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Financial Planning Coalition Strongly Disagrees with U.S. Department of Labor on Proposed Retirement Investment Advice Rule Package

Comment Letter from CFP Board, FPA and NAPFA States the Proposed Rule will Allow for Conflicted Advice

Washington, D.C. – The Financial Planning Coalition ("Coalition")—comprising Certified Financial Planner Board of Standards, Inc. (CFP Board), the Financial Planning Association® (FPA®) and the National Association of Personal Financial Advisors (NAPFA)— today submitted a comment letter to express strong disagreement with the U.S. Department of Labor's ("DOL") proposed Retirement Investment Advice Rule Package.

In the DOL's June 29 announcement of the rule package, it was stated that the proposed rule will *"benefit American workers and retirees by delivering more choices for their financial future with clear standards to be upheld by investment advice providers."*

The Coalition opposes DOL's characterization of the rulemaking and stressed in its comment letter that the proposed rule runs counter to the intended purpose of the Employee Retirement Income Security Act of 1974, the federal retirement benefits law also known as ERISA.

The Coalition, in its comment letter stated, *"Congress enacted ERISA in 1974 to establish special rules to protect Americans' retirement assets in tax-advantaged retirement savings vehicles. In doing so, Congress recognized that it was in the public interest to encourage all Americans to save for a secure and independent retirement. Given the importance of maximizing Americans' retirement assets, Congress intentionally established requirements for financial advice under ERISA that are distinct from and more rigorous than those that apply under insurance and securities laws to nonretirement assets, including the explicit requirement that advice be in the sole interest of the plan and plan participants."*

Building on that opinion, the Coalition believes the proposed rule will allow for conflicted advice by non-fiduciary advisers related to retirement assets, in contravention of Congress' express intent and demonstrated through its enactment of ERISA in 1974.

In reviewing and assessing the efficacy of DOL's proposed rulemaking, the Coalition cited CFP Board's revised *Code of Ethics and Standards of Conduct* as a framework for comparison. The revised *Code and Standards* that all CERTIFIED FINANCIAL PLANNER™ professionals are required to follow when providing financial advice to clients, provides for an unambiguous fiduciary standard. The Coalition determined that DOL's proposed prohibited transaction exemption rule falls far short of the same high standard.

"A clear fiduciary standard, equally applied to all financial professionals who provide retirement investment advice, has become a necessity to protect investors in today's rapidly-evolving marketplace," stated the Coalition.

The Coalition is greatly concerned with the proposed rulemaking's failure to meet a high fiduciary standard. This concern is due to two key provisions in the rulemaking: the plan to reinstate the "five-part test" for determining what constitutes investment advice under ERISA, and the proposed Prohibited Transaction Exemption.

- **Reinstatement of the <u>Five-Part Test</u>:** While ERISA broadly defines who is an "investment advice fiduciary," DOL adopted in 1975, replaced in 2016, and reinstated in 2020 a narrow regulatory definition—the "five-part test—that determines whether an adviser or firm meets the statutory definition. The effect of these regulatory loopholes is even more pronounced given the realities of the modern investment advice landscape. The Coalition believes, *"The five-part test opens significant loopholes that allow for the sale of products that may not be in the best interest of a retirement investor. Importantly, while many financial advisors seek to do what is best for their clients, others may take advantage of 'regulatory gaps' to steer their clients into high-cost, substandard investments that pay the advisor well but gradually eat away at retirement investors' nest eggs."*

- **Prohibited Transaction Exemption (PTE):** The proposed PTE would eliminate the requirement to act "without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party." Not only are those provisions necessary to support a true best interest standard under ERISA, but the substitute language would effectively neuter the fiduciary obligations of an Adviser. The Coalition believes, *"In essence, with this one change, the Department seeks to replace a robust fiduciary standard appropriate to an advisory role with a weaker, non-fiduciary standard."*

The SEC has stated explicitly that its "Regulation Best Interest," which provides weaker investor protections than those required under ERISA for retirement assets, is not a fiduciary standard. Because of these regulatory realities, the Coalition believes that "Regulation Best Interest" does not provide an adequate basis for, nor should be used as a model for, a PTE rulemaking under ERISA.

U.S. 401(k) plans held an estimated $5.6 trillion in assets and represented more than 19 percent of the $28.7 trillion in U.S. retirement assets as of March 31, 2020, according to the Investment Company Institute. With so much at stake for millions of American workers, policymakers need to ensure investment advice being provided is consistent with an unambiguous fiduciary standard, which is why DOL's proposed rulemaking is of significant concern to the Coalition.

The comment letter is available on the Coalition's website. Public policy staff from CFP Board, FPA, and NAPFA are available for interviews by contacting the communications representatives below.

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About the Financial Planning Coalition

The Financial Planning Coalition is a collaboration of Certified Financial Planner Board of Standards, Inc. (CFP Board), the Financial Planning Association® (FPA®) and the National Association of Personal Financial Advisors (NAPFA)—the leading national organizations representing the development and advancement of the financial planning profession. Together, the Coalition seeks to educate policymakers about the financial planning profession, to advocate for policy measures that ensure financial planning services are delivered in the best interests of the public, and to enable the public to identify trustworthy financial advisers. To learn more, please visit www.FinancialPlanningCoalition.com.

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