

TESTIMONY
SUBCOMMITTEE ON EMPLOYMENT AND WORKPLACE SAFETY
OF THE
SENATE COMMITTEE ON HEALTH, EDUCATION, LABOR AND
PENSIONS
ON RESTRICTING ADVICE AND EDUCATION: DOL'S UNWORKABLE
INVESTMENT PROPOSAL FOR AMERICAN FAMILIES AND
RETIREES
BY
DARLENE MILLER
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Thank you Chairman Isakson, Ranking Member Franken and members of the Subcommittee on Employment and Workplace Safety and members of the Senate Committee on Health, Education, Labor and Pensions.

I am Darlene Miller, President and CEO of Permac Industries in Burnsville Minnesota. I am here representing the U.S. Chamber of Commerce of which I am a Board Member and chairperson of the U.S. Chamber Small Business Council.

Permac Industries is a precision machining manufacturer that services the global aerospace, defense, medical, high-reliability industrial and commercial industries. When I purchased Permac in 1993 there were 7 employees. We now have almost 30 employees and are looking to expand. In order to expand, my company must be able to compete with much larger companies for talented employees. One way that we are able to compete is by offering employee benefits, including a retirement savings plan. As the owner of a business, I am focused on the details of my core business function – sales, finance, and manufacturing oversight – and use outside professionals to help me with supplemental business functions. For example, I use a CPA firm accountant to assist with tax issues, attorneys to assist with legal issues, and a financial advisor to help me with my retirement savings plan.

In 1999, Permac implemented a SARSEP – a Simplified Employee Pension plan which is now known as a SEP-IRA. The plan was recommended to me by a broker whom I worked with to provide medical benefits for my employees. This broker was a trusted adviser that I had worked with previously and had provided valuable assistance. Several years later, my broker advised me that I was in danger of violating the SARSEP rules because my employee population was exceeding the 25 employee limit. At that point, I worked with him to determine how to continue to provide retirement benefits for my employees. We decided that a 401(k) plan was the best

option for my company and in 2008 we implemented the new plan. Through the 401(k) plan, Permac provides the opportunity to save, a matching contribution, and investment education. There is 93% participation in the plan and, annually, the company provides an investment seminar. All employees – even those who don't participate in the plan – are encouraged to participate in the investment seminar.

My broker helped me implement the SARSEP, notified me when I was about to be in violation of the rules and guided my transition to a 401(k) plan. My current employees are like family and I want to be able to help them. Just as importantly, I want to be able to attract new employees. Providing retirement benefits has been important to help my current employees and to attract new employees. As my company continues to grow, I look forward to providing competitive benefits. I am very concerned that the proposed rule will prevent my ability to do so.

The Chamber has earlier 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:

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"). However, this carve-out does not apply to advisors to small businesses. The DOL seems to believe that small business owners, such as me, are not as sophisticated as large businesses and, therefore, need additional protections. The validity of this rationale is based on faulty assumptions, and does not justify discriminatory treatment. When I work with my financial adviser, I am aware that he is providing a service for a fee and selling a product. I would not be able to run a successful business if I were not able to understand when I am involved in a sales discussion - particularly, 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 readily understandable to any recipient.

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

The assumption that small plans, participants and IRA owners cannot understand the difference between sales and advice does not match 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 their right to choose the services and products that best fit their 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 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 what how to invest their own retirement savings and risk 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

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”)

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 Permac no longer provides a SEP-IRA, we might never have offered one if the fees had been too high. And without that introduction into providing a retirement savings program, we might not have moved onto a 401(k) plan. 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, we are 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 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 look forward to any questions you may have.

Exemption – would itself substantially increase costs for advisors due to its many conditions and requirements.