IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE NATIONAL ASSOCIATION FOR FIXED ANNUITIES,	)	
Plaintiff,	)	
v.	)	No. 1:16-cv-1035
THOMAS E. PEREZ and UNITED STATES DEPARTMENT OF LABOR	)	
Defendants.	)	

MEMORANDUM FOR AARP AND AARP FOUNDATION
AS AMICI CURIAE IN SUPPORT OF DEFENDANTS
URGING DENIAL OF PRELIMINARY INJUNCTION

Maame Gyamfi*
**Counsel of Record*
Mary Ellen Signorille
William Alvarado Rivera
AARP Foundation Litigation
601 E Street, NW
Washington, DC 20049
Telephone (202) 434-2060
Facsimile (202) 434-6424
mgyamfi@aarp.org

Attorneys for *Amici Curiae*

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INTEREST OF AMICI CURIAE[1]

AARP—with approximately 38 million members—is a nonprofit, nonpartisan organization dedicated to fulfilling the needs and representing the interests of people age fifty and older. AARP fights to protect older people's financial security, health, and well-being. AARP's charitable affiliate, AARP Foundation, creates and advances effective solutions that help low-income individuals fifty and older to secure the essentials so that they do not fall into poverty during retirement. Through, among other things, participation as amicus curiae in state and federal courts,[2] AARP and AARP Foundation seek to increase the availability, security, equity, and adequacy of public and private pension, health, disability and other employee benefits that countless members and older individuals receive or may be eligible to receive including.

A major priority has been to assist Americans in accumulating and effectively managing the assets they will need to supplement Social Security, so that they can maintain an adequate standard of living in retirement. Close to 75 million households are counting on employer-sponsored plans, Individual Retirement Accounts (IRAs), or both, to supplement Social Security for their retirement security.[3] However, the shift from defined benefit plans to defined

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[1] Amici state that no party's counsel authored this brief either in whole or in part, and further, that no party or party's counsel, or any person or entity other than amici, their members and their counsel, contributed money intended to fund preparing or submitting this brief. Plaintiff had taken no position on amici's request for consent to the filing of this brief, but apparently has changed its position; defendants have consented.

[2] *E.g.*, *Tibble v. Edison Int'l*, 135 S. Ct. 1823 (2015); *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014); *Cigna Corp. v. Amara*, 563 U.S. 421 (2011); *LaRue v. DeWolff, Boberg & Assocs*., 552 U.S. 248 (2008*); Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc*., 530 U.S. 238 (2000); *Varity Corp. v. Howe*, 516 U.S. 489 (1996).

[3] Inv. Co. Inst., *The Role of IRAs in U.S. Households' Saving for Retirement, 2015*, at 3, Figure 1 (Feb. 2016), https://www.ici.org/pdf/per22-01.pdf.

contribution plans has transferred significant responsibility to individuals for investment decisions that will directly impact the adequacy of the assets available to fund their future retirement needs.[4] This shift has made the goal of achieving and maintaining an adequate income in retirement more challenging. It is hard enough to save for retirement. Conflicted investment advice should not be one of the barriers millions of Americans face as they work to save for their retirement. The Department of Labor's Conflict of Interest Rule ("Rule") and suite of Exemptions[5] helps Americans in their efforts to accumulate as much money as possible in their retirement accounts to achieve a secure retirement.[6] With approximately 10,000 baby boomers retiring every day,[7] the stakes could not be higher for individuals and federal and state governments to ensure that individuals have the maximum amount saved for retirement.[8] In light

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[4] *See* U.S. Dep't of Labor, EMPLOYEE BENEFITS SECURITY ADMINISTRATION, PRIVATE PENSION PLAN BULLETIN HISTORICAL TABLES AND GRAPHS (1975-2013) 1, 5, 13, 17, 21, 25-27 (Sept. 2015), http://www.dol.gov/ebsa/pdf/historicaltables.pdf (by every measure, defined contribution plans have become the nation's primary retirement vehicle).

[5] Definition of the Term ''Fiduciary''; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20,946 (Apr. 8, 2016).

[6] Retirement plans, their sponsors, and beneficiaries receive substantial tax incentives in deferred and lost taxes on the contributions and earnings. J. Comm. on Taxation, *Estimates Of Federal Tax Expenditures For Fiscal Years 2014–2018* (JCX-97-14), Aug. 1, 2014, https://www.jct.gov/publications.html?func=startdown&id=4663 (loss in tax revenue of $547.8 billion over five years). These retirement assets deserve a higher level of protection than other types of investments or purchases due to Congress' purpose of protecting employee benefits through, among other things, ERISA's fiduciary provisions. ERISA §§ 2, 404, 406, 29 U.S.C. §§ 1001, 1104, 1106.

[7] Glenn Kessler, *Do 10,000 baby boomers retire every day?*, WASHINGTON POST (July 24, 2014), https://www.washingtonpost.com/news/fact-checker/wp/2014/07/24/do-10000-baby-boomers-retire-every-day/.

[8] *See, e.g.*, Jay Goodliffe, et al., *The Cost of Retiring Poor: Cost to Taxpayers of Utahns Retiring Poor* (Jan. 2015) (increases in retirement savings will prevent substantial increases in costs associated with existing public programs), http://www.aarp.org/content/dam/aarp/ppi/2016-03/cost-to-taxpayers-of-utahns-retiring-poor.pdf; Aleta Sprague, *The California Secure Choice Retirement Savings Program* 5 (Apr. 26, 2013), http://www.retirementmadesimpler.org/Library/

of the significance of the issues presented by this case, AARP and AARP Foundation respectfully submit this brief.

ARGUMENT

AN ORDER ENJOINING THE DEPARTMENT OF LABOR'S RULE AND SUITE OF EXEMPTIONS WOULD NOT BE IN THE PUBLIC INTEREST.

For the court to issue a preliminary injunction, the movant must establish that (1) it is likely to succeed on the merits, (2) it is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in its favor, and (4) an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). Because a preliminary injunction is an extraordinary remedy, *id.*, the movant has the burden to establish that all four factors, taken together, weigh in favor of the injunction. *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1292 (D.C. Cir. 2009). As explained below, amici submit that an order enjoining the Department of Labor's Rule and suite of Exemptions will not be in the public interest as delayed implementation of the Rule will subject retirement investors, particularly individuals close to retirement, to investment advice that is not in their best interest.

A. Because Significant Changes In The Retirement System Have Forced Individuals To Manage Their Own Retirement Monies, Retirement Investors Need Greater Protections From Conflicted Investment Advice.

1. Conflicted investment advice has the potential for significant negative impact on individuals' retirement security due to higher fees, higher-risk investments, and excessive transaction costs.

Defined benefit plans were commonplace when the Department issued the initial fiduciary investment advice regulation in 1975.[9] These plans employed professional managers to administer plan assets and serve as fiduciaries. Since 1975, there has been a dramatic decline in

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CAretirementFinal4.26.13.pdf (noting that retirees without adequate retirement savings will rely on the federal and state social safety net).

[9] 40 Fed. Reg. 50842 (Oct. 31, 1975).

defined benefit plans.[10] Today, most Americans with retirement savings utilize IRAs or 401(k) plans. However, when the initial regulation was issued in 1975, IRAs had just been created,[11] and 401(k) plans did not even exist.[12] Moreover, since 1975, the variety and complexity of investments have dramatically changed. For example, in 1975, Wall Street had not yet created collateralized debt obligations,[13] or contemplated the creation and tremendous growth of target date funds.[14] The initial regulation did not contemplate any of these developments, which have led individuals to become solely responsible for the decisions concerning their retirement assets.[15]

Of particular concern to amici is the potential negative impact of conflicts of interest on the retirement security of AARP members and other older Americans. For example, the Government Accountability Office (GAO) estimated that $20,000 in a 401(k) account that had a one-percentage point higher fee for 20 years would result in an over 17% reduction—over

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[10] *See* U.S. Dep't of Labor, EMPLOYEE BENEFITS SECURITY ADMINISTRATION, PRIVATE PENSION PLAN BULLETIN HISTORICAL TABLES AND GRAPHS (1975-2013) 1 (Sept. 2015), http://www.dol.gov/ebsa/pdf/historicaltables.pdf (*Historical Tables)*.

[11] ERISA, Pub. L. No. 93-406 § 2002(b) (1974), *codified in* 26 U.S.C. § 408.

[12] Revenue Act of 1978, Pub. L. No. 95-600 §§ 135(a), 141(f)(3), 143(a), 152(e), 92 Stat. 2763, 2785-86, 2795, 2796, 2799; Internal Revenue Serv., *Certain Cash or Deferred Arrangements Under Employee Plans*, 46 Fed. Reg. 55544 (Nov. 10, 1981).

[13] Nat'l Comm'n On The Causes Of The Fin. And Econ. Crisis In The U.S., THE FINANCIAL CRISIS INQUIRY REPORT 129 (Jan. 2011), https://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf (Drexel Burnham Lambert issued the first collateralized debt obligation in 1987).

[14] Target Date Analytics LLC, *A Brief History of Target Date Funds*, http://www.ucs-edu.net/cms/wp-content/uploads/2014/04/I_ABriefHistoryOfTargetDateFunds.pdf (last visited July 5, 2016) (first target date funds were introduced in 1994).

[15] Inv. Co. Inst., *Retirement Assets Total $24.1 Trillion in First Quarter 2016,* https://www.ici.org/research/stats/retirement/ret_16_q1 (June 23, 2016) (401(k)s held $4.8 billion in assets at the end of March 2016).

$10,000—in the account balance. U.S. Gov't Accountability Office, GAO-07-21, *Private Pensions: Changes Needed to Provide 401(k) Plan Participants and the Department of Labor Better Information on Fees* 7 (2006). We estimate that over a 30-year period, the account would be about 25 percent less. Even a difference of only half a percentage point—50 basis points—would reduce the value of the account by 13 percent over 30 years. In short, conflicted advice resulting in higher fees and expenses can have a huge impact on the amount of retirement income; indeed, it could cost retirement investors billions of dollars each year.

Conflicted advice can result in costs and losses other than direct higher fees and expenses. For example, retirement investors may end up with higher-risk investments,[16] and they may incur excessive transaction costs.[17] Conflicted advice also frequently leads to the purchase of investments that underperform the market.[18] And, when retirement investors end up with less money to spend, there is a significant cost to the economy, in addition to the individual.[19]

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[16] *E.g.*, Stephen R. Foerster, et al., *Retail Financial Advice: Does One Size Fit All?* (July 2, 2015), http://ssrn.com/abstract=2522934.

[17] *E.g.*, Andreas Hackethal, et al., *Financial Advisors: A Case of Babysitters?* (June 8, 2011), http://ssrn.com/abstract=1360440.

[18] *E.g.*, John Chalmers & Jonathan Reuter, *Is Conflicted Investment Advice Better than No Advice?* 1, 26, Nat'l Bureau of Econ. Research Working Paper 18158 (June 2012), http://www.nber.org/papers/w18158 (retirement investors who received conflicted advice underperformed a self-managed accounts).

[19] *Cf*. Gary Koenig & Al Myles, AARP Pub. Policy Inst., *Social Security's Impact on the National Economy* 1-2, 4-7 (2013), http://www.aarp.org/content/dam/aarp/research/public_policy_institute/econ_sec/2013/social-security-impact-national-economy-AARP-ppi-econ-sec.pdf (because recipients spend almost all of their Social Security benefits on goods and services, every dollar of Social Security benefits generates $2 of economic output); Nari Rhee, Nat'l Inst. on Ret. Sec., *Pensionomics 2014: Measuring the Economic Impact of DB Pension Expenditures* 1, 13-21 (2014), http://www.nirsonline.org/storage/nirs/documents/Pensionomics%202014/pensionomics2014_final.pdf (demonstrating that consumer spending generated by pension benefits provided by state and local government pension plans have a sizable economic impact that ripples through every state).

For many individuals now saving for retirement through their employer-sponsored 401(k) plans, the amount contributed and accumulated is critically important,[20] as it is often their only source of private retirement income.[21] Thus, when individuals seek investment advice to assist them in managing their own savings, it is imperative that such advice be conflict-free and in the best interest of the individual.

2. Because the decision to rollover employer-sponsored plan assets to an IRA is one of the most significant financial transactions that a individuals will make, it is important that these decisions are protected from the negative impact of conflicted investment advice.

Since the advent of 401(k) plans, there has been a significant movement of assets from employer-sponsored plans to IRAs. Indeed, the amount of assets in IRAs now exceeds that of defined contribution plans, and recent data show a steady increase of those assets.[22] This movement between employer-sponsored plans to IRAs is commonly known as a "rollover." Rollovers occur when individuals change jobs or approach retirement, and they move their retirement assets from their employer-sponsored plan to an IRA in order to maintain the tax-deferred status of their retirement assets.

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[20] *See* James Poterba, et al., *Defined Contribution Plans, Defined Benefit Plans, and the Accumulation of Retirement Wealth*, Nat'l Bureau of Econ. Research Working Paper 12,597 (Oct. 2006), http://www.nber.org/papers/w12597 (net-of-expense asset returns along with asset allocation and contribution rate determine account balance at retirement).

[21] U.S. Gov't Accountability Office, GAO 15-419, *Retirement Security: Most Households Approaching Retirement Have Low Savings* 8 (May 2015), http://www.gao.gov/assets/680/670153.pdf (to the extent that households have savings, they are not significant outside of retirement accounts); Sudipto Banerjee, *Income Composition, Income Trends, and Income Shortfalls of Older Households*, EBRI ISSUE BRIEF NO. 383, at 5 (Feb. 2013), http://www.ebri.org/pdf/briefspdf/ebri_ib_02-13.no383.incmeld.pdf (pensions and annuities are the second-most important source of income for most older households outside of Social Security).

[22] Inv. Co. Inst., *supra* n.15 ($7.4 trillion in IRAs compared with $6.8 trillion in defined contribution plans of which $4.8 trillion are in 401(k) plans).

"Rollovers from employer-sponsored retirement plans have fueled the growth in IRAs."[23] "Nearly half of traditional IRA–owning households indicated their IRAs contained rollovers from employer-sponsored retirement plans," with 76 percent rolling over the entire retirement account balance in their most recent rollover.[24] In 2012, individuals rolled over about $335 billion into an IRA.[25] The average and median rollover amounts to traditional IRAs were $96,660 and $27,967, respectively, with individuals near retirement age rolling over average and median amounts around $160,000 and $60,000.[26] Not surprisingly, older individuals rolled over larger amounts than other individuals and had larger IRA account balances. [27] Sixty-three percent of individuals consulted a "professional financial adviser" when they were considering rolling over their 401(k) account balance into an IRA.[28]

Those IRA investors who are closer to retirement may be more vulnerable to the negative impact of conflicted advice for three reasons: (1) the assets they have to invest are larger;[29] (2)

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[23] Inv. Co. Inst., *The Role of IRAs in U.S. Households' Saving for Retirement, 2015*, at 1 (Feb. 2016), https://www.ici.org/pdf/per22-01.pdf.

[24] *Id.* at 1.

[25] *Id.* at 13.

[26] Craig Copeland, *Individual Retirement Account Balances, Contributions, and Rollovers, 2013; With Longitudinal Results 2010–2013: The EBRI IRA Database*, EBRI ISSUE BRIEF NO. 414, at Figure 19, 11, 16, 20 (May 2015), https://www.ebri.org/pdf/briefspdf/EBRI_IB_414.May15.IRAs.pdf. The amounts that older workers hold in their 401(k) accounts correlate with the cited rollover amounts. *See* Jack VanDerhei, et al., *401(k) Plan Asset Allocation, Account Balances, and Loan Activity in 2014*, EBRI ISSUE BRIEF NO. 423, at 16-17 (Apr. 2016), https://www.ebri.org/pdf/briefspdf/EBRI_IB_423.Apr16.401k-Update.pdf.

[27] Inv. Co. Inst., *supra* n.23 at 5; Craig Copeland, *supra* n.26 at Figure 19, 11, 16, 20.

[28] Inv. Co. Inst., *supra* n.23 at 16.

[29] *See* Craig Copeland, *supra* n.26 at 6-7, 9, 10, Figure 13 (the median balance in IRAs originating from rollovers were higher than other IRA types).

they may lack strong financial literacy skills;[30] and, (3) they make these decisions when their cognitive skills may affect their financial decision making.[31] In addition, the detrimental effects of conflicted advice have the most negative potential impact on individuals with modest balances,[32] as they have fewer economic resources,[33] and any additional costs or losses diminish what little savings they have. For all these reasons, investors close to retirement are especially vulnerable as they make significant and often one-time decisions to move retirement savings from more protected employer-based plans into significantly less protected IRAs.

[30] Annamaria Lusardi, et al., *Financial Literacy and Financial Sophistication in the Older Population: Evidence from the 2008 HRS* (Sept. 2009), http://www.mrrc.isr.umich.edu/ publications/papers/pdf/wp216.pdf ("In view of the fact that individuals are increasingly required to take on responsibility for their own retirement security, this lack of [financial] knowledge has serious implications."); *see also* Annamaria Lusardi & Olivia S. Mitchell, *Financial Literacy and Planning: Implications for Retirement Wellbeing,* Nat'l Bureau of Econ. Research Working Paper 17,078, at 6 (May 2011), http://www.nber.org/papers/w17078.pdf (one-third of survey respondents did not understand compound interest, one-quarter did not understand inflation implications and half did not know about risk diversification).

[31] *E.g.*, Keith Jacks Gamble, et al., *How Does Aging Affect Financial Decision Making?* (Issue Brief No. 15-1), Ctr. for Retirement Research at Boston College, at 1, 6 (Jan. 2015), http://crr.bc.edu/wp-content/uploads/2015/01/IB_15-1-508.pdf (declining cognition begins to accelerate after age 60 and has a noticeable effect on financial literacy; "given the increasing dependence of retirees on 401(k)/IRA savings, cognitive decline will likely have an increasingly significant adverse effect on the well-being of the elderly."); *see generally* Tara Siegel Bernard, *As Cognition Slips Financial Skills Are Often the First to Go*, NEW YORK TIMES (Apr. 24, 2015), http://www.nytimes.com/2015/04/25/your-money/as-cognitivity-slips-financial-skills-are-often-the-first-to-go.html?_r=0 ("A person's financial decision-making ability peaks at age 53, or more generally, in their 50s").

[32] *See* Craig Copeland, *supra* n.26 at 6-7 (average IRA account balance was about $95,000, with average IRA individual balance about $120,000); Alicia H. Munnell, *401(k)/IRA Holdings in 2013: An Update from the SCF* (Issue Brief No. 14-15), Ctr. for Retirement Research at Boston College (Sept. 2014), http://crr.bc.edu/wp-content/uploads/2014/09/IB_14-151.pdf (households approaching retirement had approximately $111,000 in 401(k) and IRA assets).

[33] GAO calculated that an account balance of $109,000 invested in a single-premium immediate single life annuity would earn a 65-year-old $405 per month for life. U.S. Gov't Accountability Office, *supra* n.21 at 7.

When retirement investors look at insurance products to produce a stream of income in retirement at the time of a rollover, they most often think of single premium immediate annuities.[34] However, there are other types of insurance annuity products such as variable and fixed indexed annuities whose value varies with the financial markets or the particular investment group to which they are tied.[35] These annuity products come with high fees,[36] long surrender periods, which may make them unsuitable as investments for most seniors due to their illiquidity,[37] and different tax consequences than other investments.[38] Thus, comparing and choosing suitable products can be difficult for retirement investors due to the complexity of the products.[39] Given the complexity, illiquidity, and significant fees, and the risk to individual retirement investors as they manage their own retirement security, it is crucial that

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[34] Conrad de Aenlle, *Annuities Not For Everyone*, *But They Have A Place*, NEW YORK TIMES (Mar. 12, 2014), http://www.nytimes.com/2014/03/13/business/retirementspecial/annuities-not-for-everyone-but-they-have-a-place.html?_r=0.

[35] *Id.*; Suze Orman, Financial Solutions for You, *Truth About Annuities*, http://apps.suzeorman.com/igsbase/igstemplate.cfm?SRC=MD012&SRCN=aoedetails&GnavID=84&SnavID=29&TnavID&AreasofExpertiseID=107; Tim Maurer, *Annuities: More cons than pros*?, CNBC (Dec. 3, 2013), http://www.cnbc.com/2013/12/03/annuities-more-cons-than-pros.html**.**

[36] *Id*.

[37] Orman, *supra* n.35; Maurer, *supra* n.35; William Baldwin, *Deferred Variable Annuities: Pros and Cons*, FORBES (Sept. 8, 2014), http://www.forbes.com/sites/baldwin/2014/09/08/deferred-variable-annuities-pros-and-con/#49203a1975ca**;** Eve Kaplan**,** *9 Reasons You Need To Avoid Variable Annuities*, FORBES (July 2, 2012), http://www.forbes.com/sites/feeonlyplanner/2012/07/02/9-reasons-you-need-to-avoid-variable-annuities/#2be518754d62.

[38] *Id.*

[39] Kaplan, *supra* n.37 (disclosures are not user friendly).

recommendations to place retirement assets in these products should be made in the best interest of the retirement investor.[40]

Moreover, for many people, the account balance in their 401(k) or IRA represents the bulk of their personal savings.[41] As a result, the distribution decision will often determine the value of a working lifetime of retirement savings. Few financial decisions will be as important as the determination of the timing and the manner in which to take a distribution from a retirement plan or IRA. Most individuals consult an adviser when making this decision, which is often effectively irreversible, because tax consequences and transaction costs generally make it impractical to reverse the distribution decision.[42] Distribution advice may be a one-time transaction, but it will likely determine the largest, most significant—and potentially irreversible—decision that can be made with retirement savings. The proposed rule would close this and other loopholes, and it is of paramount importance that advice rendered before a rollover serve the best interest of the individual retirement investor. An injunction would permit advisers and insurance brokers to continue to give advice that is conflicted and not in the best interest of the individual retirement investor; this is not in the public interest.

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[40] In a recent webinar concerning the DOL Rule, some insurance brokers have admitted that they will be "pushing their clients" to purchase indexed annuities. Ins. News Net, *How Annuity Distribution Can Survive the DOL Rule* at 49:39 - 50:20 (Apr. 21, 2016), https://www.youtube.com/watch?v=eCU86v1ZJqc (on file with counsel). Relatedly, in another webinar focused on plan sponsor duties under the new Rule, some attendees noted that service providers were contacting participants about purchasing certain investments, or leaving money in or taking money out of the plan. Mercer LLC, *New DOL fiduciary rule: What you need to know* at 42:15 - 44:20, 53:40 - 54:50 (May 19, 2016), http://www.mercer.com/events/webcasts/new-dol-fiduciary-rule-what-you-need-to-know.html (last viewed July 12, 2016).

[41] U.S. Gov't Accountability Office, *supra* n.21 at 8 (to the extent that households have savings, they are not significant outside of retirement accounts).

[42] Jeffrey Lewis, et al., EMPLOYEE BENEFITS LAW 5-76-116, 6-21-25, 6-51-53 (3d ed. 2012) (explaining federal tax distribution rules from various types of retirement vehicles).

B. An Injunction Would Perpetuate The Myth That All Investment Advisors Are Already Required To Give Retirement Investors Advice In Their Best Interest.

Results from numerous AARP surveys concerning whether there should be a requirement that financial advice about retirement be provided in the best interest of the individual have consistently revealed that an overwhelming majority of respondents favored this requirement.[43] A survey prior to the issuance of the DOL's Conflict of Interest Rule found that 77% of respondents are concerned that investment advice from plan providers is not required to be in the best interest of individual plan participants.[44] These findings are not surprising since a 2006 survey showed that 90% of respondents believed that investment advisers already had a fiduciary duty.[45]

Most financial advisers hold themselves out as trusted advisers, and investors in the market currently expect and believe that all financial advisers are already acting in the retirement

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[43] *E.g*,. S. Kathi Brown, AARP Research, *Attitudes Toward the Importance of Unbiased Financial Advice* (May 2016), http://www.aarp.org/research/topics/economics/-2016/attitudes-toward-unbiased-financial-advice.html (almost 90% of retirement account holders ages 25+ believe it is important for financial advisors to give financial advice in a client's best interest); S. Kathi Brown, AARP Research, *Fiduciary Duty and Investment Advice: Attitudes of 401(k) and 403(b) Participants* (Sept. 2013), http://www.aarp.org/research/topics/economics/info-2014 /fiduciary-duty-and-investment-advice---attitudes-of-401-k--and-4.html (93% of respondents favored requiring retirement advice to be in their best interest and 81% of respondents agreed that it is important to get investment advice about their retirement from an independent advisor who does not earn money based on their investments); S. Kathi Brown, AARP Research, *Fiduciary Duty and Investment Advice: Attitudes of Plan Sponsors* (Mar. 2014), http://www.aarp.org/research/topics/economics/info -2014/fiduciary-duty-and-investment-advice---attitudes-of-plan-sponsor.html (89% of plan sponsors favored best interest standard).

[44] S. Kathi Brown, AARP Research, *Fiduciary Duty and Investment Advice: Attitudes of 401(k) and 403(b) Participants* (Sept. 2013), http://www.aarp.org/research/topics/economics/info-2014/fiduciary-duty-and-investment-advice---attitudes-of-401-k--and-4.html.

[45] Angelia A. Hung, et al, *Investor and Industry Perspectives on Investment Advisers and Broker-Dealers*, RAND, INST. FOR CIVIL JUSTICE 31 (2008). That same survey showed that 47 percent of respondents were not aware that brokers do not have to disclose all conflicts of interest. *Id*.

investors' sole interest.[46] Every day, individual investors make decisions that affect the adequacy and quality of their retirement assets. This rule remedies longstanding misconceptions about investment advice that greatly disadvantages individual retirement investors. It is critical that this rule go into effect as planned to ensure that retirement investors receive investment advice that is in their best interest, so that their retirement security is not put at risk.

CONCLUSION

For the foregoing reasons, the Court should deny NAFA's motion for a preliminary injunction.

Dated: July 12, 2016

Respectfully submitted,

/s/Maame Gyamfi
Maame Gyamfi*
**Counsel of Record*
Mary Ellen Signorille
William Alvarado Rivera
AARP Foundation Litigation
601 E Street, NW
Washington, DC 20049
Telephone (202) 434-2060
Facsimile (202) 434-6424
mgyamfi@aarp.org

Attorneys for *Amici Curiae*

[46] S. Kathi Brown, *supra* n.44.