



Consumer Federation of America



Financial Advisor or Investment Salesperson?

Brokers and Insurers Want to Have it Both Ways

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Executive Summary

When is a “financial advisor” really an advisor and when is she just a salesperson? The answer to that question has important implications for millions of Americans who turn to financial professionals to help them navigate often complex decisions regarding how best to invest for long-term goals, including retirement. After all, people expect salespeople to look out for their own interests and maximize profits, but advisors are expected to meet a higher standard. They are expected to put their clients’ interests first, a requirement that is known as a fiduciary duty.

It turns out, however, that how certain “financial advisors”¹ answer that question varies greatly depending on the context. These are the transaction-based financial professionals typically employed by broker-dealers and insurance companies. When they are marketing their services to the investing public and enticing clients into handing over their hard-earned savings, these sales-based financial professionals present themselves as “trusted advisors” whose only concern is their clients’ best interest. But try to hold them legally accountable for meeting that standard, and those same “advisors” quickly change their tune. Because they are salespeople who are “merely selling” investment products, they claim, no fiduciary standard ought to apply.

Investors who unknowingly rely on biased salespeople as if they were trusted advisors can suffer real financial harm as a result. It is estimated, for example, that retirement savers lose \$17 billion a year or more as the result of the excess costs associated just with conflicted retirement advice.² The cost on an individual basis, in the form of lost retirement savings, can amount to tens or even hundreds of thousands of dollars over a lifetime of investing, money that retirees struggling to make ends meet can ill afford to do without. In addition to paying higher costs, investors who rely on biased sales recommendations as if it were unbiased advice can end up facing unnecessary risks or receiving substandard returns as a result of incentives that pervade the compensation system for sales-based advisors. Cumulatively, these industry practices drain tens of billions of dollars every year out of retirement savers’ pockets and into the pockets of financial institutions and their financial professionals.

The dichotomy between financial firms’ marketing claims and their legal arguments was previously described in research from the Public Investors Arbitration Bar Association (PIABA). That study contrasted the way major brokerage firms describe themselves in advertising campaigns with the arguments they mount when defending against customer claims in arbitration.³ Based on its analysis, PIABA concluded that a fiduciary standard should be adopted

¹ The term financial advisor has no legal definition. In this report, we use the title, financial advisor, as it is commonly used in practice – to refer to sales reps of broker-dealers and insurance agents. Financial advisors are not to be confused with investment advisers, which is a legally defined term that refers to individuals who render advice about securities for a fee. Investment advisers are held to a fiduciary standard under state and federal securities laws.

² White House Council of Economic Advisers, “The Effects Of Conflicted Investment Advice On Retirement Savings,” Feb. 2015, https://www.whitehouse.gov/sites/default/files/docs/cea_coi_report_final.pdf.

³ Joseph C. Peiffer and Christine Lazaro, *Major Investor Losses Due to Conflicted Advice: Brokerage Industry Advertising Creates the Illusion of a Fiduciary Duty*, Public Investors Arbitration Bar Association, March 25, 2015, <https://piaba.org/piaba-newsroom/report-major-investor-losses-due-conflicted-advice-brokerage-industry-advertising-cre>

to protect investors from the harmful impact of conflicted advice.

Since the PIABA study was released, the Department of Labor (DOL) has finalized a rule that requires all financial professionals to act as fiduciaries when providing investment advice to retirement savers. At the center of the rule is an obligation to offer recommendations in the best interests of the customer, without regard to their own financial interests. Having fought to prevent the rule from being adopted, the major broker-dealer and insurance trade associations have challenged the DOL rule in court, arguing in part that the DOL exceeded its authority by applying a fiduciary standard to conduct that was not advisory in nature.

Building on the earlier PIABA study, we sought to test this legal argument against the actual practices of the trade associations' member firms. To do so, this white paper compares how major broker-dealer and insurance firms present themselves and their services on their websites and how they describe those same services in their legal challenge to the DOL rule. Based on a detailed review of company websites for 25 brokerage and insurance firms – all of which are members of the trade associations that have challenged the DOL rule – we found that these firms have adopted all the hallmarks of fiduciary advisors:

- They routinely refer to their financial professionals not as sales representatives or agents but as “financial advisors” and indicate that they have a level of expertise that can and should be relied upon by their less sophisticated clients. In our in-depth review of company websites, we did not find one firm that referred to its financial professionals as salespeople.
- They typically describe their services as providing investment “advice” and retirement “planning,” not simply product sales. Our review of company websites did not identify any prominent description of their services as arm’s length investment sales recommendations.
- And they market those services with messages whose clear intent is to convince retirement savers that they should trust that their advisor will be looking out for their best interests. In so doing, firms encourage reliance on their expertise and recommendations.

In short, in their eagerness to attract clients and increase sales, these brokers and insurers do everything they can to create the reasonable belief and expectation on the part of investors that they are providing fiduciary investment advice rather than non-fiduciary investment sales.

This stands in sharp contrast to how financial trade associations have presented their business practices in legal filings challenging the DOL rule. In such filings, the U.S. Chamber of Commerce and several of its Texas affiliates, the Securities Industry and Financial Markets Association (SIFMA), the Financial Services Institute (FSI), the Financial Services Roundtable (FSR), the Insured Retirement Institute (IRI), the American Council of Life Insurers (ACLI), and the National Association of Insurance and Financial Advisors (NAIFA) have claimed, for example, that broker-dealer reps and insurance agents are not true advisors because they do not actually provide unbiased advice and are not engaged in relationships of trust and confidence with their clients. Instead, they claimed that broker-dealer reps are just “salespeople” engaging in

activity “whose essence is sales” that is no different from other commercial sales relationships in which “both parties understand that they are acting at arms’ length.” They therefore claim that it is more appropriate that they be held to a sales-based “suitability” standard rather than an advice-based fiduciary standard.

The difference in the two standards – the best interest standard firms strongly suggest that they meet when marketing their services and the suitability standard they argue should apply – is significant. The suitability standard that governs securities and insurance recommendations allows “financial advisors” to recommend investments that are more profitable for them, rather than those that are the best option for their customers, as long as those recommendations are generally suitable for the investor. In short, they can legally recommend the worst of the many possible suitable investments, rather than the one that is best for the customer. Moreover, as noted above, firms often pay higher compensation or offer other incentives to encourage their sales reps to recommend investments that are most beneficial for the firm.

Investors want and need advice that promotes their best interests, as multiple public opinion surveys have clearly shown. The DOL rule requires financial firms to conduct themselves like the advisors they have long claimed to be. When it goes into effect, investors will finally be legally entitled to receive the best interest advice they have been led by industry’s marketing practices to expect. And the billions they currently lose to conflicted advice will remain in the pockets of working families and retirees.

I. Sales-based financial professionals use a variety of tactics to portray themselves as trusted advisors.

When the leading financial trade associations took to the courts to challenge the Department of Labor’s conflict of interest rules,⁴ they based their claim in part on the argument that DOL had inappropriately extended the fiduciary standard to “activities that have never been understood to entail fiduciary duties, such as recommending the purchase of an investment product.”⁵ A fiduciary duty “only applies where a heightened relationship of trust and confidence exists,” they argue.⁶ As such, it should not apply to brokers and insurance agents, they claim, because they are salespeople engaged in activity that “involve[s] nothing more than suggesting and selling a financial product” to a retirement saver.⁷ But industry’s claims to be mere salespeople selling products are out of sync with million-dollar marketing campaigns designed to

⁴ In early June 2016, the U.S. Chamber of Commerce and several of its Texas affiliates, as well as four financial industry trade associations – the Securities Industry and Financial Markets Association (SIFMA), the Financial Services Institute (FSI), the Financial Services Roundtable (FSR), and the Insured Retirement Institute (IRI) – filed a lawsuit in the United States District Court for the Northern District of Texas. Civil Action No. 16-cv-1476. The American Council of Life Insurers (ACLI), the National Association of Insurance and Financial Advisors (NAIFA) and several of NAIFA’s Texas affiliates also filed suit in the United States District Court for the Northern District of Texas. Civil Action No. 1:16-cv-1530. These two cases were later consolidated with another suit brought by the Indexed Annuity Leadership Council. 3:16-cv-1537-N.

⁵ Compl., Chamber, et al. v. Thomas E. Perez, Secretary of Labor and U.S. Department of Labor, at 4.

⁶ *Id.* at 22.

⁷ Memorandum in Support of Summary Judgment, Chamber, et al. v. Thomas E. Perez, Secretary of Labor and U.S. Department of Labor, at 20.

send precisely the opposite message.

In order to test the trade association's legal arguments against their members' actual business practices, we conducted an in-depth review of the company websites of 25 broker-dealer and insurance companies. All the companies whose websites we reviewed are members of SIFMA or ACLI, two of the trade associations challenging the DOL rule in court. All engage in conduct that is designed to create the reasonable expectation in the minds of their customers that they are receiving expert, best interest advice from a trusted financial professional. The following report details the tactics companies use to promote precisely the sort of relationship of "trust and confidence" that demands a fiduciary standard.

A. Use of titles that convey the impression that they are providing expert investment advice

While financial industry lobbyists argue in court that the brokers and insurance agents whose interests they represent are "merely selling a product,"⁸ a review of firms' websites contradicts this claim. Not once did we find on these firms' websites any prominent reference that labeled their representatives and agents as salespeople. Instead, they adopted titles for their financial professionals that explicitly and implicitly identify them as advisors.

- The title most commonly adopted by financial firms for their financial professionals appears to be "Financial Advisor." Firms that use this title or a variation thereof include: Janney Montgomery Scott,⁹ D.A. Davidson,¹⁰ Stifel,¹¹ Wells Fargo Advisors,¹² HD Vest,¹³ Baird,¹⁴ Raymond James,¹⁵ Ameriprise,¹⁶ Edward Jones,¹⁷ BB&T Scott and

⁸ *Id.* at 17.

⁹ See JANNEY, Private Client Group Opportunities, <http://www.janney.com/about-janney/careers-at-janney/private-client-group> (last visited August 21, 2016) [Appendix 1].

¹⁰ See D.A. DAVIDSON, <https://dadavidson.com/> (last visited August 24, 2016) [Appendix 2].

¹¹ See STIFEL, Find a Financial Advisor, <http://www.stifel.com/fa> (last visited August 24, 2016) [Appendix 3].

¹² See WELLS FARGO ADVISORS, Meet with an Advisor, <https://www.wellsfargoadvisors.com/services/financial-advisor.htm> (last visited August 24, 2016) [Appendix 4].

¹³ See HD VEST, <https://www.hdvest.com/> (last visited August 24, 2016) [Appendix 5].

¹⁴ See BAIRD, Find a Financial Advisor, <http://www.locatebaird.com/> (last visited August 24, 2016) [Appendix 6].

¹⁵ See RAYMOND JAMES, Find an Advisor (USA), http://www.raymondjames.com/office_locator.htm (last visited August 24, 2016) [Appendix 7].

¹⁶ See AMERIPRISE FINANCIAL, Working with an Ameriprise financial advisor, <https://www.ameriprise.com/financial-planning/working-with-financial-advisor/> (last visited August 24, 2016) [Appendix 8].

¹⁷ See EDWARD JONES, Find a Financial Advisor, <https://www.edwardjones.com/find-financial-advisor.html> (last visited August 24, 2016) [Appendix 9].

Stringfellow,¹⁸ Chase,¹⁹ UBS,²⁰ Morgan Stanley,²¹ Signator Investors (John Hancock Financial Network),²² Lincoln Financial,²³ and VALIC.²⁴

- Indeed, one of the industry plaintiffs suing the DOL is the National Association of Insurance and Financial Advisors. This would be a questionable choice of names for the organization if its member firms truly functioned solely as salespeople, as the lawsuit claims.
- While “financial advisor” appears to be the title most commonly used by sales-based professionals, other firms have adopted variations that create a similar impression. For example, Schwab,²⁵ Stephens,²⁶ and Hilliard Lyons²⁷ all use the title “Financial Consultant.” Hilliard Lyons also uses the title “Chartered Wealth Advisor.”²⁸ Voya uses the title “Retirement Consultant,”²⁹ USAA uses the title “Wealth Manager,”³⁰ and Prudential uses the title “Retirement Counselor.”³¹

What all of these titles have in common is that they are designed to create the impression that advice, not product sales, is the essential service being offered. If, as industry lobbyists claim in court, these financial professionals are merely selling investment products, then the titles they use are inherently deceptive. If the titles accurately portray the function served by these financial professionals, then they clearly are engaged in services that fall well within a reasonable definition of fiduciary investment advice. Certainly, investors perceive and rely on these services as advice.

¹⁸ See BB&T SCOTT AND STRINGFELLOW, <http://www.bbtscottstringfellow.com/> (last visited August 24, 2016) [Appendix 10].

¹⁹ See CHASE, Our financial advisors, <https://www.chase.com/investments/financial-advisor> (last visited August 24, 2016) [Appendix 11].

²⁰ See UBS, Find a Financial Advisor, <https://www.ubs.com/us/en/wealth/find-a-financial-advisor.html> (last visited August 24, 2016) [Appendix 12].

²¹ See MORGAN STANLEY, Find a Financial Advisor, <https://www.morganstanleyfa.com/locator/> (last visited August 24, 2016) [Appendix 13].

²² See SIGNATORONE, Working With An Advisor, <http://www.signatorone.com/working-with-an-advisor> (last visited August 24, 2016) [Appendix 14].

²³ See Lincoln Financial Group, Work with a financial advisor, <https://www.lfg.com/public/individual/planyourfinancialfuture/workwithafinancialadvisor> [Appendix 15].

²⁴ See VALIC, https://www.valic.com/home_3240_422903.html (last visited August 24, 2016) [Appendix 16].

²⁵ See SCHWAB, Wealth Management, https://www.schwab.com/public/schwab/wealth_management (last visited August 24, 2016) [Appendix 17].

²⁶ See STEPHENS, Private Wealth Management, <http://www.stephens.com/private-wealth-management/> (last visited August 24, 2016) [Appendix 18].

²⁷ See HILLIARD LYONS, Our Financial Consultants, <http://www.hilliard.com/site/our-financial-consultants/> (last visited August 24, 2016) [Appendix 19].

²⁸ See HILLIARD LYONS, Chartered Wealth Advisors®, <http://www.hilliard.com/site/our-financial-consultants/chartered-wealth-advisors.html> (last visited August 24, 2016) [Appendix 19].

²⁹ See VOYA, Working with a Financial Advisor Can Help You Keep Your Goals on Track, <https://www.voya.com/articles/working-financial-advisor-can-help-you-keep-your-goals-track> (last visited August 21, 2016) [Appendix 20].

³⁰ See USAA, Wealth Management, <https://www.usaa.com/inet/pages/investing-wealth-management-main?akredirect=true> (last visited August 24, 2016) [Appendix 21].

³¹ See PRUDENTIAL, Personal Retirement Services, <http://www.prudential.com/view/page/public/13243> (last visited January 17, 2017) [Appendix 26].

B. Promotion and descriptions of their work that convey the strong impression they are offering investment advice and retirement planning tailored to meet individual needs

Just as firms use titles to portray their financial professionals as advisors, they describe their services as advisory in nature. A review of a number of prominent firms' websites shows broker-dealer firms and insurance companies prominently and routinely portray their services as providing expert investment advice, comprehensive financial planning, and retirement planning that is based on their clients' needs and goals and that is designed to serve their best interests. Not once did we find on any of these firms' websites any prominent reference that described their services as providing arm's length investment sales recommendations. These practices further contradict industry lobbyists' legal claims that they are "merely selling a product." The following are a few representative examples of such messaging.

Schwab. The homepage of the firm's website features the question: "How will you help me with my financial goals?" The answer, in big, bold font: "A Schwab Financial Consultant can help you create a plan tailored to your needs." It continues: "It starts with a conversation and a fresh perspective, discussing your long- and short-term goals. We evaluate your current investments then create specific recommendations."³² The website describes the benefits of meeting with a financial consultant this way: "Your Financial Consultant can work with you to create a holistic plan with specific investment recommendations and a clear explanation of the benefits and risks....Your plan will reflect your priorities, from retirement income and estate planning to insurance and debt management. And you can meet regularly to keep your plan up to date as your life evolves."³³

Janney Montgomery Scott. In explaining the firm's mission and history, the company website states: "Through our wealth management approach, we focus on the delivery of strategic financial plans that utilize a variety of financial products and services best suited to help individual investors and families meet their financial goals."³⁴ It describes the role of its Financial Advisors this way: "Janney Financial Advisors build long-term relationships with our clients and their families. They provide advice on a wide range of financial matters and use a full array of investment options to provide customized solutions to meet clients' needs."³⁵

D.A. Davidson. The center of the D.A. Davidson homepage features the following statement: "The Strength of Advice."³⁶ Another page discussing how and why one should establish a relationship with a D.A. Davidson Financial Advisor includes the statement: "For

³² SCHWAB, <https://www.schwab.com/> (last visited August 21, 2016) [Appendix 17].

³³ SCHWAB, Wealth Management, https://www.schwab.com/public/schwab/wealth_management (last visited August 21, 2016) [Appendix 17].

³⁴ JANNEY, Our Mission and History, <http://www.janney.com/about-janney/mission--history/our-mission--history> (last visited August 21, 2016) [Appendix 1].

³⁵ JANNEY, Private Client Group Opportunities, <http://www.janney.com/about-janney/careers-at-janney/private-client-group> (last visited August 21, 2016) [Appendix 1].

³⁶ D.A. DAVIDSON, <https://dadavidson.com/> (last visited August 24, 2016) [Appendix 2].

over 80 years, our advisors have offered straightforward advice, personalized solutions, and industry expertise to individuals, families, and businesses.”³⁷

Wells Fargo Advisors. The center of the Wells Fargo homepage features the statement: “Helping Clients Succeed Financially. We provide advice and guidance to help maximize all elements of your financial life, whenever and however you need it.”³⁸ A prospective client who clicks on the “Why Invest With Us” tab will find the following statement under the “Our Advisors” heading: “A Financial Advisor can provide the advice and guidance you need to focus on your short- and long-term goals while navigating life’s financial opportunities and turning points. Start planning now for the future. Choose a Financial Advisor from the firm that lives and breathes a client-centered approach to advice.”³⁹

Edward Jones. The Edward Jones website features the following statement: “Our goal is to provide advice and guidance based on your needs. We have more than 13,000 financial advisors in the U.S. – each one dedicated to doing what’s right for our clients.”⁴⁰

Ameriprise. The website features a 44-page “Client Relationship Guide” whose stated purpose is to give clients a better understanding of the company and the services it offers. It states: “Our commitment to you: We provide personal, high-quality advice. Our approach is based on sound financial principles and a full view of your needs. We go beyond the numbers to understand your needs and provide you with clear actions you can take to help you achieve your dreams and feel more confident about the future. We tailor our advice to your personal objectives, time horizon, and risk tolerance, as well as other factors.”⁴¹

BB&T Scott & Stringfellow. The following statement can be found on the firm’s Retirement Planning website: “Prudent portfolio management is a cornerstone of every successful long-term plan. Your Financial Advisor will be happy to review your plan and propose planning strategies that best reflect your current financial situation in relation to your life goals.”⁴²

Chase. A prospective client who navigates to the firm’s “Working With Your Financial Advisor” webpage will find the following statement: “Our Advisors focus on what YOU need.”⁴³ As you plan for the financial goals most important to you, your Financial Advisor can provide guidance on your overall investment approach. By getting to know you and understanding all of

³⁷ D.A. DAVIDSON, Wealth Management, <https://dadavidson.com/WHAT-WE-DO/Wealth-Management> (last visited August 24, 2016) [Appendix 2].

³⁸ WELLS FARGO ADVISORS, <https://www.wellsfargoadvisors.com/> (last visited August 21, 2016) [Appendix 4].

³⁹ WELLS FARGO ADVISORS, Our Advisors, <https://www.wellsfargoadvisors.com/why-wells-fargo/financial-advisor.htm> (last visited August 21, 2016) [Appendix 4].

⁴⁰ EDWARD JONES, Find an Advisor, <https://www.edwardjones.com/find-financial-advisor.html> (last visited August 21, 2016) [Appendix 9].

⁴¹ Ameriprise Financial Client Relationship Guide: Understanding your relationship with Ameriprise Financial and your financial advisor, at 2, https://www.ameriprise.com/content/files/AMP_401043.PDF (last visited August 21, 2016) [Appendix 8].

⁴² BB&T SCOTT AND STRINGFELLOW, Retirement Planning, <http://www.bbtscottstringfellow.com/planning/retirementplanning> (last visited August 21, 2016) [Appendix 10].

⁴³ CHASE, Our Financial Advisors, <https://www.chase.com/investments/financial-advisor> (last visited August 21, 2016) [Appendix 11].

your financial goals and objectives, we'll work together to build a customized plan that helps meet your specific investing, retirement planning or college saving needs.”⁴⁴

UBS. On the firm's homepage, a rotating banner reads: “Advice. Beyond investing.” A prospective client who navigates to the firm's Investing webpage will see the following statement: “Building an investment plan and an optimal asset allocation strategy to meet your unique needs requires careful consideration and often, outside expertise. Our UBS Financial Advisors are committed to helping you with this process, allowing you to spend more time on the activities you truly enjoy...UBS Financial Advisors take a holistic wealth management approach to carefully understanding your overall financial situation, unique needs and goals, and deliver an optimal investment solution to meet them.”⁴⁵

US Bank. The firm's “Financial Planning” webpage states: “Our advisors can help you clearly define your goals and create a strategy to help address them.”⁴⁶

Morgan Stanley. The firm's “Wealth Management” webpage states: “You have meaningful goals. Our Financial Advisors can help you reach them. For nearly 80 years, we have worked with individuals, families, businesses, and institutions—to deliver services and solutions that help build, preserve and manage wealth. We understand our clients' aspirations, and we're as devoted to their goals as they are.”⁴⁷ The webpage further states: “The Path to Reaching Your Goals Begins with a Financial Advisor: Morgan Stanley Financial Advisors harness the firm's global resources and intellectual capital to help create a financial strategy that works for you.”⁴⁸

Hilliard Lyons. Prominently featured in the center of the firm's homepage is the statement: “Investment counseling to grow, protect, & manage wealth since 1854.”⁴⁹

Voya. The firm's website includes the following explanation: “When you choose Voya, you're choosing to work with people who care about your needs and always put them first.”⁵⁰ It further states: “Our financial professionals are dedicated to providing one-on-one guidance geared toward your needs. No cookie-cutter advice – just thoughtful direction to help match your life and your goals.”⁵¹ Also available on the website is an article titled “Working with a Financial Advisor Can Help You Keep Your Goals on Track,” which extolls the virtues of working with a Voya Retirement Consultant.⁵² The article explains: “With a Voya retirement consultant, you know you're getting a qualified professional who is thoroughly familiar with all of our products

⁴⁴ *Id.*

⁴⁵ UBS, Wealth Management Americas, Investing, <https://www.ubs.com/us/en/wealth/investing.html> (last visited August 21, 2016) [Appendix 12].

⁴⁶ US BANK, Financial Planning, <https://www.usbank.com/investments-wealth-management/financial-planning.html> (last visited August 21, 2016) [Appendix 14].

⁴⁷ MORGAN STANLEY, Wealth Management, <http://www.morganstanley.com/what-we-do/wealth-management> (last visited August 21, 2016) [Appendix 13].

⁴⁸ *Id.*

⁴⁹ HILLIARD LYONS, <http://www.hilliard.com/> (last visited August 21, 2016) [Appendix 19].

⁵⁰ VOYA, Why Voya, <https://www.voya.com/articles/why-voya> (last visited August 21, 2016) [Appendix 20].

⁵¹ *Id.*

⁵² VOYA, Working with a Financial Advisor Can Help You Keep Your Goals on Track, <https://www.voya.com/articles/working-financial-advisor-can-help-you-keep-your-goals-track> (last visited August 21, 2016) [Appendix 20].

and services, able to offer good advice and make sound financial decisions on your behalf. You'll build an ongoing, one-on-one relationship as your advisor gets to know you and your situation, and you can work together to tailor financial advice specifically to meet your needs.”⁵³

USAA. The firm's “Wealth Management” webpage states: “Your wealth manager can advise you on a range of issues through a comprehensive financial planning process and provide you a personalized suite of integrated solutions to address even the most complex needs — from limiting investment risks and managing a retirement income stream to long-term care and wealth transfer. Through proactive contact and regular meetings to review your plan, your wealth manager will provide tailored advice at each stage of your life and help you achieve your goals while managing the challenges so you stay on track.”⁵⁴

Northwestern Mutual. The Northwestern Mutual website includes the following statement on a page titled “Financial Guidance:” “Whether you're fresh out of college, well on your way to living your dream or eagerly approaching retirement, make sure you're financially prepared to achieve a lifetime of goals. We can help you reach them with a personalized financial plan. We'll apply time-tested strategies, provide expert advice and make recommendations based on your priorities. And as your circumstances and priorities change over time, we'll work with you to revise your plan so you can meet each of life's challenges head on, and celebrate your accomplishments along the way.”⁵⁵ In a video on the same webpage titled “Planning for Financial Security with Northwestern Mutual,” the voiceover states: “We'll work together to create a personalized financial plan that's built on a comprehensive process yet is as unique as your goals...we'll give objective advice, offer options, turn your priorities into a plan...Together, we'll review your options and implement strategies that can best help you achieve your goals.”⁵⁶

* * *

The examples cited here were excerpted from surrounding text that further emphasizes the advisory nature of the services offered. Even where the websites acknowledged the firm's role in investment sales, nothing about the messaging suggested that the firms were “merely selling a product.”

C. Messages that encourage relationships of trust and reliance

In addition to describing their financial professionals as advisors and describing their services as advisory in nature, sales-based firms also routinely use messaging that is designed to foster a relationship of trust and reliance. In our review of firms' websites, we found that these broker-dealer firms and insurance companies prominently and routinely advertise that they foster trusted relationships with their clients in which they serve their clients' best interests. In so doing, firms encourage reliance on their expertise and recommendations. The following are a few representative examples of such messaging.

⁵³ *Id.*

⁵⁴ USAA, Wealth Management, <https://www.usaa.com/inet/pages/investing-wealth-management-main?akredirect=true> (last visited August 21, 2016) [Appendix 21].

⁵⁵ NORTHWESTERN MUTUAL, Financial Guidance, <https://www.northwesternmutual.com/financial-guidance> (last visited August 21, 2016) [Appendix 22].

⁵⁶ *Id.*

Schwab. On the webpage where potential clients go to find a Schwab branch location in their area, the most prominent language reads: “A relationship you can trust, close to home.”⁵⁷

Janney Montgomery Scott. The first sentence in the “About Us” section on the firm’s homepage states: “Putting clients first is ingrained in the way we do business.”⁵⁸ The company’s “Mission and History” webpage further states: “Decisions are always made with our clients’ best interests in mind.”⁵⁹

D.A. Davidson. When visited on August 21, 2016, the website featured an “About Us” section stating in boldface capital letters: “CLIENTS COME FIRST.”⁶⁰ The firm also published on its website a pamphlet explaining D.A. Davidson clients’ various rights and responsibilities, in which the opening paragraph stated in bold font, “Trust is the cornerstone of the relationship between you, as an investor, and the D.A. Davidson & Co. financial professionals working for you. Your needs should always come first.”⁶¹ However, the firm’s website underwent substantial revisions thereafter and this content was removed.

Stifel. In the firm’s “Statement of Commitment” to clients, Stifel pledges: “Putting the welfare of clients and community first, we strive to be the Advisor of Choice in the industry.”⁶² Further, the firm states that its guiding principle is: “Safeguarding the money of others as if it were our own.”⁶³ The firm also publishes a welcome pamphlet for clients which states: “We believe that by placing the clients’ interests first, they prosper. It is when our clients prosper that the firm succeeds. At Stifel, we can truly say that we predicate our success on the success of our clients. We are nurtured by years of trust and understanding, and by shared goals and shared successes.”⁶⁴

Baird. The firm’s “Who We Are” webpage offers the following explanation of the firm’s “unique” culture: “Everything we are, do and hope to achieve at Baird is driven by a straightforward mission: *To provide the best financial advice and service to our clients and be the best place to work for our associates.* What this means for clients around the world is we strive to help create great outcomes in their financial lives by keeping their interests first – always. It means being committed to honesty, integrity, transparency and teamwork – the ideals our firm was founded on nearly 95 years ago and they continue to make us a great firm to work

⁵⁷ SCHWAB, Find a Branch, <https://client.schwab.com/Public/BranchLocator/branchdetails.aspx?branchid=1213> (last visited August 21, 2016) [Appendix 17].

⁵⁸ JANNEY, About Janney, <http://www.janney.com/about-janney/home> (last visited August 21, 2016) [Appendix 1].

⁵⁹ JANNEY, Why Janney, <http://www.janney.com/about-janney/mission--history/why-janney> (last visited August 21, 2016) [Appendix 1].

⁶⁰ D.A. DAVIDSON, About Us, http://www.davidsoncompanies.com/indv/a_indv/aboutus.cfm (last visited August 21, 2016) [Appendix 2].

⁶¹ D.A. DAVIDSON, Your Rights, <http://www.davidsoncompanies.com/indv/files/DADYourRights505.pdf> (last visited August 21, 2016) [Appendix 2].

⁶² STIFEL, About Stifel, <http://www.stifel.com/home/aboutstifel> (last visited August 21, 2016) [Appendix 3].

⁶³ STIFEL, Letter From Ron, <http://www.stifel.com/docs/pdf/aboutus/welcometostifel.pdf> (last visited August 21, 2016) [Appendix 3].

⁶⁴ STIFEL, Welcome to Stifel, <http://www.stifel.com/docs/pdf/aboutus/welcometostifel.pdf> (last visited August 21, 2016) [Appendix 3].

with today.”⁶⁵ Moreover, in distinguishing Baird and its Financial Advisors from other firms, the website states that, “Baird Financial Advisors serve as true partners to families and individuals across the United States.... And being employee-owned and independent makes us different from many other firms. We’re free to offer advice that is solely in your best interests – without worrying about outside shareholders.”⁶⁶

Raymond James. Raymond James promises to conduct itself in accordance with several precepts, the first of which – and the only one in bold – is that: “**Our clients always come first.**”⁶⁷

Edward Jones. The firm states on its website: “Your financial advisor is your long-term financial partner. These are important goals and you need an advocate – someone who listens and really understands what’s important to you. We believe that’s the best way to develop a personalized financial strategy.”⁶⁸

Ameriprise. In advertising how well-credentialed Ameriprise financial advisors are, the firm states, “Ameriprise advisors are dedicated to doing what’s right for their clients.”⁶⁹

BB&T Scott & Stringfellow. The firm’s homepage features the following statement: “We put our clients’ interests first.... That’s powerful synergy. A powerful partnership, working on your behalf.”⁷⁰ The company’s Mission Statement states: “Since 1893, our mission has been to put our clients’ interests first and foremost through our commitment to their financial success.”⁷¹

HD Vest. On the firm’s website explaining why prospective clients should choose the firm, it highlights “today’s increasingly complex financial marketplace” and proposes the firm’s advisors as the solution: “[I]ntroducing a comprehensive approach to total wealth management delivered by your most trusted advisor.”⁷²

Stephens. The firm’s “About Stephens” webpage states: “We are an independent financial services firm with the freedom to focus on what matters most: building value for our clients. We are committed to establishing and maintaining long-term relationships based on

⁶⁵ BAIRD, A Unique Culture, <http://www.rwbaird.com/who-we-are/unique-culture/> (last visited August 21, 2016) (emphasis in original) [Appendix 6].

⁶⁶ BAIRD, About Private Wealth Management, <http://www.rwbaird.com/private-wealth-management/about> (last visited August 21, 2016) [Appendix 6].

⁶⁷ RAYMOND JAMES, Mission Statement, <http://www.raymondjames.com/about/mission.htm> (last visited August 21, 2016) (emphasis in original) [Appendix 7].

⁶⁸ EDWARD JONES, Working with a Financial Advisor, <https://www.edwardjones.com/value/financial-advisor.html> (last visited August 21, 2016) [Appendix 9].

⁶⁹ AMERIPRISE, Financial advisor credentials, <https://www.ameriprise.com/financial-planning/choosing-financial-advisor/our-financial-advisor-credentials/> (last visited August 21, 2016) [Appendix 8].

⁷⁰ BB&T SCOTT & STRINGFELLOW, <http://www.bbtscottstringfellow.com/> (last visited August 21, 2016) [Appendix 10].

⁷¹ BB&T SCOTT & STRINGFELLOW, Mission Statement, <http://www.bbtscottstringfellow.com/aboutus/missionstatement> (last visited August 21, 2016) [Appendix 10].

⁷² HDVEST, Why Choose HD Vest, <https://www.hdvest.com/investor/why-choose-hd-vest> (last visited August 24, 2016) [Appendix 5].

integrity and trust and delivering long-term results based on deep research and independent thinking.”⁷³

UBS. In the firm’s “About Us” section on its website, it states: “The UBS Wealth Management Americas approach is based on the trusted relationship of our **Financial Advisors** and their clients. Our experienced Advisors are committed to understanding clients’ needs and delivering insightful, informed advice to help them realize their dreams.”⁷⁴

Mass Mutual. The firm’s homepage urges prospective clients to “Join **millions of people** who place their confidence and trust in us. We’re committed to the people who depend on us.”⁷⁵

Northwestern Mutual. The firm’s “Values” webpage declares: “Above all, we believe in doing what’s right for our clients. With every important decision, we ask ourselves this poignant question: “Is this in the best long-term interest of our clients?”⁷⁶

Meanwhile, NAIFA, which is one of the trade associations that is party to the lawsuit, has launched a consumer advertising campaign that perfectly illustrates the many ways in which brokers and insurance agents market themselves as trusted advisors. The campaign is called “Trust a NAIFA Advisor,”⁷⁷ and their website carries the heading “Advisors You Can Trust.”⁷⁸ The homepage of the website features the following statement in large capital letters and bold font: “TRUST YOUR FUTURE WITH A NAIFA ADVISOR.”⁷⁹ There is a video advertisement on the website, with voiceover stating: “Contact a NAIFA member for advice you can trust. NAIFA members adhere to a code of ethics that is about honesty and integrity. They’re committed to working with you and guiding you with a financial plan that will lead you to a secure future and a retirement you’ll enjoy.”⁸⁰

II. Industry’s legal challenges are based on the claim that they are mere salespeople engaged in an arms’ length sales relationship with their customers.

The industry trade associations’ legal challenges to the DOL rule paints an entirely different picture of the services offered by their members to retirement savers than the image created in marketing materials. Doubtless the industry plaintiffs recognize that, if they once acknowledge that their members are engaged in providing advice, their argument that DOL erred

⁷³ STEPHENS, About Stephens, <http://www.stephens.com/about-stephens/> (last visited August 21, 2016) [Appendix 18].

⁷⁴ UBS, About Us, https://www.ubs.com/us/en/wealth/about_us.html (last visited August 21, 2016) (emphasis in original) [Appendix 12].

⁷⁵ MASS MUTUAL, <https://www.massmutual.com/> (last visited August 21, 2016) (emphasis in original) [Appendix 23].

⁷⁶ NORTHWESTERN MUTUAL, Our Values, <https://www.northwesternmutual.com/about-us/what-we-believe/our-values> (last visited August 21, 2016) [Appendix 22].

⁷⁷ NAIFA, NAIFA: Advisors You Can Trust, <http://www.naifa.org/practice-resources/prp/naifa-advisors-you-can-trust> (last visited August 21, 2016) [Appendix 25].

⁷⁸ NAIFA, Advisors You Can Trust, <http://www.advisoryoucantrust.org/> (last visited August 21, 2016) [Appendix 25].

⁷⁹ *Id.*

⁸⁰ *Id.*

in applying a fiduciary standard to that advice goes up in smoke.⁸¹ Accordingly, the industry plaintiffs go to great lengths to avoid using the word “advice” or the title “financial advisor” in their legal filings. Instead, they refer to these sales-based financial professionals as registered representatives⁸² and insurance agents.⁸³ What marketers describe as “advice you can trust,” plaintiffs instead refer to as “retirement assistance, products, and services”⁸⁴ or, more baldly still, as simple “commercial sales relationships.”⁸⁵

The industry plaintiffs argue, moreover, that broker-dealer reps and insurance agents cannot reasonably be viewed (or regulated) as advisors, since they do not actually provide unbiased advice. Instead, they claim that broker-dealer reps and insurance agents are just “salespeople” engaging in activity “whose essence is sales” that is no different from other commercial sales relationships.⁸⁶ The key distinction they draw is between a relationship of trust and confidence, where they acknowledge that a fiduciary duty should apply, and a commercial sales relationship in which a sales-based standard should apply.⁸⁷ In their complaint, for example, the Chamber et al. state: “It has long been the law, however, that a difference exists between sales activity and fiduciary activity—which occurs only under certain circumstances arising out of a special relationship marked by trust and confidence between the parties.”⁸⁸ Similarly, ACLI and NAIFA argue that “the Department should have carved out from the Rule’s regulatory ambit ordinary sales conversations where both parties understand that they are acting at arms’ length.”⁸⁹

Unfortunately for the credibility of this argument, industry’s marketing campaign to blur the line between product sales and investment advice has unquestionably “succeeded.” After decades of being told they should trust their “financial advisor” to put their interests first, the majority of investors are unable to determine whether their own financial professional is a salesperson or a true advisor or whether the service being offered constitutes mere investment sales or fiduciary investment advice. Survey after survey has shown that investors do not distinguish between the sales recommendations they receive from broker-dealers and insurance agents and the advice they receive from fiduciary advisors.⁹⁰ Moreover, they overwhelmingly

⁸¹ Plaintiffs do introduce the argument that any advice they offer is “incidental” to their activities as salespeople, but they ignore the fact that ERISA, unlike the securities laws, does not include a “solely incidental” exclusion from the definition of fiduciary investment advice. They conveniently fail to mention, moreover, that key plaintiffs (including SIFMA and FSI) have elsewhere supported SEC rulemaking to apply a fiduciary standard to even such “incidental” advice.

⁸² Memorandum in Support of Summary Judgment, Chamber, et al. v. Thomas E. Perez, Secretary of Labor and U.S. Department of Labor, at 3.

⁸³ Memorandum in Support of Summary Judgment, ACLI and NAIFA v. U.S. Department of Labor and Thomas E. Perez, at 4.

⁸⁴ Compl., Chamber, et al. v. Thomas E. Perez, Secretary of Labor and U.S. Department of Labor, at 3.

⁸⁵ Compl., ACLI and NAIFA v. U.S. Department of Labor and Thomas E. Perez, at 65.

⁸⁶ Memorandum in Support of Summary Judgment, Chamber, et al. v. Thomas E. Perez, Secretary of Labor and U.S. Department of Labor, at 1, 18.

⁸⁷ Compl., ACLI and NAIFA v. U.S. Department of Labor and Thomas E. Perez, at 49-50.

⁸⁸ Compl., Chamber, et al. v. Thomas E. Perez, Secretary of Labor and U.S. Department of Labor, at 43.

⁸⁹ Compl., ACLI and NAIFA v. U.S. Department of Labor and Thomas E. Perez, at 49-50.

⁹⁰ See, e.g., Angela A. Hung, *et al.*, Investor and Industry Perspectives on Investment Advisers and Broker-Dealers, Rand Corporation, Sponsored by the United States Securities and Exchange Commission (January 2008) https://www.sec.gov/news/press/2008/2008-1_randiabdreport.pdf; Siegel & Gale, LLC and Gelb Consulting Group, Inc., Results of Investor Focus Group Interviews About Proposed Brokerage Account Disclosures,

expect that all financial professionals are required to act in their best interests.⁹¹ So, even on its own terms, plaintiffs' argument fails, since there is no evidence that, when it comes to retirement investment advice, "both parties" do in fact understand that they are in an arms' length sales relationship rather than an advisory relationship of trust and reliance.

Industry's desire to market themselves as trusted advisors is understandable. Clearly, if they portrayed themselves as mere salespeople engaged in arms' length sales transactions, they wouldn't be nearly as effective at attracting clients. But, in making these claims, they have landed themselves in a Catch 22. If their legal claims to be acting as mere salespeople are accurate, then their marketing is grossly deceptive, and securities and insurance regulators have an obligation to step in and bring a halt to the misrepresentation. If their marketing claims are accurate, then it is their legal arguments that are based on a fallacy, and the courts have no choice but to reject their challenge.

III. The DOL's rule will cure this problem.

The market practices chronicled in this white paper show that financial firms and their sales-based financial professionals function as investment advice providers, despite financial lobbyists' legal claims to the contrary. They also illustrate why it was appropriate for the DOL to determine that such practices demand fiduciary protections. The DOL's revised definition of fiduciary investment advice appropriately captures the full range of services that retirement savers would reasonably view as fiduciary investment advice. As a result, the updated definition better ensures that retirement savers will receive critical fiduciary protections against conflicts of interest for the types of interactions that they reasonably rely on as advisory in nature. In addition, it is much less susceptible to evasion by market participants, reducing the risk that they will function as advisors without complying with the standards that Congress intended should apply to that function. Importantly, the DOL rule achieves this expansion of the fiduciary standard to a broader range of advisory services while preserving the ability of financial professionals, including sales-based advisors, to comply with a fiduciary standard under a variety of business models.

If, on the other hand, the courts were to buy industry's misleading argument that these "financial advisors" are salespeople "merely selling a product," or if the rule were to be blocked or fundamentally undermined by Congressional or Administration action, then these sales-based advisors could continue to evade their fiduciary duty to their clients who are saving for retirement, resulting in billions of dollars in additional losses to retirement savers. All retirement savers would face the continuing risk that self-dealing transactions would harm their retirement security. Small savers would remain in particular danger, since they need to make every dollar count and are currently most at risk of receiving conflicted advice.

Report to the Securities and Exchange Commission (March 10, 2005)
<https://www.sec.gov/rules/proposed/s72599/fcrpt031005.pdf>; Infogroup/ORC, U.S. Investors & The Fiduciary Standard: A National Opinion Survey (September 15, 2010)
<http://www.hastingsgroup.com/fiduciarysurvey/docs/091510%20Fiduciary%20survey%20report%20FINAL2.pdf>.

⁹¹ S. Kathi Brown, Attitudes Toward the Importance of Unbiased Financial Advice, AARP Research (May 2016)
<http://www.aarp.org/research/topics/economics/info-2016/attitudes-toward-unbiased-financial-advice.html?cmp=RDRCT-PRI-OTHER-FINANCE-042816>.

IV. Conclusion

For too long, the industry has escaped being appropriately held accountable for their actions based on a legal farce – that they are “merely” salespeople who do not function as advisors or seek to occupy positions of trust and confidence. But this is a position they adopt only when they are seeking to avoid regulation as advisors. All their other conduct – from the titles they adopt to the way they describe and market their services – sends precisely the opposite message. The DOL appropriately brought the advisory activities of these firms under fiduciary scrutiny by holding them accountable for the recommendations they provide that reasonably can be construed to be advisory in nature. As the rule is implemented, retirement savers will benefit from receiving genuine advice that’s in their best interest rather than advice that is influenced by conflicts of interest. It is essential that the rule go into effect as scheduled in order for retirement savers to receive the protections they so desperately need and deserve.