House Committee on Education and the Workforce
Health, Employment, Labor and Pensions Subcommittee
Hearing – February 15, 2024, at 10:15 AM ET
"Protecting American Savers and Retirees from DOL's Regulatory Overreach"
Oral Statement of Jason Berkowitz
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Good morning, Chairman Good, Ranking Member DeSaulnier (Chairwoman Foxx, Ranking Member Scott), and members of the Health, Employment, Labor and Pensions Subcommittee.

My name is Jason Berkowitz. I am the Chief Legal and Regulatory Affairs Officer for the Insured Retirement Institute. IRI represents the entire supply chain of the insured retirement industry, including insurers, distributors, asset managers, and solution providers.

I'd like to begin by thanking Chairwoman Foxx and many other subcommittee members for your longstanding commitment to enhancing retirement security for all Americans without impairing access to valuable financial products and services.

Thank you for the opportunity to share our views about the DOL's latest fiduciary proposal.

To be clear, I am not here today to oppose a best interest standard. IRI wholeheartedly believes all consumers should be able to trust that advice they receive from financial professionals is in their best interest. Our industry is full of good, hard-working financial professionals who share this perspective.

I am here to oppose the DOL's proposal, which goes far beyond a best interest standard and would harm those who most need the guidance and assistance of financial professionals.

Retirement savers face many risks as they strive for financial security, including the risk of running out of money.

Protected lifetime income products help savers manage those risks, and professional guidance helps them acquire and use those products appropriately.

Congress recognized this when it enacted the SECURE Act and the SECURE 2.0 Act, bipartisan laws designed to strengthen our retirement system by expanding access to these valuable products and services.

Conversely, the DOL proposal is functionally equivalent to the now-vacated 2016 fiduciary rule, and like that rule, will foster widespread retirement insecurity. Millions of low- and middle-income workers – especially those most impacted by the wealth gap – will find it nearly impossible to access the products and services they need to achieve a secure and dignified retirement.

By contrast, best interest rules adopted by the SEC and 42 states and counting are working without putting unnecessary roadblocks between consumers and the products and services they need.

IRI supports those measures, which provide regulators with the tools they need to protect retirement savers and appropriately address the conduct of bad actors.

With these rules in place, the DOL's proposal is a solution in search of a problem.

The DOL has hypothesized that regulatory gaps exist and are being exploited to harm retirement savers, but it has produced no evidence to support that theory.

If bad actors are exploiting regulatory gaps to harm retirement savers, such gaps should be addressed through targeted rulemaking.

But a targeted approach is impossible without clear evidence of a problem. So instead, the DOL wants to completely upend the existing regulatory framework**.**

They have characterized the proposal as a "best interest rule," even going so far as to assert that anyone complying with Reg BI should have no problem operating under the proposal. This is NOT TRUE.

Under ERISA, the DOL can only regulate the conduct of those who trigger fiduciary status, so the proposal would shoehorn nearly all financial professionals into fiduciary status. You may be wondering why that is a problem given our support for a best interest standard.

It is a problem because ERISA fiduciaries must act "solely in the interest of [plan] participants and beneficiaries…for the exclusive purpose of…providing benefits to participants and their beneficiaries…" Merely acting in the client's best interest is not enough to satisfy this standard.

As a federal appeals court recognized when it rejected the 2016 rule, fiduciary status should apply only when there is a special relationship of trust and confidence.

The DOL has tried to circumvent that decision by asserting that such a relationship exists whenever a financial professional makes a recommendation to a retirement saver. We disagree.

A special relationship of trust and confidence cannot spring into existence spontaneously but rather must be intentionally cultivated over time.

Pretending otherwise will deepen the nation's retirement crisis and further exacerbate retirement insecurity among your constituents.

Instead, the DOL should recognize the limits of its jurisdiction and let the SEC and state insurance departments do their jobs as Congress intended.

This proposal is not fixable. It is not needed. It must be withdrawn.

Thank you. I look forward to answering your questions.