



Statement of the U.S. Chamber of Commerce

ON: The Department of Labor's Proposed Fiduciary Rule

**TO: Subcommittee on Oversight of the U.S. House of
Representatives Committee on
Ways and Means**

BY: Patricia Owen, President and Owner, FACES Day Spa

DATE: September 30, 2015

1615 H Street NW | Washington, DC | 20062

The Chamber's mission is to advance human progress through an economic, political and social system based on individual freedom, incentive, initiative, opportunity and responsibility.

The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system.

More than 96% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

Besides representing a cross-section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on issues are developed by Chamber members serving on committees, subcommittees, councils, and task forces. Nearly 1,900 businesspeople participate in this process.

Thank you Chairman Roskam, Ranking Member Lewis, and members of the Subcommittee on Oversight of the House Committee on Ways and Means for the opportunity to testify today on the U.S. Department of Labor's proposed fiduciary rule.

I am Patricia Owen, President and Owner of FACES Day Spa in Hilton Head Island, South Carolina. I am here representing the U.S. Chamber of Commerce, where I am a member of its Small Business Council.

FACES Day Spa is a premier, award-winning day spa that provides a variety of services specializing in skin care, stress relief, beauty, and overall wellness for men and women of all ages. I opened FACES Day Spa in 1983, originally as retail skin care and cosmetics store, but as of 2000, transformed it into a day spa where our business is primarily service oriented. As such, human capital is one of the most vital resources to my company. I currently employ 25 people, of which two-thirds work full-time. Hilton Head Island is a vacation destination where there is significant competition for workers in the hospitality industry, especially among spas. In order for me to compete with the larger hotel chain spas and other small businesses for good talent, I offer a variety of affordable employee benefits, including paid training, employee discounts, supplemental health insurance plans, and a retirement savings plan. As the owner of a business, I am focused on the details of my core business function – strategic planning, marketing and training – and use outside professionals to help me with important business functions that I don't have the time or expertise to deal with on an everyday basis. For example, I use a CPA firm to assist with accounting and tax issues, an attorney to assist with legal matters, and a financial advisor to help me with my retirement savings plan.

Most of my employees are considered "millennials." In other words, they are young and in the earlier stages of their work life. Therefore, saving for retirement is not a priority, and not on the forefront of their minds. Because I consider myself a "second mother" to many of my employees and want to ensure they are thinking about their future, I implemented a 401(k) plan in 2007 where I provided a 50% match to what each plan participant contributes. My financial advisor helped me set-up the plan, educated me on a range of investment options appropriate for my employees, and provided general investment guidance to my employees. Today, if any of my employees have questions about their 401(k) account, they can call an 800 number and get quality, personalized assistance on how to invest their savings.

Unfortunately, the financial crisis hit in late 2008, and like many small businesses that cater to the hospitality industry, we were significantly impacted, and I was no longer able to provide the match. I made this difficult decision to cut back on

this benefit to successfully avoid laying off anyone. I have been rebuilding and growing my business since then and have recently considered re-implementing the matching contribution. However, the potential of significantly higher costs for small businesses emanating from the impending fiduciary rule at the Department of Labor has caused me to hold off on re-instituting the match for now. If the rule moves forward as proposed, it is unlikely that I will be able to absorb both the higher costs resulting from the Department of Labor rule and provide a 50% match to my employees. It is possible that I may even need to drop the plan altogether.

In the meantime, I encourage all employees – even those who aren't eligible or don't participate in the plan – to participate in the investment seminar my financial advisor conducts for my company to help educate them on saving for retirement and ways to meet retirement goals. The current participation rate for those eligible for our 401(k) plan is less than 50%. This percentage is noticeably lower than when I did offer a matching contribution. At that time, the participation rate was nearly 75%. Accordingly, any new costs imposed on small businesses will have a huge trickle-down effect on the savings rate.

Since the impact of the financial crisis has subsided, my company is now on stable footing and growing again, and I want to be able to attract new employees through competitive benefit packages. Providing retirement benefits has been important to help my current employees and to attract new ones. However, I am very concerned that the proposed rule will prevent my ability to do so.

Earlier this year, the Chamber submitted a comment letter to the Department of Labor enumerating many ways in which the proposed rule is unworkable.¹ In my testimony, I would like to highlight three issues that will have a particularly negative impact on small business plans like mine:

1. The seller's carve-out discriminates against small businesses and will decrease access to much-needed guidance.
2. The changes to the education carve-out will restrict access to investment education for both small business owners and their employees.
3. The Best Interest Contract Exemption will increase the costs of services to small businesses and possibly eliminate access.

The seller's carve-out discriminates against small businesses and will decrease access to much-needed guidance. Under the proposal, there is a carve-out for advisors that are selling or marketing materials ("Seller's Carve-Out").

¹ The Chamber's comment letter is attached to this testimony.

However, this carve-out does not apply to advisors to small businesses. The DOL seems to believe that small business owners like me are not as savvy as large businesses and, therefore, need additional protections. The validity of this rationale is based on faulty assumptions, and does not justify discriminatory treatment. I am aware that that my financial advisor is providing a service for a fee and selling a product when I work with him. I would not be able to run a successful business if I were not able to discern when I am involved in a sales discussion – especially if it follows a basic disclosure that an advisor is selling a proprietary financial product, that the advisor is paid to sell the product, and the advisor is not providing fiduciary advice. This disclosure, similar to that the Department requires in the large plan carve out, is easily understandable to any recipient.

The assumption that small plans, participants and IRA owners cannot understand the difference between sales and advice runs counter to my real world experience. The Department can protect participants, IRA owners and small plans with the same kind of disclosures that it requires of large plans under the large plan carve out, but without eliminating our right to choose the services and products that best fit our needs.

The changes to the education carve-out will restrict access to investment education for both small business owners and their employees. While the Proposal expressly permits education to be provided to plans, participants, and IRAs, the redefinition of asset allocation models that reference the plan's investment options as fiduciary advice will significantly disrupt plan sponsor efforts to educate their plan participants and retirees about investment options. Many small businesses, including mine, rely on trusted third parties to provide investment education to their employees. These efforts include providing asset allocation models that provide a recommendation on investments in various asset classes based on a plan participant's age, expected retirement and risk tolerance. However, under the Proposal, any party who provides specific investment options for each asset class would be deemed an ERISA fiduciary. This significant modification from current rules, which allows for such information on a non-fiduciary basis, would harm investors, and particularly harm small business plan participants that likely have access to fewer resources.

My employees value the investment education provided to them – specifically, providing investment recommendations in various asset classes. This information allows them to make informed investment decisions. Many of my employees cannot afford to pay for investment education separately and might be discouraged from investing in the plan at all if the company did not provide this benefit. By disallowing any party to make the link between asset classes and specific investment options, the

Department of Labor is forcing plan participants into the tenuous position of figuring out how to invest their own retirement savings at the risk of making poor choices.

The Best Interest Contract Exemption will increase the costs of services to small businesses and possibly eliminate access. Because advisors to small businesses are not carved out of the fiduciary definition, they must change their fee arrangements or qualify for a special rule called an “exemption” in order to provide services on the same terms as before.² The reason the DOL regulatory package causes such significant change is that a fiduciary investment advisor under ERISA generally has engaged in a prohibited transaction if the advisor recommends investments that either pay the advisor a different amount than other investments or that are offered by affiliates (for example, the advisor is connected with the insurance company that offers the investment). There are certain exceptions to these rules, called “prohibited transaction exemptions,” but as DOL has proposed the new rules, the exemptions generally won’t help financial advisors who are working with small businesses to set up plans. Therefore, it may be illegal for those advisors to get commissions or to recommend certain investments.

This problem is highlighted in services for SEP and SIMPLE IRAs. One way advisors might try to comply is by charging a flat fee for their SEP or SIMPLE IRA services. Even though FACES Day Spa offers a 401(k) plan rather than a SEP or SIMPLE IRA, I can attest that other small businesses may never have offered one if the fees had been too high. Consequently, it is extremely important to consider the negative impact that increased costs will have – particularly in the small business plan market.

In conclusion, for the reasons stated above, I am very concerned that the Proposal will not achieve the Department’s goals of better protecting workers and retirees, but will instead make it harder for small business employers and employees to access financial advice and to increase retirement savings. I appreciate that the DOL is looking to work with the industry to resolve our concerns. However, I am very concerned that the current timeline does not allow enough time for proper discussions. If the final rule does not properly resolve the issues raised above, the

² However, the new exemption proposed by DOL may not apply to small business plans. It does apply to individual owners of IRAs, but it is not clear whether this exemption is available for retirement plans – including SEP and SIMPLE IRAs - that are being offered by the employer. Further, even if it does apply, the new exemption – called the Best Interest Contract (“BIC”) Exemption – would itself substantially increase costs for advisors due to its many conditions and requirements.

unintended consequences will have substantial negative repercussions on my employees, as well as the employees of many other small businesses.

Thank you for the opportunity to testify before you today, and I look forward to any questions you may have.