . . and the cost of compliance." Michael Finke & Thomas Langdon, *The Impact of the Broker-Dealer Fiduciary Standard on Financial Advice* 22 (Mar. 9, 2012) (unpublished manuscript), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2019090 [<https://perma.cc/B5AM-YH2N>].

221. Javier Simon, *Industry Trends Threaten Traditional Broker/Dealer Model*, PLANADVISER (Oct. 4, 2017), <https://www.planadviser.com/industry-trends-threaten-traditional-brokerdealer-model> [<https://perma.cc/4BVA-MLZK>].

222. *Id.*

223. David Trainer, *Even Without the Rule, Fiduciary Awareness Remains*, FORBES (Mar. 16, 2018, 11:38 PM), <https://www.forbes.com/sites/greatspeculations/2018/03/16/even-without-the-law-fiduciary-rule-awareness-remains> [<https://perma.cc/AEE4-UV3G>] (discussing that the impact of the DOL's rule cannot be easily wiped out and that "the fiduciary principle is eternal").

224. *Id.*

investment advisers, and their conflicted advice has cost American investors billions, these professionals should face greater scrutiny. Consequently, Congress should amend ERISA to impose a fiduciary standard on broker-dealers who manage retirement accounts that emphasizes relevant, fully disclosed, transparent, and comprehensive investment recommendations. Congress should delegate responsibility for enforcing the fiduciary standard to the SEC. Congress can no longer turn a blind eye to the clear need for reform in the retirement planning industry.