To Members of the House of Representatives:

In the coming weeks, you will likely be voting on H.R. 2374, the "Retail Investor Protection Act." This misnamed bill would delay and possibly derail efforts by the Securities and Exchange Commission (SEC) and Department of Labor (DOL) to protect American workers and vulnerable investors from financial services providers who seek to profit at their expense and, in doing so, put their retirement security at risk. We are very concerned that this anti-investor legislation is being promoted on the basis of misinformation, and are writing to share a public interest perspective.

1) **H.R. 2374 ignores the pressing problems the SEC and DOL are attempting to address.**

Middle income Americans who need to make every dollar count are routinely taken advantage of by brokers who market themselves as trusted "financial advisers" but act and are regulated as salespeople, with no obligation to put the interests of their clients first. As a result of this regulatory loophole, these so-called "financial advisers" are free to recommend investment products with high costs and poor performance, or that expose the investor to unnecessary risks, as long as the product meets a basic suitability standard. Moreover, under a compensation system that is rife with conflicts of interest, brokers often have strong financial incentives to act in ways that put their own financial interests ahead of the interests of their customers. The added costs that investors pay as a result can add up to many thousands of dollars over the years, worsening the significant problems middle income Americans face in their efforts to accumulate adequate savings to buy a home, pay for a child's education, provide a decent standard of living in retirement, or provide for their family in an emergency.

The DOL is grappling with a similar problem as it relates to the millions of Americans whose retirement security depends on their ability to save and invest successfully through 401(k) plans and Individual Retirement Accounts (IRAs). ERISA's fiduciary rules are intended to protect workers' retirement savings from fraudulent, deceptive, and misleading practices. Critical gaps exist, however, in part because the rule that determines when a person providing investment advice is a fiduciary was drafted in a way that makes it difficult to enforce and all too easy to evade. As a result, important protections do not apply in many situations in which financial professionals provide advice to workers and retirees. A recent Government Accountability Office (GAO) study that examined roll-overs from retirement plans into IRAs found significant problems with the roll-over recommendations retirement plan participants received and a process with significant incentives to favor roll-overs regardless of the worker's best interests.[1] As dramatic changes have occurred in the retirement system, weaknesses in the DOL's fiduciary rules leave too many avenues open for potentially deceptive or abusive practices that threaten workers' retirement security.

2) **The legislation ignores the extensive research and analysis being undertaken by both SEC and DOL as part of the rulemaking process.**

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[1] U.S. Government Accountability Office, *401(k) Plans: Labor and IRS Could Improve the Rollover Process for Participants*, (GAO-13-30), March 2013.

In imposing significant new obligations on the SEC before it can adopt a fiduciary rule, H.R. 2374 demonstrates either an ignorance of or indifference to the extensive, decades-long study of this issue that the SEC has already undertaken. The SEC has been considering how to deal with advisory services offered by brokers since at least 1981, when it first addressed the question of whether to apply the Investment Advisers Act to brokers who hold themselves out as financial planners.[2] It began collecting extensive additional comment on the issue with the release of its proposed fee-based brokerage account rule in 1999.[3] In 2005, with pressure mounting on the SEC to resolve this still open rulemaking, the Commission released the results of focus group testing that it had commissioned in an effort to develop an improved disclosure regarding legal duties owed by brokers and advisers.[4] Concluding based in part on the results of that testing that disclosure alone did not offer a sufficient solution, the Commission then hired the RAND Corporation to conduct an additional study to provide the basis for further rulemaking.[5]

All of that study occurred before the passage of the Dodd-Frank Act, which required yet another study of issues that the Commission had already studied extensively. Among the many issues the Commission was required to examine was the potential impact of a fiduciary rule on retail customers': access to the range of products and services offered by brokers and dealers;" access to investment advice and recommendations about securities; the impact on the profitability of their investments; and the effect on protection from fraud. In other words, the SEC has already fully examined the issues that H.R. 2374 would require it to examine again As a result of those years of study, the Commission staff has advocated a rulemaking approach in its 913 study that has won the support of state securities regulators, investor advocates, investment adviser groups, and even the main broker-dealer trade association (the Securities Industry Financial Markets Association, or SIFMA).

By delaying and possibly derailing the SEC rulemaking, H.R. 2374 would also forestall the ability of the DOL to protect retirement plan participants as part of its entirely separate rulemaking under ERISA. Like the SEC, the DOL has also conducted an extensive review of the issues preparatory to rulemaking, including soliciting public comment and holding roundtables to solicit input into the rulemaking process. Moreover, when concerns were raised about the original DOL rule proposal, the agency did precisely what it was asked to do. It withdrew the proposal for redrafting to respond to concerns that had been raised. As part of that process, it has undertaken a new, more extensive economic analysis of the rule's potential impact. It has promised to release the prohibited transaction exemptions at the same time it issues the revised rule, so that commenters can evaluate the rule in light of how it would function in real world scenarios. And it has pledged that any rule it adopts will not conflict with SEC rules. Surely it

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[2] See, for example, SEC Investment Advisers Act Rel. No. 770 (1981) as well as SEC Rel. No. IA-1092 (1987).

[3] Securities and Exchange Commission, "Certain Broker-Dealers Deemed Not to be Investment Advisers," File No. S7-25-99, November 4, 1999.

[4] Siegel & Gale, LLC and Gelb Consulting Group, Inc., *Results of Investor Focus Group Interviews About Proposed Brokerage Account Disclosures,* Report to the Securities and Exchange Commission, March 10, 2005.

[5] RAND Institute for Civil Justice (Angela A. Hung, Noreen Clancy, Jeff Dominitz, Eric Talley, Claude Berrebi, Farrukh Suvankulov), *Investor and Industry Perspectives on Investment Advisers and Broker-Dealers,* Sponsored by the United States Securities and Exchange Commission, 2008.

deserves to have its rule proposal judged based on its own merits, not halted in response to unsubstantiated industry fears.

3) Changes to the bill in the Financial Services Committee were largely cosmetic.

During mark-up, the Financial Services Committee removed provisions in the bill that dictated the form of the economic analysis the Commission must undertake before adopting a rule. But the Commission is already conducting an economic analysis under guidelines that heavily weight concerns about cost to industry. Meanwhile, the bill still requires the Commission to reach findings with regard to the existence of harm to investors under the existing standard and the impact the rule would have on access to services. But measuring the harm that results from advice that complies with a suitability standard but fails to meet a best interest standard is difficult at best. Moreover, as a SIFMA spokesman recently stated, the benefits to investors of a best interest standard are self-evident, and further economic analysis to prove that point should not be necessary.[6] Under the circumstances, it seems clear that the purpose of these additional requirements is not to improve the quality of analysis underlying the proposed rule, but to provide an additional basis for legal challenge by those fringe elements in the broker-dealer industry who remain adamantly opposed to any rule that would require them to stop profiting at their customers' expense.

Through this mechanism, H.R. 2374 would make the courts rather than the SEC the ultimate arbiters of the appropriate regulatory approach. As such, even as amended, H.R. 2374 continues to place unreasonable and possibly insurmountable barriers in the way of SEC action to protect vulnerable investors and, by extension, the ability of the DOL to protect retirement plan participants and retirees.

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For all these reasons, we urge you to reject H.R. 2374 when it is brought to the floor for a vote. Thank you for your attention to our concerns. Please feel free to contact CFA Director of Investor Protection Barbara Roper (719-543-9468, bnroper@comcast.net) or Lauren Rothfarb of AFL-CIO's Department of Government Affairs (202-637-5078, Lrothfar@aflcio.org) if you have any questions about our position.

AFL-CIO
Americans for Financial Reform
Consumer Federation of America
OWL-The Voice of Midlife and Older Women
Pension Rights Center
ProtectSeniors.Org
Public Citizen
The Association of BellTel Retirees, Inc.
The National Association of Professional Geriatric Care Managers
Wider Opportunities for Women

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[6] Schoeff, Mark, "Reps willing to bear 'substantial costs' of fiduciary duty: SIFMA Exec," *Investment News*, June 13, 2013 (available here).