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April 17, 2017

Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Room N-5655
Washington, DC 20210
Attention: Fiduciary Rule Examination

Re: Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice; Best Interest Contract Exemption (Prohibited Transaction Exemption 2016-01); Prohibited Transaction Exemption 84-24
RIN 1210-AB79

To Whom it May Concern:

The Insured Retirement Institute ("IRI")[1] appreciates the opportunity to provide these comments to the Department of Labor (the "Department") in connection with the Department's review of the final regulation defining the term "fiduciary" (the "Fiduciary Definition Regulation") under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), the Best Interest Contract Exemption (the "BIC Exemption"), and the amendments to prohibited transaction exemption 84-24 (the "Amended PTE 84-24") issued by the Department on April 8, 2016 (collectively, the "Fiduciary Rule") pursuant to the memorandum issued by President Donald J. Trump on February 3, 2017 (the "Presidential

[1] IRI is the only national trade association that represents the entire supply chain of the retirement income industry. IRI has more than 500 member companies, including major life insurance companies, broker-dealers, banks, and asset management companies. IRI member companies account for more than 95 percent of annuity assets in the United States, include the top 10 distributors of annuities ranked by assets under management, and are represented by more than 150,000 financial professionals serving over 22.5 million households in communities across the country.

Memorandum”). For the reasons outlined below, we respectfully urge the Department to delay the applicability date for all aspects of the Fiduciary Rule until the Department completes its review as directed by the Presidential Memorandum. Moreover, IRI and our members believe the Fiduciary Rule will “adversely affect the ability of Americans to gain access to retirement information and financial advice” and therefore should be rescinded.[2]

While we believe the Fiduciary Rule should be rescinded, we remain supportive of a consistent and workable best interest standard for ERISA plans, IRAs and non-qualified retail accounts. To that end, we would encourage the Department to collaborate with other federal and state regulators in a constructive process to develop such a standard, and IRI and our members stand ready to work with the Department and these other regulatory agencies to accomplish this important goal.

Executive Summary

1. *The Department should further extend the applicability date for the entire Fiduciary Rule, including the fiduciary definition and the impartial conduct standards, to take the time necessary to analyze new information obtained since the original rulemaking, to correct procedural and analytical flaws with the rulemaking, and to complete the other elements of the review mandated by President Trump.*

    - Unless action is taken to further delay the applicability date of the Fiduciary Rule, two of its core elements – the Fiduciary Definition Regulation and the impartial conduct standards – will become applicable on June 9, 2017, despite the President’s directive to review the entire Fiduciary Rule.

    - While IRI has long supported a “best interest” standard for financial professionals, the Department should not confuse this position with support for the approach taken in the Fiduciary Rule. We continue to have serious concerns about the significantly expanded definition of fiduciary, as well as the Department’s formulation of the best interest standard.

    - The Department has concluded that the Fiduciary Definition Regulation and the impartial conduct standards – which are core elements of the Fiduciary Rule – are “among the least controversial” and need not be further delayed. This conclusion is simply incorrect. Significant questions of law and policy continue to exist regarding these aspects of the Fiduciary Rule. Moreover, the Department’s conclusion was reached without the benefit of the new information included in

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[2] If the Department determines to revise rather than rescind the Fiduciary Rule, we will provide further comments to assist the Department in the development of revisions to address our concerns; we do note, however, that we do not believe our concerns can be fully addressed through revisions to the Fiduciary Rule.

this and other comment letters, which are due today. The Department should therefore delay the entire Fiduciary Rule so it can take the time it needs to review this new information as directed by the President.

- Allowing these core elements of the Fiduciary Rule to become applicable on June 9, 2017 will cause significant consumer harm, including loss of access to retirement savings products and services.
- An additional delay can be implemented without further public comment, similar to the approach taken by the Department with respect to its investment advice regulation in 2009.
- To address uncertainty among financial professionals about their responsibilities while the Department is reviewing the Fiduciary Rule, the Department should issue guidance expressly stating that neither the Fiduciary Rule or any potential successor rule will apply to advice given or transactions entered into during the pendency of the delay.

2. *New information obtained since the Fiduciary Rule was adopted clearly demonstrates that the Rule will make it harder for retirement savers to plan for retirement by depriving them of access to affordable, holistic financial planning and education and a wide range of investment options.*
   - A 2016 study found that 71 percent of financial professionals will disengage from at least some retirement savers because of the Fiduciary Rule. On average, these financial professionals estimate they will no longer work with 25 percent of their mass-market clients (i.e., investors with less than $300,000 in net investable assets) — creating an advice gap for low-balance investors. More than 26 million U.S. households have IRA balances under $100,000. Evidence shows that savers who work with financial professionals have 22.8 percent more income in retirement, but as a result of the Fiduciary Rule, low- and moderate-balance savers face a significant risk of losing this valuable assistance.
   - Another 2016 study found that by 2020, broker-dealer firms (including wirehouses, independents, and dually-registered broker-dealer/registered investment advisers) will collectively stop serving the majority of the $400 billion currently held in low-balance retirement accounts.
   - According to a 2017 survey conducted by the National Association of Insurance and Financial Advisors ("NAIFA"), nearly 90 percent of the financial professionals who responded to the survey believe consumers will pay more for professional advice services, 75 percent have seen or expect to see increases in minimum account balances for the clients they serve, and 91 percent have already

experienced or expect to experience restrictions of product offerings to their clients.

- Some distribution firms and financial professionals have already significantly scaled back their use of commission-based products such as variable annuities because of concerns about the potential implications of the Fiduciary Rule on recommendations of such products. In fact, despite the existence of a rising stock market, which has always led to increased sales of variable annuities, sales declined by 21.6 percent from 2015 to 2016.
- In a 2017 survey of IRI member firms, we found that more than 80 percent of members who participated in the survey have already introduced, plan to introduce, or are considering introducing fee-based variable annuities. However, those products are unlikely to be widely available in the near-term and may not be appropriate for all retirement savers, including some for whom a traditional commission-based variable annuity would be more economical, less costly, and likely in their best interest.
- In addition, 70 percent of the respondents to the IRI survey either already have or are considering exiting smaller markets such as lower balance IRAs and small employer based plans, and nearly half already have or are considering raising IRA account minimums.

3. *Requiring all financial professionals to operate as ERISA fiduciaries is inconsistent with the statutory text of ERISA and will cause significant dislocations or disruptions within the retirement services industry.*
    - The Fiduciary Rule inappropriately characterizes as fiduciary investment advice virtually any communication between financial professionals and retirement savers, even where there can be no reasonable expectation of fiduciary status.
    - As a result, the Fiduciary Rule will cause many financial professionals to disengage from their less affluent clients (as reflected in the new information cited above), thereby leaving those most in need of assistance without access to a financial professional.
4. *The Fiduciary Rule will result in increased litigation as a result of the significant expansion of the definition of fiduciary and the inappropriate use of a private right of action as the primary enforcement mechanism.*
    - A new 2017 Morningstar report found that class action lawsuits under the BIC Exemption will cost the industry between $70 million and $150 million each year, with costs potentially several times higher in the near term.

- Ultimately, significant portions of this litigation expense will be passed along to retirement savers in the form of increased costs for products and services.

5. *The Department's rulemaking process was fundamentally flawed.*

    - An inquiry initiated by Senator Ron Johnson (R-Wisconsin) in 2015 found that the Department "was predetermined to regulate the industry and sought evidence to justify its preferred action." In other words, the Department first concluded that it wanted to change the rules governing investment advice fiduciaries, and then sought to justify that conclusion.
    - As a result of this backwards approach to regulation, the Department failed to adequately consider a number of critical factors, including (a) the Fiduciary Rule's impact on retirement savers' access to financial assistance, products and services; (b) the job losses likely to result from the Fiduciary Rule; (c) the Fiduciary Rule's adverse impact on annuities; (d) viable alternatives to the Fiduciary Rule; and (e) comments provided by other regulators.
    - Overwhelming new evidence provided in this letter and others demonstrates that a significant percentage of retirement savers will lose access to financial assistance and products. This new information needs to be fully evaluated as part of the Department's review of the Fiduciary Rule.

6. *The Department's Regulatory Impact Analysis overstated the benefits of the Fiduciary Rule and underestimated the Fiduciary Rule's direct and indirect costs to the financial services industry and retirement savers.*

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I. ***The Department Should Further Extend the Applicability Date for the Entire Fiduciary Rule to Allow Time to Consider New Information, Correct Procedural and Analytical Flaws with the Rulemaking, and Evaluate Fundamental Problems with All Aspects of the Fiduciary Rule as Directed by the President.***

While IRI and its members believe financial professionals should act in the best interest of their clients when recommending investments, we have long-standing concerns about the Fiduciary Rule and its harmful impact on retirement savers. The Department's recent decision to extend the applicability date is a necessary first step as the Department undertakes to review the Fiduciary Rule in accordance with the Presidential Memorandum. However, this first step merely delayed the applicability date of the Fiduciary Definition Regulation and the impartial conduct standards imposed under the BIC Exemption and Amended PTE 84-24 from April 10, 2017 to June 9, 2017, and delayed the applicability date for certain other elements of these exemptions until January 1, 2018.

Let there be no confusion, though: while the Department was instructed to review the Fiduciary Rule in its entirety, the Department has asserted that the Fiduciary Definition Regulation and the impartial conduct standards are "among the least controversial aspects of the rulemaking project." This is simply not correct. As a result of this inaccurate conclusion, even with the recent extension, the Fiduciary Definition Regulation itself will go into full force and effect on June 9, 2017, well before the Department is expected to complete its review. Again, absent a further delay, the Fiduciary Rule, with its flaws, will go into effect on June 9, 2017.

The Department, in its own words, has implied that as of June 9, 2017, providers in the marketplace need only comply with the impartial conduct standards. Unfortunately, that is a false premise, for at least two reasons:

- First, as noted, the Fiduciary Definition Regulation will go into effect June 9, 2017, before the Department expects to complete its review in response to the president's directive. The Department's conclusion mistakenly assumes that all activity will occur under the two referenced exemptions. Yet one of our core concerns has been and continues to be that firms will withdraw from supporting plans and IRAs, either in total or with respect to smaller account balances, generally following a migration to asset-based fees which, if requirements are satisfied, need not rely on either of the referenced exemptions. The new information presented throughout this letter confirms that these concerns about diminished access to retirement products and services were well-founded.
- Second, the assertion itself conflates the marketplace's general support for a best interest standard, with the Department's articulation of these impartial conduct standards. There are many disconnects, as highlighted throughout this letter. To highlight just one more example of that disconnect, the impartial conduct standards shift the burden of evaluating the reasonability of compensation from the party making the purchasing decision (i.e., the plan sponsor/fiduciary, or the IRA owner) to the party providing the investment product or service without providing any objective guidance about how to satisfy this standard. This shift further underscores the importance of the litigation concerns arising out of the Fiduciary Rule, both from the marketplace and from the president's directive.

IRI and our members emphatically disagree with this conflation of a workable "best interest" standard with the Department's impartial conduct standards. The Department should not confuse widespread support for "a best interest standard" with support for the approach taken in the Fiduciary Rule. As we will explain further below, we and other commenters have raised and continue to have serious concerns about the significantly expanded definition of fiduciary. For example, the best interest standard articulated by the Department appears to require a complete disregard for the business and economic reality that firms and financial professionals have to generate enough revenue to cover their costs and earn a reasonable profit in order to stay in business. We are particularly concerned about how this requirement will be applied in the context of proprietary annuity distribution models, which provide consumers with invaluable and irreplaceable sources of knowledge about annuity products and how annuities can be used to provide guaranteed lifetime income to retirees.

Allowing these key elements of the Fiduciary Rule to take effect before completion of the Department's review creates a significant risk that the rules will be changed multiple times in a relatively short period, which would cause market disruption and considerable confusion for retirement savers and financial professionals.

While the Department concluded that "a longer delay likely would result in too little additional cost savings to justify the additional investor losses," IRI believes the Department's analysis of the costs and benefits of a longer delay is fundamentally flawed. Specifically, the Department asserted that, even with the 60 day delay, "most, but not all, of the investor gains predicted in the 2016 RIA for the transition period will remain intact," but "[l]osses arising from a delay of longer than 60 days would quickly overshadow any additional compliance cost savings." This analysis, however, is built upon the same flawed logic employed by the Department in the Regulatory Impact Analysis issued in connection with the Fiduciary Rule in 2016 (the "2016 RIA"). As we will discuss in greater detail below, there were significant procedural and analytical flaws in the original rulemaking process. Among other things, the 2016 RIA failed to consider the costs to retirement savers who lose access to advice as a result of the rule, the increased cost of advice for savers who move from commission-based accounts to fee-based accounts, and the impact of the rule on the annuity marketplace. We believe the updated analysis required under the Presidential Memorandum – including consideration of the new information presented in this and other letters – will reveal that the Fiduciary Rule will harm (and in fact is already harming) retirement savers far more than it might help them. It follows, then, that the cost of not delaying the Fiduciary Rule for longer than 60 days will also cause significant consumer harm far in excess of any potential benefit.

Accordingly, we urge the Department to further extend the applicability date for all aspects of the Fiduciary Rule, including the Fiduciary Definition Regulation and the impartial conducts standards, until the Department completes its review. This additional delay is necessary to ensure the Department can meaningfully comply with President Trump's directive and, more importantly, to avoid the consumer harm that will result if the Fiduciary Definition Regulation is allowed to take effect on June 9, 2017.

We believe the Department could rely on the existing record of public comments submitted earlier this year to support a longer delay without running afoul of the Administrative Procedure Act ("APA"). The Department actually established a precedent for such action without additional notice and comment when it extended the delay of its investment advice rule on two separate occasions in 2009. We believe a similar approach would be appropriate in this instance.

In addition, we urge the Department to issue guidance expressly stating that neither the Fiduciary Rule or any potential successor rule will apply to advice given or transactions entered into during the pendency of the delay (including any extension of the delay). Many financial professionals are struggling to understand the implications of the delay, and are worried that the Fiduciary Rule (including any changes the Department may decide to make based on the review) will be retroactively applied to their current conduct. The requested guidance will provide certainty so that financial professionals can continue to serve their customers while the Department considers how to proceed. Absent such guidance, the adverse impacts of the Fiduciary Rule will continue to harm retirement savers while its effectiveness in promoting the goals of the president is under review.

II. ***New Studies Conducted After Adoption of the Fiduciary Rule Clearly Demonstrate that the Fiduciary Rule Will Cause Significant Consumer Harm and Should Therefore be Rescinded.***

The Presidential Memorandum directed the Department to revise or rescind the Fiduciary Rule if it concludes, based on its review, that the Fiduciary Rule will "adversely affect the ability of Americans to gain access to retirement information and financial advice." In particular, the Department must consider whether the Fiduciary Rule would cause any of the following:

- A reduction of Americans' access to certain retirement savings offerings, retirement product structures, retirement savings information, or related financial advice;
- Dislocations or disruptions within the retirement services industry that may adversely affect investors or retirees; and
- An increase in litigation, and an increase in the prices that investors and retirees must pay to gain access to retirement services.

During the rulemaking process, IRI and other commenters provided extensive input to the Department indicating that the Fiduciary Rule would, in fact, cause all of the foregoing to occur. The Department essentially dismissed those concerns when it adopted the Fiduciary Rule and when it issued the recent delay. However, in the pages that follow, we will provide new data and information that did not yet exist during the Department's rulemaking process to demonstrate that the adverse consequences we and others predicted are coming to fruition.

A. The Fiduciary Rule will make it harder for retirement savers to plan for retirement by depriving them of access to affordable, holistic financial planning and education and a wide range of investment options.

In an age when saving and preparing for retirement is squarely on the shoulders of individuals, financial professionals have an important part in helping their clients develop retirement plans and grow their savings. While leaders in Congress have recognized that positive changes are needed to help Americans be financially prepared to enjoy longer lifespans, the Fiduciary Rule runs contrary to this goal by limiting consumer choice and depriving lower- and middle-income consumers of access to affordable assistance with retirement planning.

1. *New study shows 64 percent of financial professionals expect the Fiduciary Rule will harm retirement savers and 71 percent will disengage from savers with less than $300,000.*

For many retirement savers, commission-based accounts are the most appropriate, desirable and cost-effective way to pay for these valuable services (a fact the Department seemingly disregarded in adopting the Fiduciary Rule). Unfortunately, the burdens and risks associated with the BIC Exemption discourage the use of commission-based accounts. In fact, several firms have already announced that they will transition all or most of their brokerage accounts into fee-based advisory accounts to avoid the need to rely on the BIC Exemption. Fee-based accounts, however, typically have minimum account balance requirements that most retirement savers simply cannot meet. As a result, many savers will no longer have access to assistance from financial professionals once the Fiduciary Rule takes effect.

According to a non-commissioned study conducted in October 2016 (after the Fiduciary Rule was adopted), 64 percent of financial professionals think the Fiduciary Rule will have a largely negative impact on less affluent retirement savers (i.e., those with less than $300,000 in net investable assets), 39 percent think financial advice will become too expensive for most retirement savers, and 71 percent will disengage from at least some retirement savers because of the Fiduciary Rule.[3] On average, these financial professionals estimate they will no longer work with 25 percent of their less affluent clients.[4] To put this into perspective, 40.2 million U.S. households owned IRAs in mid-2015, and the Investment Company Institute ("ICI") estimates that 65 percent of these households (over 26 million households) have balances under $100,000 and 48 percent (almost 20 million households) have less than $50,000.[5] It would be reasonable and logical to extrapolate from this study that these percentages will be higher for clients with the smallest balances. This will create an advice gap for low- and moderate-balance investors, despite the fact that these are the people most in need of assistance as they

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[3] CoreData Research UK, Fiduciary rule to leave US mass-market investors stranded, study shows, (November 2016), available at http://www.valuewalk.com/wp-content/uploads/2016/11/Fiduciary-rule-Press-Release-percentE2 percent80 percent93-CoreData-Research.pdf

[4] *Id*.

[5] Investment Company Institute comment letter to Department of Labor, July 21, 2015.

plan for retirement. Another new 2016 study found that by 2020, broker-dealer firms (including wirehouses, independents, and dually-registered broker-dealer/registered investment advisers) will collectively stop serving the majority of the $400 billion currently held in low-balance retirement accounts.[6]

This reduction in access is further borne out by a 2017 survey of IRI members. Seventy percent of the members who participated in the survey reported they either already have or are considering exiting smaller markets such as lower-balance IRAs and small employer-based plans. And nearly half already have or are considering raising IRA account minimums.[7]

Similarly, a recent survey by the National Association of Insurance and Financial Advisors (the "2017 NAIFA Survey") found that nearly 90 percent of respondents believe consumers will pay more for professional advice services, and 75 percent have seen or expect to see increases in minimum account balances for the clients they serve.[8]

These new findings clearly validate the evidence presented to the Department during the rulemaking process about the likely adverse impact of the Fiduciary Rule on access to advice, including a 2015 study that concluded 57 percent of all retirement savers will be forced to terminate their relationship with their financial professional as a result of the Fiduciary Rule.[9]

By way of example, for many retirement savers, professional insurance agents are an important source of financial information, advice and assistance, and access to annuities and other products that provide financial security in retirement. This is particularly the case with regard to fixed indexed annuities ("FIAs"). In 2015, about 63 percent of FIAs were sold by professional insurance agents who were not affiliated with a broker-dealer. These agents, many of whom are small businesses or sole proprietorships, will be unable to satisfy the BIC Exemption and will be forced to exit the fixed-indexed annuity market unless the agents join a broker-dealer or other "Financial Institution" willing to assume the associated fiduciary liability. Those options are not viable for most insurance-only licensed agents who offer FIAs.

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[6] A.T. Kearney, *The $20 billion impact of the new fiduciary rule on the U.S. wealth management industry*, October 2016, available at https://www.atkearney.com/financial-institutions/dol-fiduciary-rule.

[7] Insured Retirement Institute, *March 2017 Survey of IRI Member Companies*.

[8] National Association of Insurance and Financial Advisors, *NAIFA Survey Gauges Impacts of DOL Fiduciary Rule*, April 2017, available at http://www.naifa.org/news-publications/naifa-blog/april-2017/naifa-survey-gauges-impacts-of-dol-fiduciary-rule.

[9] NERA Economic Consulting, *Comment on the DOL Proposal and Regulatory Impact Analysis*, July 2015, available at http://www.sifma.org/issues/item.aspx?id=8589955443

2. *The Fiduciary Rule will significantly impair retirement savers' access to products.*

The adverse impacts of the Fiduciary Rule are not limited to retirement savers' ability to obtain advice. Savers are also losing access to important retirement savings products and services, such as mutual funds in brokerage IRA accounts, IRA brokerage accounts, web-based financial education tools and services for low-balance accounts.[10] According to the new 2017 NAIFA Survey, 91 percent of respondents have already experienced or expect to experience restrictions of product offerings to their clients.[11] In particular, some distribution firms and financial professionals have already significantly scaled back their use of commission-based products, such as variable annuities, because of concerns about the potential implications of the Fiduciary Rule on recommendations of such products. In fact, despite the existence of a rising stock market, which has traditionally led to increased sales of variable annuities, sales declined by 21.6 percent from 2015 to 2016.[12]

Creating products designed to provide guaranteed income in retirement has always been a very complex and expensive endeavor. The evolving complexity of financial markets and financial products, coupled with increasing longevity, has served only to make the process of providing such products a more daunting exercise (were these facts not so, many more Americans would likely be enjoying the benefits and comfort associated with participation in defined benefit pension plans). As such, annuities with features that provide guaranteed income over the course of an individual's (or a couple's) life in retirement are necessarily complex investment vehicles and proper utilization of such products in an individual's portfolio is a complex exercise. Due in large part to this complexity, the overwhelming majority of guaranteed income products are purchased through investment professionals, as opposed to the consumer purchasing such products directly from the manufacturer.

Annuity manufacturers have started to develop new products to comply with the Fiduciary Rule. In a 2017 survey of IRI member firms[13], we found that more than 80 percent of respondents have already introduced, plan to introduce or are considering

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[10] Kenneth E. Bentsen, Jr., *DOL pending fiduciary rule remains flawed, negatively impacting the marketplace*, February 9, 2017 available at http://thehill.com/blogs/congress-blog/economy-budget/318816-dol-pending-fiduciary-rule-remains-flawed-negatively.

[11] National Association of Insurance and Financial Advisors, *NAIFA Survey Gauges Impacts of DOL Fiduciary Rule*, April 2017, available at http://www.naifa.org/news-publications/naifa-blog/april-2017/naifa-survey-gauges-impacts-of-dol-fiduciary-rule.

[12] Insured Retirement Institute, *IRI Issues Fourth-Quarter 2016 Sales Report*, March 30, 2017, available at https://www.myirionline.org/newsroom/newsroom-detail-view/iri-issues-fourth-quarter-2016-annuity-sales-report (variable annuity sales data provided by Morningstar, Inc.). See, also, InvestmentNews, *Department of Labor's fiduciary rule blamed for insurers' massive hit on variable annuity sales*, March 28, 2017.

[13] Insured Retirement Institute, *March 2017 Survey of IRI Member Companies*.

introducing fee-based variable annuities. However, the timeline for launching innovative new products can be lengthy due to the need for regulatory filings and reviews by the Securities and Exchange Commission (the "SEC") and state insurance departments, extensive product selection processes by distribution firms, and the development and implementation of training and compliance processes to ensure that financial professionals can fully understand and properly utilize new products. As a result, these products are unlikely to be widely available in the near-term. Moreover, fee-based annuities may not be appropriate for all retirement savers, including some for whom a traditional commission-based variable annuity would be more economical, less costly, and likely in their best interest.

3. *Working with a financial professional has a significant positive impact on retirement savers' behavior and outcomes.*

Financial professionals play a critical role in helping consumers understand the wide variety of options available in the market and how best to utilize those options to prepare for retirement. A 2016 study found that Americans accumulate more savings when working with a financial professional, saving twice the amount over a seven- to 14-year period.[14] This is consistent with previous research showing that investment advice significantly increases retirement savings.[15] According to the report, among individuals with $100,000 or less in annual income, individuals who receive investment advice save at least 38 percent more than individuals who do not receive investment advice. For individuals of retirement age (65 and older), the disparity increases: advised individuals have more than double the assets of non-advised individuals.

Working with a financial professional has also been shown to have a positive influence on retirement planning behaviors including: increased usage of tax-advantaged savings vehicles, greater portfolio diversification, and less-speculative investing.[16] Financial professionals also help retirement savers achieve better outcomes by providing assistance with the following:

- Total wealth asset allocation that takes into account both the risk preference (i.e., an investor's aversion to risk) and risk capacity (i.e., an investor's ability to assume risk);

[14] Claude Montmarquette, Nathalie Viennot-Briot. Centre for Interuniversity Research and Analysis on Organizations (CIRANO). *The Gamma Factor and the Value of Advice of a Financial Advisor*. https://cirano.qc.ca/files/publications/2016s-35.pdf.
[15] Oliver Wyman, The Role of Financial Advisors in the US Retirement Market (2015).
[16] *Ibid.*

- Tax efficient allocations that are updated based on market performance and expected investor longevity (versus a static withdrawal strategy);
- Portfolio optimization that better hedges funding risks (such as inflation risk and currency risk) faced by retirees; and
- Annuity allocation that hedges longevity risk and improves the overall efficiency of a retiree's portfolio to guard against outliving one's savings.[17]

This assistance helps savers who work with a financial professional earn, on average, 1.59 percent in additional returns, leading to 22.8 percent more income in retirement.[18] Moreover, financial professionals help their clients overcome the emotional aspects of investing, which can add one to two percent in net return.[19]

Workers receiving help in employer-sponsored plans have annual returns that are more than three percent higher than workers without help. For a 45-year-old worker, this performance will lead to 79 percent more savings by retirement age.[20]

Assistance from financial professionals when changing jobs or retiring helps prevent $20 billion to $30 billion in lost retirement savings, which would reduce individual workers' retirement savings by 20 percent to 40 percent. [21]

The help provided to employers from financial professionals regarding the selection and monitoring of funds increases the availability of small business retirement plans. Without this help, nearly 30 percent of small businesses would likely stop offering their workers a plan, and 50 percent would reduce contribution matches, offer fewer investment options, or increase fees paid by workers.[22]

It is also significant to note the particular benefits of retirement planning advice for women and minorities. Women are more than twice as likely to be confident in their outlook on retirement when they work with a financial professional.[23] African Americans are nearly three times more likely to save in an IRA and four times more likely to have

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[17] Morningstar, *Alpha, Beta, and Now…Gamma*, available at http://corporate.morningstar.com/ib/documents/PublishedResearch/AlphaBetaandNowGamma.pdf.
[18] *Id*.
[19] Vanguard Research, *Putting a Value on Your Value: Quantifying Vanguard Advisor's Alpha*, available at http://www.vanguard.com/pdf/ISGQVAA.pdf.
[20] Aon Hewitt and Financial Engines, *Help in Defined Contribution Plans: 2006 through 2012*, available at https://corp.financialengines.com/employers/FinancialEngines-2014-Help-Report.pdf.
[21] Quantria Strategies, *Access to Call Centers and Broker Dealers and Their Effects on Retirement Savings*, available at http://quantria.com/DistributionStudy_Quantria_4-1-14_final_pm.pdf.
[22] U.S. Hispanic Chamber of Commerce and Davis & Harman, *The Impact of the Upcoming Re-Proposed Department of Labor Fiduciary Regulation on Small Business Retirement Plan Coverage and Benefits*, available at http://ushcc.com/wp-content/uploads/2014/05/survey_0029436_embargoed_002095743.pdf.
[23] Prudential Financial, Inc., *Financial Experience & Behaviors Among Women: 2014-2015 Prudential Research Study*, available at http://www.prudential.com/media/managed/wm/media/Pru_Women_Study_2014.pdf.

an annuity when working with a financial professional.[24] Similarly, nearly 90 percent of Hispanic Americans contribute to a retirement plan when working with a professional, compared to only 54 percent working on their own.[25]

4. *The Proposed BIC Exemption for Insurance Intermediaries will not work for the vast majority of insurance agents.*

To address the unique challenges faced by insurance-only licensed agents under the BIC Exemption, the Department proposed a new version of the BIC Exemption (the "BIC II") specifically designed for insurance intermediaries that provide various support services for insurance-only licensed agents, such as independent marketing organizations ("IMOs") and field marketing organizations ("FMOs"). However, this proposed exemption has serious flaws (as we explained in our comment letter on the proposal), including the fact that firms would have to meet needlessly high financial requirements in order to use the BIC II. While there are hundreds of IMOs, FMOs and similar firms, just five to ten are large enough to actually meet those requirements. The Department will have to make significant improvements to the BIC II to address those concerns and avoid a disruption in services to clients of impacted agents.

5. *Conflicts of interest are not a significant concern for most retirement savers.*

While the Fiduciary Rule was designed in large part to eliminate conflicts of interest, IRI research has found that conflicts of interest are not a significant concern for most retirement savers. In fact, an overwhelming majority of people indicated they are aware of potential conflicts of interest but are nevertheless highly satisfied with their relationship with their financial professional and would recommend him or her to a friend or relative.[26]

Moreover, our members have indicated that efforts to develop policies and procedures to comply with the Fiduciary Rule would, in many cases, simply result in substituting one type of potential conflict with another. For example:

- To mitigate their personal litigation risk, financial professionals will refrain from offering their clients annuities, despite the fact that annuities may be the best solution for them, because the additional benefit of lifetime income provided by annuities comes at an additional cost not present in other investment options,

[24] Prudential Financial, Inc., *The African American Financial Experience*, available at http://www.prudential.com/media/managed/aa/AAStudy.pdf.
[25] Prudential Financial, *Hispanic Americans On the Road to Retirement*, available at http://www.prudential.com/media/managed/Hispanic_Retirement_FINAL_3-19-08.pdf.
[26] Insured Retirement Institute, *January 2014 Survey of Americans aged 51-67*.

and consequently would be more likely to attract the scrutiny of opportunistic plantiffs' counsel.

- Service providers will avoid providing rollover education, despite the fact that having this education is in the best interest of investors, because doing so could cause them to be deemed a fiduciary.
- Financial professionals working with clients could be more likely to recommend that additional savings be directed into non-qualified/non-ERISA solutions to avoid becoming subject to increasing ERISA prohibited transaction risks.

B. Requiring all financial professionals to operate as ERISA fiduciaries is inconsistent with the statutory text of ERISA and will cause significant dislocations or disruptions within the retirement services industry.

As we explained in the prior section, new information clearly demonstrates that the Fiduciary Rule will harm (and, in fact, is already harming) retirement savers by depriving them of access to assistance from financial professionals and a wide range of products to help them prepare for retirement. New studies have shown that more than 70 percent of financial professionals will disengage from retirement savers with less than $300,000 in investable assets because of the Fiduciary Rule. Given that 26 million households have less than $100,000 in their IRAs, the vast majority of American families with IRAs will lose the ability to work with financial professionals who, as we explained above, help savers earn 1.59 percent in additional returns, leading to 22.8 percent more income in retirement. And in terms of access to products, we have seen a 21 percent decline in variable annuity sales in 2016 alone, which represents a dramatic reduction in the number retirement savers with a source of retirement income they cannot outlive.

All of this is a direct result of the Department's inappropriate expansion of the definition of fiduciary to include virtually any communications between financial professionals and their clients. IRI and our members have long supported a best interest standard for financial professionals who provide personalized investment advice, and we believe the vast majority of financial professionals already act in the best interest of their clients (and recent IRI research shows nearly all retirement savers agree[27]). We do not believe, however, that it is necessary or appropriate to require all financial professionals to operate as ERISA fiduciaries in order to ensure that this standard is being met. ERISA fiduciary status is widely recognized as being the most stringent standard of conduct imposed under law, and entails more than just "acting in the client's best interest."

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[27] Insured Retirement Institute, *January 2014 Survey of Americans aged 51-67*.

The Fiduciary Rule, however, inappropriately characterizes as fiduciary investment advice a broad spectrum of financial marketing and sales activities. Fiduciary status would arise even where no reasonable expectation can exist that a firm or financial professional has been engaged by a client to act as an unbiased and impartial source of recommendations under a legal obligation to disregard its own interests as a seller of investment products or asset management services. Under the Fiduciary Definition Regulation, the definition of investment advice that gives rise to fiduciary status covers virtually any communication that is in any way *suggestive* of a plan investment or investment management activity and is either *individualized for* or *specifically directed to* a client *for consideration* in making investment or management decisions. This is an extremely ambiguous standard under which it will be unclear whether particular types of conduct would give rise to fiduciary status. In our view, financial professionals should not be subject to an advice definition that does not allow them to know when they have engaged in an action for which they must be able to demonstrate compliance with a best interest standard.

Moreover, financial professionals should be permitted to suggest products for clients to consider without such suggestions rising to the level of investment advice that would trigger fiduciary status. Requiring firms and financial professionals to completely disregard their own interest in earning compensation is inappropriate, overly burdensome, and for the reasons outlined throughout this letter, will substantially impair Americans' access to valuable retirement products and services.

In our view, an investment advice fiduciary relationship should only arise when a communication with a retirement investor is sufficiently tailored, within the context of a particular relationship, to provide a basis for the investor's reliance on that communication as an impartial and unbiased investment recommendation.

IRI members engage in many common activities that do not reasonably give rise to a fiduciary relationship and have not traditionally been considered fiduciary in nature but could give rise to fiduciary status under the Fiduciary Definition Regulation, including, for example, suggesting that a client:

- Rollover all or part of their retirement savings from a 401(k) plan to an IRA account, or transfer all or part of their savings from one IRA to another;
- Hire another person to provide investment advice or investment management services; or
- Transition from a commission-based brokerage account to a fee-based advisory account.

Guidance issued by the Department in other contexts recognizes the distinction between communications that are merely suggestive and those that may be viewed as an endorsement of a particular program. The Department's safe-harbor exclusion from ERISA coverage for certain group-type insurance programs offered by an employer to employees requires that:

> [T]he sole function of the employer or employee organization with respect to the program [is], without endorsing the program, to permit the insurer to publicize the program to employees or members, to collect premiums through payroll deductions or dues check offs and to remit them to the insurer…[28]

Under this regulation, an employer who "endorses" an insured benefit program would not be eligible for this ERISA-coverage exclusion and would risk subjecting the program to ERISA's requirements. Moreover, an employer who "endorses" such a program within the meaning of this regulation risks becoming an ERISA fiduciary with respect to the ERISA plan created by the program.[29] Importantly, however, the Department's regulation in this context recognizes that employers can make such programs available to employees without "endorsing" them.

Similarly, FINRA guidance concerning the distinction between recommendations and non-recommendations focuses not on the existence of a mere suggestion, but on whether there has been a communication that could be viewed as a "call to action" that might reasonably influence an investor to trade a particular security or group of securities.[30] IRI believes such FINRA guidance may usefully be applied to distinguish an objective description of the features of an investment product or service (including performance and benchmarking information) from communications that constitute a "recommendation." The definition of "recommendation" should not require a provider to cease marketing its products and communicating with potential purchasers about the provider's products in order to avoid becoming a fiduciary.

The Fiduciary Rule fails to recognize that financial professionals may undertake to work with plans, participants, beneficiaries and IRA owners in a manner that does not purport to be unbiased or impartial. For example, a financial professional who sells proprietary annuity products may work with a prospective client to identify a particular product that fits the customer's needs. The customer, who has been informed that the firm offers

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[28] 29 C.F.R. § 2510.3-1(j)(3); *see also* 29 C.F.R. § 2510.3-2(d) (identical condition with respect to IRA safe harbor).
[29] The Department has issued similar guidance in the context of IRAs. 29 C.F.R. 2510.3-2(d). And, in Interpretive Bulletin 99-1 with respect to payroll IRAs, the Department made clear the circumstances under which an employer that offers employees access to a payroll deduction IRA may avoid creating an ERISA-covered pension plan. In that Bulletin, the Department clarified the circumstances under which an employer will not be deemed to "endorse" the IRA, and therefore avoid ERISA coverage. DOL Interpretive Bulletin 99-1, 29 C.F.R. 2509.99-1(c).
[30] *See* NASD Notice to Members 01-23.

proprietary annuity products, is under no illusion that the financial professional is unbiased or impartial. Based on the customer’s lack of any expectation of receiving unbiased or impartial advice, it would be inappropriate to impose fiduciary status on such a relationship.

Nevertheless, the Department concluded that, “as a rule,” retail customers are not capable of looking out for their own best interests by engaging in arm’s length bargaining with financial service providers for favorable terms. IRI disagrees with the premise that all consumers should be pre-judged to be incapable of looking after their own affairs and that existing regulations do not appropriately require financial professionals to act in the best interest of their clients. This view is also inconsistent with the position taken by Congress in enacting ERISA § 404(c) and was unsupported by the rulemaking record.

As a result of this overbroad definition of “fiduciary,” the Fiduciary Rule effectively bans common and long-accepted forms of compensation such as commissions, sales loads, and 12b-1 fees (charges used to pay the company or agent for ongoing support and services provided to the customer), because under ERISA and the Code, fiduciaries are prohibited from receiving compensation that varies based on the investment “advice” or transaction.

Moreover, the best interest standard articulated by the Department appears to require a complete disregard of any financial interest of the fiduciary and its affiliates. In particular, the phrase “without regard to the financial or other interests of the fiduciary, any affiliate or any other party” is problematic because it appears to require that any advice provided wholly ignore the business and economic reality that financial professionals and annuity providers have to generate enough revenue to cover their costs and earn a reasonable profit in order to stay in business.

Judicial authorities interpreting ERISA’s general fiduciary standards have long agreed that an ERISA fiduciary’s receipt of an incidental benefit from a transaction that otherwise is primarily for the benefit of a plan, will not itself cause a violation of ERISA’s fiduciary standards. In other words, many courts have held that where taking the best course of action for a participant or beneficiary would lead to an “incidental benefit” to a plan fiduciary, such incidental benefit is permitted by ERISA.

C. New study shows the Fiduciary Rule will result in increased litigation due to the significant expansion of the definition of fiduciary and the inappropriate use of a private right of action as the primary enforcement mechanism in contravention of congressional intent.

The Fiduciary Rule inappropriately utilizes private litigation (or the threat thereof) as the primary enforcement mechanism by requiring that fiduciaries execute a contract, including required contractual warranties (and thereby exposing fiduciaries to contractual liability). Allowing state courts to interpret ERISA fiduciary standards of care is contrary to congressional intent as reflected in ERISA § 514(a) and is likely to result in inconsistent interpretations that will be particularly problematic for employers with employees in multiple states.

Given that the Department lacks authority to enforce the Fiduciary Rule in the IRA space, the BIC Exemption requires financial institutions to enter into contracts that expose them to liability in class action lawsuits. The preamble to the BIC Exemption acknowledges that financial institutions will have no choice but to submit to the terms of its exemptions. That was the Department's objective, since, as it stated in the preamble to the BIC Exemption, "banning all commissions, transaction-based payments, and other forms of conflicted payments" (which would otherwise occur under the Rule) "could have serious adverse unintended consequences."

The Department has also made clear that it intends to subcontract to the class action bar enforcement of the new regulatory scheme that it lacks the power to enforce itself. Former Assistant Secretary of Labor Phyllis Borzi acknowledged this, saying "Back in the day, when people wanted to make changes, they passed legislation," but the Fiduciary Rule changes "the way that social change and legal change and financial change is accomplished through congressional action to two different avenues for making changes: The main one being regulation and the second one being litigation." Borzi further explained that the BIC Exemption "deputiz[es]" consumers to bring "state contract actions" because the Department lacked direct statutory authority over IRAs.

As a result of this inappropriate utilization of private litigation as the primary enforcement mechanism for the Fiduciary Rule, the financial services industry finds itself faced with a significant risk of increased litigation. This risk is attributable not to actual violations of the best interest standard but to the uncertainty around the requirements of the Fiduciary Rule and the BIC Exemption. Morningstar, Inc. conducted a study of this risk in February 2017, and found that class action lawsuits under the BIC

Exemption will cost the industry between $70 million and $150 million each year.[31] In the near term, these costs could be several times higher "as firms try to figure out how to determine, demonstrate, and document best interest." Ultimately, significant portions of this litigation expense will likely be passed along to retirement savers in the form of increased costs for products and services.

During the rulemaking process, IRI and numerous other commenters expressed serious concerns about these costs, as well as the risks inherent in deferring interpretation and enforcement of the Fiduciary Rule to 50 fifty different state courts across the country. The Department simply disregarded these extensive comments, assigning *no* cost estimate to class action litigation in the Regulatory Impact Analysis. As a result, the Department improperly failed to assess the adverse impact associated with one of the most controversial elements of the Fiduciary Rule.

III. The Department's Rulemaking Process was Fundamentally Flawed.

In addition to the issues and concerns outlined above regarding the substance of the Fiduciary Rule, IRI and our members have significant concerns about the process by which the Department proposed and adopted the Fiduciary Rule.

In February 2015, Senator Ron Johnson (R-Wisconsin), Chairman of the Senate Committee on Homeland Security and Governmental Affairs, initiated an inquiry to examine the Department's rulemaking process (the "Johnson Report"). The Johnson Report found that the Department "was predetermined to regulate the industry and sought evidence to justify its preferred action." This conclusion was based, in part, on emails from Department officials discussing "the need to find literature and data that 'can be woven together to demonstrate that there is a market failure and to monetize the potential benefits of fixing it.'" In other words, the Fiduciary Rule was, from the very beginning, a solution in search of a problem. The Department first concluded that it wanted to change the rules governing investment advice fiduciaries, and then sought to justify that conclusion.

As a result of this backwards approach to regulation, we believe the Department failed to adequately consider a number of critical factors, including (a) the Fiduciary Rule's impact on retirement savers' access to financial assistance, products and services; (b) the job losses likely to result from the Fiduciary Rule; (c) the Fiduciary Rule's adverse impact on annuities; (d) viable alternatives to the Fiduciary Rule; and (e) comments provided by other regulators.

[31] Morningstar, Inc., *Weighing the Strategic Tradeoffs of the U.S. Department of Labor's Fiduciary Rule*, February 2017.

A. The Department failed to consider the adverse impact of lost access to financial guidance and a full range of financial products and services.

IRI and other commenters provided extensive evidence to the Department during the rulemaking process about the value of working with financial professionals and the likelihood that the Fiduciary Rule would deprive retirement savers of access to advice, creating an "advice gap," particularly for low- and middle-income Americans. For example, Oliver Wyman conducted an in-depth, years-long study of the value of financial advice. Its report was submitted in full to the Department, and was cited by numerous commenters. The Department, however, barely acknowledged the findings of the Oliver Wyman study in its rulemaking, and dismissed concerns about the loss of access by, in part, suggesting that financial assistance would remain widely available, and in any event, was not particularly helpful to retirement savers. "There is little evidence," it said, "that financial advisers improve retirement savings." The Department further asserted that "investors who receive advice from a broker exhibit worse market timing than those who don't." This conclusion, however, is directly contrary to the Department's own assessment in a prior rulemaking that investment mistakes cost investors approximately $114 billion per year, that access to financial assistance reduced the cost of those mistakes by $15 billion per year, and that increased access to financial assistance would enable them to save billions more. And as we explained above, new information has clearly demonstrated that the Department's conclusions were inaccurate. Working with a financial professional has been shown to result in 22.8 percent more income in retirement, and savers are already losing access to advice because of the Fiduciary Rule.

Moreover, the Department chose to ignore evidence regarding the impact of similar rules established in other jurisdictions. Most notably, following the United Kingdom's 2013 move to a fee-based compensation model, the U.K. regulator determined that retirement savers – particularly those with lower incomes – were adversely affected and acknowledged that its "high standard of advice is primarily accessible and affordable only for the more affluent in society." Rather than taking advantage of the opportunity to learn from mistakes made by other countries, the Department simply denied the existence of an "advice gap" in the U.K. and dismissed the possibility that a similar "advice gap" would develop in the U.S. under the Fiduciary Rule.

B. The Department failed to consider job losses likely to result from the Fiduciary Rule.

One of the more jarring omissions in the Department's process was the lack of any meaningful attempt to assess the Fiduciary Rule's potential impact on jobs. The 2016 RIA only briefly addressed the jobs issue, characterizing possible job losses due to the Fiduciary

Rule as “transitional frictions” that could have “some social costs.”[32] In our view, the Department should have conducted a comprehensive study of the jobs issue as part of the cost-benefit analysis. The failure to take this important step compounds the other failures described throughout this letter, and adds to the concerns we outlined above regarding dislocations in the retirement services industry.

C. The Department failed to consider the Fiduciary Rule’s adverse impact on annuities.

Outside of Social Security and private pensions, annuities are the sole source of guaranteed lifetime income during retirement. Only insurance companies and their distribution partners can provide these products. With proper planning and use, annuities can provide retirees with guaranteed lifetime income and the security of knowing that they will not outlive their savings. Boomers who own insured retirement products, including all types of annuities, have a higher confidence in their overall retirement expectations, with nine out of 10 believing they are doing a good job preparing financially for retirement.[33] Compared to non-annuity owners, Baby Boomers who own annuities are more likely – by more than a two-to-one ratio –to be among those who are most confident in living comfortably throughout all their retirement years.[34] Baby Boomer annuity owners also are more likely to engage in positive retirement planning behaviors than Baby Boomer non-annuity owners, with 68 percent having calculated a retirement goal and 63 percent having consulted with a financial adviser.[35]

Annuities appeal to Americans of all income levels and consumers who do not have access to other retirement savings vehicles. In fact, annuity owners are overwhelmingly middle-income. Seven in 10 annuity owners have annual household incomes of less than $100,000. Unfortunately, despite the lack of any evidence of problems in the way annuities are currently sold through employer-sponsored retirement plans and IRAs, the Fiduciary Rule will drastically change the regulatory framework in a manner that will unreasonably limit consumer access to annuity products at precisely the point in time when access to annuities is most vitally needed. Moreover, annuity manufacturers and distributors have incurred and continue to incur immense costs to prepare for implementation of the Fiduciary Rule. The 2016 RIA included no direct consideration of these costs, instead only noting (incorrectly) that the Department’s estimates of the costs in the context of front-end mutual funds could be readily extrapolated to the annuity marketplace. Had the Department given due

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[32] U.S. Department of Labor, Employee Benefits Security Administration, *Regulating Advice Markets, Definition of the Term “Fiduciary” Conflicts of Interest - Retirement Investment Advice, Regulatory Impact Analysis for Final Rule and Exemptions* (April 2016), p. 244.
[33] Insured Retirement Institute, *Boomer Expectations for Retirement 2011*.
[34] Insured Retirement Institute, *Survey of Americans Aged 51 to 67*.
[35] Insured Retirement Institute, *Tax Policy and Boomer Retirement Saving Behaviors.*

consideration to the costs of the Fiduciary Rule specifically as applied to annuity manufacturers and distributors, its projections would have dictated a fundamentally different course.

D. The Department failed to adequately consider viable alternatives to the Fiduciary Rule as required by the Administrative Procedure Act.

Under Executive Order 12866[36] and related guidance issued by OMB,[37] consideration of viable alternatives is a fundamental element of federal agency rulemaking. However, the lack of consideration given to all relevant costs of the Fiduciary Rule prevented the Department from properly evaluating less burdensome alternatives. For example, commenters suggested a "seller's" exception that would apply to all sellers and customers, effectuated by a clear and simple disclosure that the seller is not a fiduciary. Similarly, the Department could have considered an alternative structure under which financial professionals would be held to a "best interest" standard without imposing ERISA fiduciary status. These alternatives would have greatly reduced the costs of the Fiduciary Rule, harmonized the Department's regulatory regime with that of the SEC and, because they would have applied only to relationships in which the client has no reasonable expectation of fiduciary status, would not have caused any meaningful consumer harm. However, as a result of the Department's flawed process, it arbitrarily rejected these and other alternatives.

E. The Department failed to adequately consider the comments of other regulators during the rulemaking process.

The Johnson Report found that career, non-partisan professional staff at the SEC, regulatory experts at the Office of Information and Regulatory Affairs ("OIRA") within the Office of Management and Budget ("OMB"), and Treasury Department officials expressed numerous concerns and offered meaningful recommendations to the Department about the proposed rule. The Department disregarded many of these concerns and recommendations. Instead, the inquiry concluded, "the Department frequently prioritized the expeditious completion of the rulemaking process at the expense of thoughtful deliberation," and "political appointees at the White House played a key role in driving the rulemaking process at the inception of the redrafting effort." In sum, the inquiry determined that the Department was predetermined to regulate the industry and sought evidence to justify its preferred action. Such an approach to rulemaking is inconsistent with both the letter and the spirit of the Administrative Procedure Act, which governs the federal agencies' rulemaking process.

[36] Exec. Order No. 12,866, 3 C.F.R. 638 (1993).
[37] Office of Mgmt. & Budget, Circular No. A-4, Regulatory Analysis (Sept. 17, 2003).

This is even more problematic because, in disregarding the SEC's comments, the Department effectively dismissed the views of a regulatory agency with far greater expertise and experience in matters relating to the regulation of financial professions. For more than 85 years, oversight of the financial services and insurance industries has been the purview of the SEC, along with the Financial Industry Regulatory Authority ("FINRA"), state insurance departments, and state securities departments in all 50 states and the District of Columbia.

Congress affirmed this framework in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, § 913(g), 124 Stat. 1376, 1828 (2010) ("Dodd-Frank Act"). Section 913 of the Dodd-Frank Act specifically tasked the SEC with responsibility for determining whether and how to modify the standards of care to which financial professionals are held. Similarly, Section 989J of the Dodd-Frank expressly recognizes that a broad network of state regulation already effectively governs the insurance industry and distribution of annuities and other insurance products, and that such products should not be subject to further regulation at the federal level.

By contrast, the Department's jurisdiction is limited to employee benefit plans and, to a limited extent, individual retirement accounts ("IRAs"). IRAs are technically within the ambit of the Internal Revenue Service ("IRS"); the Department was granted authority to interpret the definition of "fiduciary" under the Code and grant exemptions from the Code's prohibited transaction rules pursuant to section 102 of Reorganization Plan No. 4 of 1978,[38] but the Department has no enforcement authority with respect to those rules.

Congress has long recognized that the hallmark of fiduciary status is the existence of a special relationship of trust and confidence. This is evident in the Investment Advisers Act of 1940 (the "Advisers Act"), which clearly draws a distinction between fiduciary investment advisers and non-fiduciary broker-dealers. Firms and individuals who "render investment advice merely as an incident…broker-dealer activities" are expressly exempt from the Advisers Act's registration requirements. The courts have consistently upheld this distinction, but the Fiduciary Rule expressly "rejects the purported dichotomy between a mere 'sales' recommendation…and advice…in the context of the retail market for investment products."[39]

As such, the Fiduciary Rule seeks to regulate the broader financial services industry by creating a new regulatory regime built through a misuse of the Department's exemptive authority. Congress gave the Department the authority to issue exemptions to provide relief from ERISA's prohibited transaction rules when appropriate, but the Fiduciary Rule

[38] 5 U.S.C. App. 237

[39] 81 Fed. Reg. 20,981/2

represents an attempt to use this exemptive authority to assume regulatory power that is appropriately vested in the SEC, FINRA and the state insurance and securities departments. The courts have rejected such efforts in the past. [40]

IV. ***The Department's Regulatory Impact Analysis was Fundamentally Flawed.***

The Regulatory Impact Analysis overstated the benefits of the Fiduciary Rule, underestimated the Fiduciary Rule's direct and indirect costs to the financial services industry and retirement savers, and, as described above, failed to give meaningful consideration to the costs to retirement savers from lost access to retirement assistance (including assistance with guaranteed lifetime income products such as annuities) and the transaction-based fee model as well as the costs of class action lawsuits arising from the BIC Exemption. When all those costs—which the record shows will total tens of billions of dollars—are properly considered, it becomes clear that the Fiduciary Rule will not deliver the financial benefits described in the Regulatory Impact Analysis.

In projecting that the Fiduciary Rule would deliver billions of dollars in benefits by eliminating conflicts of interest that supposedly sharply reduce retirement savings, the Department relied on a single factor related to a single type of investment product—and then inappropriately disregarded comments that this factor was misevaluated. Specifically, the Department admittedly based savers' projected financial gains on research regarding "only one" issue: the purported "conflict that arises from variation in the share of front-end-loads that advisers receive when selling different mutual funds that charge such loads to IRA investors." This research provides no basis for regulating products—such as annuities—that may not invest in mutual funds at all, and was not even a proper assessment of mutual fund performance.

In estimating that the average mutual fund sold by brokers underperformed its benchmark, the Department improperly used performance data on certain unrepresentative funds to draw conclusions about the entire mutual fund market. The Department compounded this error by relying on data for the period 1993 through 2009 (a cherry-picked sample encompassing the entire global financial crisis and nearly none of the recovery) and basing its underperformance estimate not on actual holding periods, or even over a full market cycle, but rather on the single year in which funds were purchased. Several commenters submitted a number of reliable studies and other evidence to the Department to refute these flawed estimates. Notably, the Investment Company Institute submitted a number of letters highlighting its finding that the Fiduciary Rule could cost investors $109 billion in added fees and lost returns over ten years.[41]

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[40] See, e.g., MCI Telecommunications Corp. v. AT&T Co., 512 U.S. 218, 234 (1994) (concluding that an agency could not use its authority to "modify" the requirements in a statute to "effectively…introduc[e]…a whole new regime of regulation").

[41] See, e.g., Comment Letters submitted to the Department of Labor by the Investment Company Institute on July 21, 2015, September 24, 2015, and December 1, 2015.

Had the Department considered those studies in any meaningful way, the Regulatory Impact Analysis would not have supported adoption of the Fiduciary Rule. The fact that the Department chose to move forward with the Fiduciary Rule clearly demonstrates that it did not give adequate consideration to those studies.

The outsized benefits the Department claimed for the Fiduciary Rule were principally the result of manipulating the "law of large numbers" by spreading small marginal benefits (i.e., the assumed reduction in fees) across trillions of dollars in retirement savings. But when it came to the Fiduciary Rule's costs, the Department downplayed and essentially dismissed the effects its action would have across millions of retirement accounts (e.g., leakage due to lack of access to help with distributions, poor performance due to lack of access to help with asset allocation). Instead, the Department focused only on firms' direct compliance costs and gave no consideration to virtually all other direct and indirect consequences.

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In conclusion, for the reasons outlined above, IRI urges the Department to (1) delay the applicability date for the entire Fiduciary Rule, including the Fiduciary Definition Regulation and the impartial conduct standards, until it completes the review ordered by President Trump, and (2) upon completion of its review, rescind the Fiduciary Rule and undertake to work with federal and state securities and insurance regulators to formulate a consistent and workable best interest standard that will protect retirement savers without depriving them of access to professional financial assistance and valuable retirement products and services that can help them achieve a secure and dignified retirement.

If you have any questions about any of the comments included in this letter or any of our previous submissions on the Fiduciary Rule, or if we can be of any further assistance as the Department undertakes to review the Fiduciary Rule, please feel free to contact me or Lee Covington, IRI's Senior Vice President and General Counsel.

Sincerely,

Catherine J. Weatherford

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President & CEO
Insured Retirement Institute