IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *et al*. Plaintiffs v. THOMAS E. PEREZ, SECRETARY OF LABOR, and UNITED STATES DEPARTMENT OF LABOR, Defendants	Civil Action No. 3:16-cv-1476-M Consolidated with: 3:16-cv-1530-C 3:16-cv-1537-N

MOTION OF AARP AND AARP FOUNDATION
FOR LEAVE TO FILE BRIEF AMICI CURIAE
URGING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS

Amici curiae AARP and AARP Foundation hereby move the Court for leave to file a brief amici curiae in support of Defendants urging summary judgment in favor of defendants. The proposed brief has been submitted for filing along with this Motion. Counsel for all parties have consented to the filing of this brief.

In support of this motion, amici AARP and AARP Foundation declare:

1. AARP is a nonpartisan, nonprofit organization with about 38 million members dedicated to fulfilling the needs and representing the interests of persons aged 50 and older. AARP fights to protect older people's financial security, health, and well-being.

2. AARP Foundation, AARP's charitable affiliate, creates and advances effective solutions that help low-income individuals aged 50 and older to secure the essentials so that they do not fall into poverty during retirement.

3. Among other things, both 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 through participation as amici curiae in state and federal courts.[1]

4. One of amici's main objectives is to ensure that participants receive those benefits that they have been promised in accordance with the protections of the Employee Retirement Income Security Act of 1974 (ERISA). 29 U.S.C. § 1001 et seq. The quality of these workers' lives in retirement depends substantially upon their ability to obtain those benefits that they have been promised. To achieve that goal, amici work to ensure that fiduciaries prudently and loyally manage and administer participants' plans.

5. Nearly half of AARP's 38 million members are employed full or part-time, with many of their employers providing retirement plans. A major priority for AARP and AARP Foundation is to provide them the knowledge and tools necessary to accumulate and effectively manage assets that will supplement Social Security income.

6. AARP and AARP Foundation direct their advocacy through legislative, administrative and adjudicative channels, including participation in federal litigation when the court's decision may substantially affect the interests of older

[1] *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).

people. A substantial portion of amici's legal efforts is devoted to filing amicus briefs in federal cases presenting ERISA issues because of the paramount importance of fiduciaries' prudent management and administration of plan assets to the retirement security of older people.

7. In light of the significance of the issues presented by this case and amici's special interest in safeguarding the retirement security of older people, AARP and AARP Foundation respectfully submit this brief amici curiae.

8. This Court has the "discretion to consider 'amicus' briefing where 'the proffered information is timely and useful or otherwise necessary to the administration of justice.'" *United States ex rel. Long v. GSD&M Idea City LLC*, No. 3:11-cv-1154, 2014 U.S. Dist. LEXIS 185691, at *11 (N.D. Tex. Aug. 8, 2014) (quoting *Does 1-7 v. Round Rock Indep. Sch. Dist.*, 540 F. Supp. 2d 735, 738 n.2 (W.D. Tex. 2007); *see also United States ex rel. Gudur v. Deloitte Consulting LLP*, 512 F. Supp. 2d 920, 927 (S.D. Tex. 2007) ("[I]n the absence of controlling authority, district courts commonly refer to [Federal] Rule [of Appellate Procedure] 29 for guidance . . . The extent to which the court permits or denies amicus briefing lies solely within the court's discretion.").

9. Amici submit that the proposed brief will assist the Court by providing useful and unique insight into the beneficial impact of the challenged rule on the retirement savings of our members and older people. Retirement savings often constitute the bulk of an individual's personal savings, and every day, individuals make investment decisions – including the rollover of employer-sponsored retirement accounts to IRAs – that can affect the adequacy and quality of their retirement

savings. Indeed, the decision to rollover retirement monies may be the single largest financial transaction of an individual's life, making it particularly essential that they are covered by the Department's Rule.

10. Amici submit that a majority of individuals rely on an investment adviser when making critical decisions about their retirement savings, including the decision to rollover retirement monies or invest in insurance products such as annuities. The larger shift from defined benefit plans to defined contribution plans has transferred significant responsibility to individuals for their own investment decisions. A large majority of consumers assume that investment advisers act in their best interests and already are held to a fiduciary standard.

11. Amici further contend that retirement monies are treated differently than other investments through significant tax incentives – both for employers and employees – that encourage individuals to save for retirement. ERISA and other laws create additional obligations on retirement savings that protect these funds for use in advanced age and retirement. The rule and suite of exemptions is part of the government's obligation to ensure that the public gets a fair return on its significant investment.

12. The proposed brief is fifteen pages, narrow in scope and avoids repetitive arguments. Given the court's orders concerning filings, amici submit only one brief for all of the consolidated cases. Amici do not seek to present an oral argument to the court.

Accordingly, Amici respectfully requests leave to file this brief amici curiae in support of Defendants to facilitate a full consideration by the Court on the legal and public policy issues presented in this case.

Dated: August 25, 2016

Respectfully submitted,

/s/ Bernard A. Guerrini

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CERTIFICATE OF CONFERENCE

I hereby certify that on August 17, 2016, I requested consent to the filing of this Motion and brief through e-mail. Counsel for Defendants (Galen Thorp), the *ACLI* Plaintiffs (Kelly Dunbar), the *IALC* Plaintiffs (Joseph Guerra) and the *Chamber* Plaintiffs (Jason Mendro) indicated that they did consent to this Motion and the filing of this brief.

/s/ Mary Ellen Signorille
Mary Ellen Signorille

CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2016, I electronically filed the foregoing Motion of AARP and AARP Foundation for Leave To File Brief Amici Curiae with the Clerk of the Court for the United States District Court for the Northern District of Texas using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Bernard A. Guerrini
Bernard A. Guerrini

IN THE UNITED STATES DISTRICT COURT
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CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *et al.*, Plaintiffs, v. THOMAS E. PEREZ, SECRETARY OF LABOR, and UNITED STATES DEPARTMENT OF LABOR, Defendants.	)	Civil Action No. 3:16-cv-1476-M Consolidated with 3:16-cv-1530-C 3:16-cv-1537-N

MEMORANDUM FOR AARP AND AARP FOUNDATION
AS AMICI CURIAE URGING
SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS

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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.

To help Americans maintain an adequate standard of living in retirement, AARP has made it a priority to provide them the knowledge and tools necessary to accumulate and effectively manage assets that will supplement Social Security income. Close to 75 million households depend 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 contribution plans has transferred significant responsibility to individuals for investment decisions that will directly impact the adequacy of the assets available

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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. Counsel for all parties have consented to the filing of this brief.

[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.

to fund their future retirement needs.[4] This shift has made the goal of achieving and maintaining adequate retirement income even 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. With approximately 10,000 baby boomers retiring every day,[6] the stakes could not be higher for individuals and federal and state governments to ensure that individuals have the maximum amount saved for retirement.[7] In light of the significance of the issues presented by this case, AARP and AARP Foundation respectfully submit this brief.

[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] 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/.

[7] *See, e.g.*, Jay Goodliffe et al., *The Cost of Retiring Poor: Cost to Taxpayers of Utahns Retiring Poor* (Jan. 2015), http://www.aarp.org/content/dam/aarp/ppi/2016-03/cost-to-taxpayers-of-utahns-retiring-poor.pdf (increases in retirement savings will prevent substantial increases in costs associated with existing public programs); Aleta Sprague, *The California Secure Choice Retirement Savings Program* 5 (Apr. 26, 2013), http://www.retirementmadesimpler.org/Library/CAretirementFinal4.26.13.pdf (noting that retirees without adequate retirement savings will rely on the federal and state social safety net).

ARGUMENT

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.

A. Retirement Monies Should Receive a Higher Level Protection Than Other Types of Investments Because The Significant Tax Incentives That Congress Has Granted Reflect Their Importance to the Public Welfare.

In both the Internal Revenue Code (IRC) and Employee Retirement Income Security Act (ERISA), Congress has given significant protection to retirement investment—a reflection that these investments are important to the public welfare. In order to achieve the important national goal of improved income security in retirement, Congress provided for significant tax incentives to encourage the offering of and participation in retirement plans. When a corporation contributes to a pension plan for the benefit of its employees, its tax liability is reduced.[8] Similarly, when employees defer their earnings by contributing to their own retirement savings, their tax liability is reduced.[9] Consequently, reduced current tax liability for employees and employers means lower current tax revenues for the federal government. Indeed, over five years, these tax incentives cost the United States $547.8 billion in deferred and lost taxes on the

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[8] 26 U.S.C. § 404 (employer permitted to deduct the contributions at the time that they are made to the plan); § 501(a) (plan does not pay taxes on any income on or appreciation in the plan assets).

[9] 26 U.S.C. § 402 (individual does not include in income the value of the plan benefit until it is actually received).

contributions and earnings.[10] To be sure, these tax incentives have been successful in encouraging the growth of the private retirement system—now over $24 trillion in assets.[11]

ERISA created a number of safeguards to guarantee that these tax incentives serve the purpose of assuring reasonable retirement income to employees. Congress established minimum standards for participation, coverage, vesting, and benefit accrual that retirement plans must satisfy if they wish to maintain tax-qualified status.[12] Similarly, Congress crafted specific rules concerning the timing,[13] amount[14] and form[15] of distributions from retirement plans. Moreover, in order to ensure that retirement benefits are available at retirement,[16] Congress prohibited retirement assets from being assigned or alienated.[17] In addition, benefits from a qualified

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[10] 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.

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

[12] ERISA §§ 202-204, 29 U.S.C. §§ 1052-1054; IRC §§ 410-411.

[13] IRC § 401(a)(9) requires individuals to begin drawing down their retirement accounts no later than the April 1st of the calendar year after the calendar year in which the participant reaches age 70-1/2 or retires, whichever is later.

[14] For individual account plans. the distribution amount depends on the life expectancy of the participant and her designated beneficiary, the value of the account balance on a specified date, and a distribution period set forth in the regulations. For defined benefit plans, the required amounts must be in the form of periodic annuity payments made in uniform intervals of no greater than one year for the life of the participant and her beneficiary or a period certain. 26 C.F.R. §§ 1.401(a)(9)-5 to -6.

[15] Certain retirement plans require the payment of a survivor annuity. ERISA § 205(b)-(d), 29 U.S.C. § 1005(b)-(d).

[16] ERISA § 2(a), 29 U.S.C. § 1001(a).

[17] ERISA § 206(d)(1), 29 U.S.C. § 1056(d)(1); IRC § 401(a)(13).

retirement plan including IRAs are excluded from a debtor's bankruptcy estate.[18] Finally, ERISA protects retirement plans by requiring fiduciaries to act solely in the interest of participants and adhere to its prohibited transaction and general fiduciary responsibility provisions.[19] These requirements are designed to ameliorate conflicts of interest.

Congress unmistakably treated retirement monies differently than other types of investment assets by requiring retirement plans to meet significant restrictions and rules to maintain their tax-qualified status. Congress recognized that retirement plan money deserves a higher level of protection than other types of investments or purchases because the revenue lost due to the special treatment of these plans are public funds. The government—as guardian of the public treasury—has an obligation and a right to see that the public gets a fair return on its investment.

B. Conflicted Investment Advice Works Against The Congressional And Individual Goals Of Retirement Security Because It Can Significantly Reduce Retirement Savings 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.[20] At that time, these plans employed professional managers to administer plan assets and serve as fiduciaries. Since 1975, there has been a dramatic decline in defined benefit plans.[21] Today, most Americans with retirement

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[18] *Rousey v. Jacoway*, 544 U.S. 320, 334 (2005); *Patterson v. Shumate*, 504 U.S. 753, 760 (1992).

[19] *See* ERISA §§ 3(21), 404, 406, 29 U.S.C. §§ 1002(21), 1104, 1106; *see Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140, 142-43, 156 (1985).

[20] 40 Fed. Reg. 50,842 (Oct. 31, 1975).

[21] *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.

savings utilize IRAs or 401(k) plans. However, when the initial regulation was issued in 1975, IRAs had just been created,[22] and 401(k) plans did not even exist.[23] Moreover, since 1975, the variety and complexity of investments have profoundly changed. For example, in 1975, Wall Street had not yet created collateralized debt obligations,[24] or contemplated the creation and tremendous growth of target date funds.[25] 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.[26] This shift to individual responsibility to fund and manage retirement monies is a radical change in the retirement industry.[27]

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

[23] 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. 55,544 (Nov. 10, 1981).

[24] 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).

[25] 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).

[26] Inv. Co. Inst., *supra* n.11.

[27] *See generally* Alicia Munnell & Annika Sunden, COMING UP SHORT: THE CHALLENGE OF 401(K) PLANS (2005) (because 401(k) plans shift all the risk and responsibility to employees, who must decide whether to join, how much to contribute, how to invest, whether to "cash out" when changing jobs, and how to manage their nest egg in retirement, most individuals have not accumulated adequate retirement income.)

$10,000—in the account balance.[28] We estimate that over a 30-year period, the account balance 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,[29] and they may incur excessive transaction costs.[30] Some products—such as fixed indexed annuities—may cap returns or adjust rates, limiting the return to the individual investor.[31] Conflicted advice also frequently leads to the purchase of investments that underperform the market.[32] And, when retirement investors end up with less money to spend, there is a significant cost to the economy, in addition to the individual.[33]

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[28] 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), http://www.gao.gov/assets/260/253638.pdf.

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

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

[31] Leslie Schism, *A New Warning on "Indexed" Annuities*, WALL ST. J. (June 7, 2015), http://www.wsj.com/articles/a-new-warning-on-indexed-annuities-1433526309.

[32] *E.g.*, John Chalmers & Jonathan Reuter, *Is Conflicted Investment Advice Better than No Advice?* Nat'l Bureau of Econ. Research Working Paper 18,158, at 1, 26 (June 2012), http://www.nber.org/papers/w18158 (retirement investors who received conflicted advice underperformed self-managed accounts).

[33] *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

For many individuals now saving for retirement through their employer-sponsored 401(k) plans, the amount contributed and accumulated is critically important,[34] as it is often their only source of private retirement income.[35] 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.

C. The Decision To Rollover Employer-Sponsored Plan Assets To An IRA Must Be Protected From The Negative Impact Of Conflicted Investment Advice Because It Is One Of The Most Significant Financial Transactions That Individuals Will Make.

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.[36] This movement from employer-sponsored plans to IRAs is commonly known as a "rollover."

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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).

[34] *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).

[35] 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).

[36] Inv. Co. Inst., *supra* n.11 ($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 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.

"Rollovers from employer-sponsored retirement plans have fueled the growth in IRAs."[37] "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.[38] In 2012, individuals rolled over about $335 billion into an IRA.[39] 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 of around $160,000 and $60,000, respectively.[40] Not surprisingly, older individuals rolled over larger amounts than other individuals and had larger IRA account balances.[41] Sixty-three percent of individuals consulted a "professional financial adviser" when they were considering rolling over their 401(k) account balance into an IRA.[42]

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[37] 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.

[38] *Id.* at 1.

[39] *Id.* at 13.

[40] 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.

[41] Inv. Co. Inst., *supra* n.37 at 5; Craig Copeland, *supra* n.40 at Figure 19, 11, 16, 20.

[42] Inv. Co. Inst., *supra* n.37 at 16.

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;[43] (2) they may lack strong financial literacy skills;[44] and (3) they make these decisions when their cognitive skills may affect their financial decision-making.[45] In addition, the detrimental effects of conflicted advice have the most negative potential impact on individuals with modest balances,[46] as they have fewer economic resources,[47] and any additional costs or losses diminish

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[43] *See* Craig Copeland, *supra* n.40 at 6-7, 9, 10, Figure 13 (the median balances in IRAs originating from rollovers were higher than other IRA types).

[44] 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* FINRA Inv'r Educ. Found., *Financial Capability in the United States 2016* (July 2016), http://www.usfinancialcapability.org/downloads/NFCS_2015_Report_ Natl_Findings.pdf (noting a downward trend since 2009 in financial literacy); Annamaria Lusardi & Peter Tufano, *Debt Literacy, Financial Experiences, and Overindebtedness*, 14 J. OF PENSION ECON. AND FIN. 332 (Oct. 2015) (only one-third of respondents correctly answered debt literacy questions concerning compounding of interest); 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).

[45] *E.g.*, Keith Jacks Gamble et al., *How Does Aging Affect Financial Decision Making?* (Issue Brief No. 15-1), Ctr. for Ret. Research at Boston Coll., at 1, 6 (Jan. 2015), http://crr.bc.edu/wp-content/uploads/2015/01/IB_15-1-508.pdf ("given the increasing dependence of retirees on 401(k)/IRA savings, cognitive decline [accelerating after age 60] 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"); Ian Skurnik et al., *How Warnings About False Claims Become Recommendations*, 31 J. CONSUMER RES. 713 (Mar. 2005) (older adults were more likely to remember a claim as true when told repeatedly told that it is false).

[46] *See* Craig Copeland, *supra* n.40 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 Ret. Research at Boston Coll.

what little savings they have.[48] 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.

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.[49] 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.[50] These are complex financial products with characteristics more similar to investments than traditional insurance.[51] These annuity products come with high fees,[52] long surrender periods, which may make them unsuitable as investments

(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).

47 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.35 at 7.

48 At least one commentator believes that increased financial education would prove inefficient at protecting investor assets and that mandating a fiduciary standard is more likely to have a positive impact on individuals' financial security. Barry Ritholtz, *Investor Education Slips Into Reverse*, BLOOMBERG VIEW (July 29, 2016), http://www.bloomberg.com/view/articles/2016-07-29/investor-education-slips-into-reverse.

49 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 (annuities other than single premium immediate annuities "offer most buyers a poor deal").

50 *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**.**

51 De Aenlle, *supra* n.49.

52 *Id*.

for most seniors due to their illiquidity,[53] and different tax consequences than other investments.[54] Thus, comparing and choosing suitable products can be difficult for retirement investors due to the complexity of the products.[55] Given the complexity, illiquidity, significant fees, and the risk to individual retirement investors as they manage their own retirement security, it is crucial that recommendations to place retirement assets in these products be made in the best interest of the retirement investor.[56]

Moreover, for many people, the account balance in their 401(k) or IRA represents the bulk of their personal savings.[57] 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

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[53] Orman, *supra* n.50; Maurer, *supra* n.50; 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.

[54] *Id.*

[55] Kaplan, *supra* n.53 (disclosures are not user friendly); Schism, *supra* n.31 (fixed indexed annuities are a "product that is frequently incorrectly sold.").

[56] 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).

[57] U.S. Gov't Accountability Office, *supra* n.35 at 8 (to the extent that households have savings, they are not significant outside of retirement accounts).

often effectively irreversible, because tax consequences and transaction costs generally make it impractical to reverse the distribution decision.[58] 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 Rule closes the loopholes surrounding conflicted advice so that advice rendered before a rollover serves the best interest of the individual retirement investor.

D. The Rule Is Consistent with And Responsive To Individuals' Belief That Investment Advisors, Brokers And Insurance Agents Are Already Required To Give Retirement Investors Advice In Their Best Interest.

Results from numerous AARP and other 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.[59] 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

[58] 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).

[59] *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); ORC/Infogroup, *U.S. Investors & The Fiduciary Standard* (Sept. 15, 2010), https://www.sec.gov/comments/4-606/4606-2748.pdf (60% of respondents believed that insurance agents already had a duty to make recommendations based on the clients' best interests).

be in the best interest of individual plan participants.[60] These findings are not surprising since a 2006 survey showed that 90% of respondents believed that investment advisers already had a fiduciary duty.[61] That same survey showed that 47 percent of respondents were not aware that brokers do not have to disclose all conflicts of interest. *Id*. Indeed, more than half of respondents stated that they believed that brokers, investment managers and financial planners had the same fiduciary duty to provide advice in their clients' best interests. *Id*.

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 investors' sole interest.[62] Every day, individual investors make decisions that affect the adequacy and quality of their retirement assets. This Rule addresses 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.

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[60] 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.

[61] Angela A. Hung et al., *Investor and Industry Perspectives on Investment Advisers and Broker-Dealers*, RAND, INST. FOR CIVIL JUSTICE 31 (2008).

[62] S. Kathi Brown, *supra* n.60.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion for summary judgment on all claims and grant Defendants' cross-motion for summary judgment on all claims.

Dated: August 25, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Northern District of Texas using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Bernard A. Guerrini
Bernard A. Guerrini

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *et al*. Plaintiffs v. THOMAS E. PEREZ, SECRETARY OF LABOR, and UNITED STATES DEPARTMENT OF LABOR, Defendants.	)	Civil Action No. 3:16-cv-1476-M Consolidated with 3:16-cv-1530-C 3:16-cv-1537-N

ORDER GRANTING MOTION OF AARP AND AARP FOUNDATION
<u>FOR LEAVE TO FILE BRIEF AMICI CURIAE</u>

Having considered the Motion of AARP and AARP Foundation for Leave to File Brief Amici Curiae filed on August 25, 2016, and for good cause shown, the Court finds that said motion should be granted and the brief should be considered filed as of the date of this Order.

Dated this ____ day of _____, 2016.

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UNITED STATES JUDGE