



National Association of Insurance  
and Financial Advisors

April 17, 2017

**VIA ELECTRONIC FILING – [www.regulations.gov](http://www.regulations.gov)**

Office of Regulations and Interpretations  
Employee Benefits Security Administration  
Attn: Conflict of Interest Rule  
Room N-5655  
U.S. Department of Labor  
200 Constitution Ave., NW  
Washington, DC 20210

**RE: RIN 1210-AB79  
Request for Comments on Fiduciary Conflict of Interest Rule and PTEs**

To Whom It May Concern:

The National Association of Insurance and Financial Advisors (“NAIFA”) appreciates this opportunity to comment on the Department of Labor’s (“Department”) examination of:

- (1) The definition of fiduciary “investment advice” under the Employee Retirement Income Security Act of 1974 (“ERISA”) and the Internal Revenue Code of 1986 (“Code”) (the “Rule”);<sup>1</sup>
- (2) The Best Interest Contract (“BIC”) Exemption;<sup>2</sup> and
- (3) Prohibited Transaction Exemption (“PTE”) 84-24.<sup>3</sup>

Founded in 1890 as The National Association of Life Underwriters (NALU), NAIFA is one of the nation’s oldest and largest associations representing the interests of insurance professionals. NAIFA members assist consumers by focusing their practices on one or more of the following:

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<sup>1</sup> Department of Labor, Final Rule, *Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice*, 81 Fed. Reg. 20946 (Apr. 8, 2016).

<sup>2</sup> Department of Labor, Adoption of Class Exemption, *Best Interest Contract Exemption*, 81 Fed. Reg. 21002 (Apr. 8, 2016).

<sup>3</sup> Department of Labor, Prohibited Transaction Exemption 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters, as amended 81 Fed. Reg. 21147 (Apr. 8, 2016).

life insurance and annuities, health insurance and employee benefits, multiline, and financial advising and investments. NAIFA's mission is to advocate for a positive legislative and regulatory environment, enhance business and professional skills, and promote the ethical conduct of its members.

### **BACKGROUND & EXECUTIVE SUMMARY**

NAIFA members—comprised primarily of insurance agents, many of whom are also registered representatives—are Main Street advisors<sup>4</sup> who serve primarily middle-market clients, including individuals and small businesses.<sup>5</sup> In some cases, our members serve areas with a single financial advisor for multiple counties. And often, our members' relationships with their clients span decades and various phases of clients' financial and retirement planning needs.

These long-term relationships between advisors and clients begin with a substantial investment of time by the advisor to get to know the client and to develop trust. For an individual client, an advisor commonly holds multiple initial meetings to discuss the client's needs, goals and concerns in both the short and long term. During the course of the advisor-client relationship, our members provide advice in the asset accumulation phase (when clients are saving for retirement), as well as the distribution phase (during retirement), which is especially critical for low- and middle-income investors. For small business owners, our advisors initially encourage them to establish retirement savings plans for their employees, and then, following in-depth discussions to ascertain specific needs and concerns, help them to implement those plans.

Many of our members work in small firms—sometimes firms of one—with little administrative or back office support. Often, their business practices are dictated by the broker-dealer, insurance company, or independent intermediary with which they work, including the format and provision of client forms and disclosures. They also are subject to transaction-level oversight and review by their overseeing financial institutions.

The retirement products most commonly offered by NAIFA members are annuity products (fixed and variable) and mutual funds.<sup>6</sup> Roughly one-third of NAIFA members work in the independent channel with independent marketing organizations or similar independent institutions. Others are affiliated with (or captives of) product providers and are restricted to some degree in the products they are permitted to sell. It is our belief that nearly all of our

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<sup>4</sup> For purposes of this comment letter, the term “advisor” refers generally to a NAIFA member who provides professional advice to clients in exchange for compensation.

<sup>5</sup> According to a recent survey of NAIFA members, about 75% provide services to plan sponsors and/or small businesses.

<sup>6</sup> Approximately 70% of NAIFA members sell securities products.

advisors, regardless of whether they are independent or affiliated, will be significantly impacted by the Department's Rule and PTEs when they become applicable in June.<sup>7</sup>

To be clear, NAIFA members support a "best interest" standard for retirement investment advisors. Indeed, we believe that our members already adhere to such a standard. It is critical, however, that any "best interest" regime be operationalized in a fashion that is workable for Main Street advisors and their clients. Specifically, any such compliance structure must present a feasible path by which diverse product offerings, various compensation arrangements, and different distribution channels can be preserved with minimal disruptions to the marketplace and without harming low- and middle-income savers.

Virtually all NAIFA members working in the individual IRA space will have to rely on the BIC exemption, which, in its current form, contains overly onerous and complex compliance obligations. As anticipated by NAIFA and many others in the retirement savings industry, the BIC exemption in particular—in concert with the broad scope of the Rule—already is causing consumer harm and market dislocations.

A recent survey of NAIFA members (with 1,084 respondents) confirms the Rule's/PTEs' negative impact on Main Street advisors and investors. Most notably, 91% of respondents have already experienced or expect to experience restrictions on product offerings to their clients, nearly 90% believe consumers will pay more for professional advice services, and 75% have seen or expect to see increases in minimum account balances for the clients they serve. And 78% of NAIFA members say that although they continue to offer professional advice to clients, general confusion about the complex Rule and PTEs is impeding their ability to serve clients.

Additionally, a survey of 552 U.S. financial advisors conducted in October 2016 found that 71% "plan to disengage from some mass-market investors because of the DOL rule."<sup>8</sup> Further, 94% of advisors say that small clients "orphaned" by advisors will have to turn to robo-advice.<sup>9</sup> Not

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<sup>7</sup> Department of Labor, Final rule; extension of applicability date, 82 Fed. Reg. 16902 (Apr. 7, 2017).

<sup>8</sup> CoreData Research London, Press Release, *Fiduciary Rule to Leave US Mass-Market Investors Stranded, Study Shows* (Nov. 2016).

<sup>9</sup> *Id.*; see also, e.g., Wall Street Journal, *Edward Jones Shakes up Retirement Offerings Ahead of Fiduciary Rule* (Aug. 17, 2016) (Edward Jones announces it will limit mutual fund access for retirement savers in accounts that charge commissions); Crain's, *Why State Farm agents are getting out of the investment game* (Sep. 3, 2016) (State Farm directs 12,000 securities-licensed agents to no longer provide their clients with mutual funds, variable annuities and other investment products); Maxey, Daisy, Wall Street Journal, *New Rule Helps No-Loan Funds—But Investors Still Need to Watch for Other Fees* (Nov. 7, 2016) (Charles Schwab stops selling fund share classes with front-end sales loads in May 2016). See, e.g., Benjamin, Jeff, *Fiduciary Focus, DOL Fiduciary Rule Class-Actions Costs could Top \$150M a Year* (Feb. 9, 2017) ("Some firms, including Merrill Lynch, Capital One, and Commonwealth Financial Network, have already announced plans to use a streamlined [BIC exemption] that does not include a contract or

surprisingly, the President has asked the Department to study, *inter alia*, whether the Rule and PTEs:

- Are likely to harm investors by reducing access to savings offerings and advice;
- Will result in dislocations or disruptions in the market that will adversely impact investors;
- Will cause an increase in litigation; and/or
- Will lead to higher prices for investors to gain access to retirement services.<sup>10</sup>

NAIFA strongly supports the President's directive and the Department's examination of the Rule and PTEs because we believe *all* of the aforementioned consequences have already come to fruition and will be exacerbated if the Rule and PTEs are implemented in their current form.

Below, we provide information on the Rule's and PTEs' impact to date on NAIFA members and their clients, as well as the broader retirement savings industry. In light of this information, we urge the Department to:

- Delay for at least another 180 days all applicability dates and compliance obligations under the Rule and PTEs to provide consistency/certainty within the industry while the Department reevaluates the Rule and PTEs;
- Conduct a new cost-benefit analysis that properly accounts for, *inter alia*, the value of professional financial advice, the benefits of annuity products for long-term security, and potential negative consequences for consumers with respect to loss of advice, fewer choices in products and services, and higher costs;
- Withdraw the Rule and PTEs and reconfigure the structure into a true principles-based approach that minimizes unnecessary burdens and costs, does not cause harmful market disruptions, and achieves the following:
  - Reserves the definition (and related obligations) of "investment advice fiduciary" for those providing actual personalized investment *advice*, rather than education and/or marketing of products and services;
  - Establishes a best interest standard of care for firms and advisors;
  - Avoids imposition of costly, unnecessary and disruptive compliance obligations;

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variable commission rate, making them exempt from class-action lawsuits. Other firms will be rolling the dice."); AdvisorHUB, *Merill to End Commission-Based Retirement Business on Retail Accounts* (Oct. 6, 2016) available at <https://advisorhub.com/exclusive-merrill-end-commission-based-retirement-business-retail-accounts/> (Merrill Lynch announces, in response to the fiduciary rule, that its 14,000 brokers cannot receive commissions for advice on retirement accounts and will have to shift clients who remain with the firm to fee-based advisory accounts).

<sup>10</sup> Presidential Memorandum, *Fiduciary Duty Rule* (Feb. 3, 2017), available at <https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-memorandum-fiduciary-duty-rule>.

- Harmonizes obligations between PTEs to avoid regulatory interference in the marketplace with respect to certain products and/or compensation arrangements; and
- Maintains a system under which federal regulators, rather than private class action attorneys and state courts, have primary enforcement authority.

## I. THE RULE'S AND PTEs' NEGATIVE IMPACT ON NAIFA MEMBERS AND THEIR CLIENTS

During a hearing of the House Education and Workforce Subcommittee on Health, Employment, Labor, and Pensions on June 17, 2015, former Secretary Perez acknowledged that “we have a retirement crisis” in this country and “we need to save more.”<sup>11</sup> This problem should not be underestimated. According to the Federal Reserve, one in five people near retirement age have *no money saved*.<sup>12</sup> As reported by the *Washington Post*, “[o]verall, 31 percent of people said they have zero money saved for retirement and do not have a pension. That included 19 percent of people between the ages of 55 and 64, or those closest to retirement age.”<sup>13</sup> Roughly 45% of people said they plan to rely on Social Security to cover expenses during retirement, whether they have personal savings or not.<sup>14</sup>

In other words, it is more important than ever that *all* Americans are encouraged to save and have access to professional advice and appropriate retirement savings products. Employers need reliable advice on the design and investment options of their retirement plans, and employees need to be educated on the importance of saving early for retirement, determining their risk tolerance, and evaluating the investment options available through their workplace retirement plan. Individuals also need professional advice when rolling over retirement plan assets from one retirement plan to another plan or an IRA, and when taking distributions during retirement, and those without access to an employer retirement plan need education and guidance about other retirement savings vehicles.

Unfortunately, the Rule and PTEs are counterproductive with respect to this country’s retirement crisis. They have and will make it harder, not easier, to provide investors with the services and products that could help them live independently during their retirement.

### A. Less Education and Advice, and Fewer Product Options for Small Businesses and Small Account Holders

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<sup>11</sup> Hearing of the House Education and Workforce Subcommittee on Health, Employment, Labor, and Pensions, *Restricting Access to Financial Advice: Evaluating the Costs and Consequences for Working Families and Retirees*, June 17, 2015 (hereinafter “June 17 Hearing”), hearing webcast available at <http://edworkforce.house.gov/calendar/eventsingle.aspx?EventID=399027>.

<sup>12</sup> Marte, Jonnelle, *Almost 20 Percent of People Near Retirement Age have not Saved for It*, *Washington Post*, Aug. 7, 2014.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

The Rule and PTEs already have generated negative consequences for consumers and, as described below, NAIFA anticipates that those consequences will be dramatically magnified if the Rule and PTEs are not withdrawn or substantially revised.

1. *Less investment advice will be provided to consumers.*

It is no surprise that when faced with a multitude of new fiduciary obligations—which, at this point, entail substantial cost and administrative burdens, new business models and fee structures, as well as immeasurable litigation exposure—some firms and/or advisors no longer will offer services and/or products to small plans or individuals with small accounts. Reduced access to professional advice and fewer services is not a desirable outcome, and presumably, is not the aim of the current Administration.

a. Retirement savers are better off with professional advice.

The value of professional advice should not be overlooked or underestimated. The fact is, advisors help people plan and save for retirement by helping employers set up retirement plans and by providing advice to individual investors outside of the workplace. Overall, advised investors are better off than non-advised investors.

An Oliver Wyman study published in 2015 found that 84% of individuals begin saving for retirement via a workplace retirement plan, and workplace-sponsored defined contribution plans represent the primary or only retirement vehicle for 67% of individuals who save for retirement with a tax-advantaged retirement plan.<sup>15</sup> Notably, small businesses that work with a financial advisor are 50% more likely to set up a retirement plan, and micro businesses with 1-9 employees are almost twice as likely.<sup>16</sup>

Moreover, according to a May 2015 LIMRA Secure Retirement Institute Consumer Survey, 18% of households that do not work with a financial advisor have *no retirement savings*, compared to only 2% of advised households.<sup>17</sup> Similarly, Oliver Wyman found that advised individuals have a minimum of 25% more assets than non-advised individuals, and for individuals aged 65 and older with \$100,000 or less in annual income, advised individuals have an average of 113% more assets than non-advised investors.<sup>18</sup>

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<sup>15</sup> Oliver Wyman Study, *The Role of Financial Advisors in the US Retirement Market* (July 10, 2015) (hereinafter “Oliver Wyman Study”), at 5 (citing Oliver Wyman Retail Investor Retirement Survey 2014).

<sup>16</sup> *Id.*

<sup>17</sup> LIMRA Secure Retirement Institute 2015 Consumer Survey, at 3.

<sup>18</sup> Oliver Wyman Study, at 6.

The value of advice increases even further at crucial points during the retirement savings timeline, particularly for lower-income investors. For instance, in NAIFA members' experience, an employee with a balance of \$5,000 in an employer-provided retirement plan likely would—without professional advice—cash out the account when changing jobs, suffer the resulting tax penalties, and deplete all of her retirement savings rather than continue to save. Less education and access to advice will only contribute to these anti-saving behaviors at critical retirement planning junctures (e.g., when leaving or changing employer-sponsored plans).

Professional advisors also help save investors from making costly mistakes with their retirement savings. The Department itself estimated that in 2010 alone, investment mistakes cost ERISA plan and IRA participants approximately \$114 billion.<sup>19</sup> The Department noted that, in its belief, receipt of professional advice would cut down on these mistake-driven costs by helping investors pay *lower* fees and expenses, engage in less excessive or poorly timed trading, more adequately diversify their portfolios, achieve a more optimal level of compensated risk, and/or pay less excess taxes.<sup>20</sup>

Finally, professional advice provides valuable peace of mind to consumers, versus having to go it alone. Although this may be less easy to quantify, it is a true benefit and should not be discounted. Additionally, many people choose their professional advisor based on personal connections and referrals, or local word of mouth. In this context, “buy local” is often favored because Main Street advisors develop positive and trusted reputations within their communities. Again, the comfort level investors have with their advisors is valuable and should have been taken into account by the Department when the Rule and PTEs were crafted.

- b. The Rule/PTEs already are, and will continue to, restrict consumers' access to professional advice.

As noted above, we already have seen a negative impact on consumers' access to professional advice as a result of the Rule/PTEs. Over 20% of NAIFA members surveyed this month say they have experienced an increase in minimum account balances for the clients they serve; and another 54% expect to see such an increase. Many advisors do not have latitude with respect to these minimum account balances because their financial institutions establish the requirements.

Further, 2,708 NAIFA members—along with thousands more Main Street advisors across the country—no longer will be able to provide personalized retirement investment advice to their clients because *just one* financial institution (of the many with which NAIFA members are affiliated) has banned its advisors from offering mutual funds, variable annuities and other investment products that trigger onerous compliance obligations under the Rule/PTEs. Instead, these clients—*hundreds* per advisor—will be sent to a self-directed call center where they will have to make investment decisions on their own.

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<sup>19</sup> Department of Labor, Final Rule, *Investment Advice—Participants and Beneficiaries*, 76 Fed. Reg. 66, 136, 66, 152 (Oct. 25, 2011).

<sup>20</sup> *Id.*

2. *Investment education for individuals and employers will be severely curtailed under the Rule.*

Given the Rule's overly restrictive definition of investment "education," advisors who do not wish to trigger fiduciary status by providing personalized advice—and its attendant obligations and costs—will no longer be able to provide any meaningful education to their employer or individual clients. During a meeting on May 4, 2015 with NAIFA members, Department officials stated that one of their objectives is to preserve investor education. And former Secretary Perez told members of Congress on June 17 that investor education is "exceedingly important."<sup>21</sup> Unfortunately, the narrow scope of the education safe harbor under the Rule will not facilitate the goal of preserving or expanding investor education.

In reality, the Rule strips advisors of the ability to provide any effective education by prohibiting under the investment education safe harbor:

- Plan information that references the appropriateness of any individual investment alternative or any individual benefit distribution option for a plan or IRA;
- Financial, investment, and retirement information that addresses specific investment products, specific plan or IRA investment alternatives or distribution options available to the plan or IRA or to plan participants, beneficiaries, and IRA owners, or specific investment alternatives or services offered outside the plan or IRA; and
- Asset allocation models and interactive investment materials that identify any specific investment product or alternative available (except, for plans, models and materials may identify investment alternatives already specified under the plan, and interactive materials may display specific investments specifically chosen by the plan or IRA owner).

What does constitute education under the Rule is so generic that it has very little utility, if any. There are approximately 9,000 mutual funds available today, not to mention the host of other types of products available in the retirement space. Telling an inexperienced investor to choose among mutual funds without providing any guidance as to the strength or desirability of any particular funds is not meaningful education; it is simply overwhelming. Meaningful education requires some identification and characterization of specific investment options.

Notably, the Department has not historically restricted "education" to generic, high-level conversations. Instead, the Department has allowed for meaningful education to take place, with appropriate disclosures. For instance, under Interpretive Bulletin 96-1,<sup>22</sup> the Department has not included within fiduciary "investment advice" asset allocation models that identify specific investment alternatives, as long as they are accompanied by a statement indicating that other investment options with similar characteristics may be available. Bulletin 96-1 reasons: "Because the information and materials described above would enable a participant or

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<sup>21</sup> June 17 Hearing *supra* note 11.

<sup>22</sup> 29 CFR Part 2509.



beneficiary to assess the relevance of an asset allocation model to his or her individual situation, the furnishing of such information would not constitute a ‘recommendation’ . . . and, accordingly, would not constitute [fiduciary investment advice].<sup>23</sup> The Department’s rationale in Bulletin 96-1 makes perfect sense and unlike the Rule, which cuts off virtually all education, its approach strikes an appropriate balance between ensuring the availability of meaningful investment education and providing investor protection.

Not only will individual investors be deprived of education under the Rule, small business owners also will lack education with respect to plan design options for their employees—and may, as a result, forego setting up any retirement plan at all. As drafted, the education safe harbor does not allow for plan design education without triggering fiduciary obligations (rather, the asset allocation and interactive material provisions require that the plan options already be chosen in order to be referenced—i.e., do not cover the selection/design stage of the process).

This approach makes little sense and will be extremely detrimental with respect to small employers’ provision of employee retirement savings programs. Unlike investment advice provided directly to individual plan participants or IRA owners, recommendations on menu design for participant-directed plans are a step removed from recommendations pertaining to actual investment decisions. The employer narrows down the product options (from thousands) available to employees, but the employees decide how their assets are allocated among different products. Thus, the risk of a conflict of interest arising at this stage between the advisor and employee investors is minimal. Furthermore, in the plan design space, the plan administrator—regardless of plan size—is under a separate obligation to make informed and prudent decisions with respect to the plan.<sup>24</sup>

3. *Marketing of retirement saving services and products to Main Street clients, including referrals to other advice professionals, will be inhibited, thereby limiting awareness of these important tools.*

Similar to the narrow education safe harbor, the Rule’s so-called “seller’s exception” will harm Main Street by unnecessarily limiting information for non-institutional investors. Whereas a robust seller’s exception would allow advisors and financial institutions to market their products and services to the general public before they must take on fiduciary obligations, the Rule’s seller’s exception does not cover such activities for retail investors (e.g., individuals, small plan administrators/fiduciaries). Additionally, the Rule includes within fiduciary investment advice recommendations about *other* persons who provide investment advice or management services.

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<sup>23</sup> *Id.*

<sup>24</sup> See 29 U.S.C. § 1002(21)(a)(iii) (under ERISA, a person is a fiduciary with respect to a plan to the extent he has any discretionary authority or discretionary responsibility in the administration of such plan); see also 26 U.S.C. § 4975(e)(3)(C) (corresponding fiduciary definition under the Code).

Again, this approach is misguided. Marketing and referrals, as opposed to true investment advice, pose very little threat of conflicts of interest. Presumably, this is why marketing has not historically been considered fiduciary activity under ERISA or the Code. Indeed, it is unclear whether the Department has statutory authority to capture such marketing and sales activities under the fiduciary umbrella.

Functionally, sales pitches in the financial advisor context are like sales pitches in all other retail contexts; they are take-it-or-leave-it promotions designed to create awareness and attract consumers in the first instance so that products and services can *then* be delivered. And like other retail contexts, financial advisor marketing should not be limited to certain segments of the population (here, for instance, to other registered financial service providers or managers of \$50 million or more in assets).

There is no evidence that financial sophistication or a large account is needed to understand when someone is making a sales pitch rather than delivering personalized impartial advice. Particularly with respect to proprietary products, consumers understand that they are limiting their universe of options, but they *choose* to do so for any number of reasons, including brand trust/recognition, conveniences, comfort with a particular seller, etc. (the same, of course, is true of a Starbucks coffee shop, a Ford car dealership, etc.).

Likewise, consumers and small business owners do not confuse professional referrals with personalized investment advice. Referrals are several steps removed from actual investment activity—one must assume, for instance, that the recipient of the referral recommendation will in fact pursue the recommended professional, the other professional to whom the individual is referred will be in a position (and agree) to work with the individual, investment advice will be given, and that advice will be acted upon. Reducing referrals will only harm consumers. Referrals are an important service for investors who are new to or inexperienced with retirement planning. A list of names in a phone book or a Google search does not offer meaningful guidance for investors to narrow down their options or find professionals who are suitable for them. Professional-to-professional referrals, on the other hand, provide investors with some comfort that they will be talking to an advisor who is, at least in someone's estimation, an appropriate advisor for the investor.

The Rule's overly paternalistic approach will only prevent a large number of consumers from learning about available products, services, and professionals, which—again—is counterproductive for the retirement crisis in this country. On the other hand, a general seller's exception, coupled with non-fiduciary referrals, would allow for effective marketing and client development, which would help advisors reach those populations that are arguably in most need of professional retirement planning assistance.

4. *The Rule/PTEs are restricting consumer choice with respect to products and preferred compensation arrangements.*

The Rule and PTEs already have sparked reactions from financial institutions that take away product options for certain consumers and restrict favored compensation arrangements (as discussed in further detail below) in order to avoid the cost of complying with the Rule—

particularly the BIC exemption—and mitigate the threat of costly class action lawsuits.<sup>25</sup> In fact, nearly half of NAIFA’s members (46%) already have experienced a restriction of product offerings to their clients, and another 45% anticipate that such restrictions are forthcoming. More specifically, 68% of our members have been told that they cannot recommend certain mutual fund classes to clients, and over 70% say they cannot recommend certain annuities.<sup>26</sup>

NAIFA members’ experience is consistent with public announcements regarding financial institutions’ response to the Rule/PTEs. Commonwealth Financial Network—an independent broker-dealer/RIA—announced in October 2016 that it will no longer offer *any* commission-based products in retirement accounts.<sup>27</sup> Similarly, in November 2016, Bank of America Merrill Lynch instructed its financial advisors to stop selling mutual funds in brokerage-based (i.e., commission-based) IRAs.<sup>28</sup> Merrill’s clients with commission-based IRAs will now be moved into the firm’s advisory fee-based accounts, “self-directed” brokerage platform, or robo advisory service.<sup>29</sup>

It also is worth noting that the Rule and PTEs themselves, without revision, may significantly decrease product availability in the marketplace. Currently, indexed and variable annuity sales (with commission-based compensation) fall under the BIC exemption. The definition of “Financial Institution” under that exemption, however, effectively precludes independent insurance intermediaries (IMOs) dealing in annuities—and by extension, the independent insurance agents and brokers with whom they work—from receiving prohibited transaction relief. The Rule/PTEs therefore threaten to significantly disrupt annuity sales in the independent distribution channel—a channel in which roughly one-third of NAIFA members operate.

#### B. Higher Costs for Small Businesses and Small Account Holders

For low- and middle-income clients who do continue to receive professional retirement advice, that advice is likely to get more expensive for them because the Rule/PTEs will force them into

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<sup>25</sup> See, e.g., public announcements *supra* note 9.

<sup>26</sup> As discussed below, annuity products are particularly important for low- and middle-income savers’ retirement security, so this latter figure is especially troubling.

<sup>27</sup> ThinkAdvisor, *DOL Rule Casualty: Commonwealth Drops Commission Retirement Products* (Oct. 24, 2016) available at <http://www.thinkadvisor.com/2016/10/24/dol-rule-casualty-commonwealth-drops-commission-re> (last visited Apr. 13, 2017).

<sup>28</sup> Idzelis, Christine, InvestmentNews, *Bank of America Merrill Lynch tells advisers to stop selling mutual funds in brokerage IRAs now* (Nov. 1, 2016) available at <http://www.investmentnews.com/article/20161101/FREE/161109984/bank-of-america-merrill-lynch-tells-advisers-to-stop-selling-mutual> (last visited Apr. 13, 2017).

<sup>29</sup> *Id.*

more expensive compensation arrangements and because the high costs of compliance will be passed on.

The Rule and PTEs effectively leave advisors with three choices:

- (1) do not give investment advice, as defined under the Rule, and avoid becoming a fiduciary;
- (2) become a fiduciary and turn all of your compensation arrangements into advisory fee-for-service arrangements or wrap accounts (with no third-party compensation); or
- (3) become a fiduciary, retain current compensation arrangements, and comply with a PTE (with attendant compliance obligations and high costs).

As discussed above, the first option leaves clients with no meaningful guidance whatsoever because investment “education” is defined so narrowly under the Rule. The second and third options will harm consumers by increasing their costs. Tellingly, roughly 90% of NAIFA members believe consumers will need to pay more for professional advisor services under the Rule/PTEs.

1. *Flat fee compensation arrangements will leave some consumers worse off.*

With respect to the second option, traditional commission-based compensation models can—as discussed below—*benefit* low- and middle-income investors and should not be uniformly discouraged. Unlike for high-wealth consumers, the alternatives—upfront advisory fees with ongoing asset management fees, and wrap account arrangements—are not workable or palatable for many of our members’ Main Street clients. In fact, a 2011 survey of 25.3 million IRA accounts found that a large majority of IRA investors opted for commission-based arrangements over fee-based arrangements, and low-balance account holders favored commission-based arrangements at an even higher rate—for good reason.<sup>30</sup>

First, clients who are deciding whether they have the resources to save for retirement at all will be unable or unwilling to pay a substantial out-of-pocket fee that represents a significant portion of the assets they may have to invest. For those who are rolling over retirement account balances, opting to pull these fees from the rollover amount will have tax implications and result in greater cost. Moreover, fees will have to be set high enough to compensate for anticipated services during a given timeframe, taking into account the fact that client needs can vary dramatically at various times (e.g., during the initial strategy phase, while transitioning between accumulation and distribution phases, in light of major life events, etc.).

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<sup>30</sup> Milloy, Meghan, American Action Forum, *The Consequences of the Fiduciary Rule for Consumers* (Apr. 10, 2017), available at <https://www.americanactionforum.org/research/consequences-fiduciary-rule-consumers/> (last visited Apr. 13, 2017).

Attached hereto as Exhibit 1 is a chart demonstrating how a small saver with a monthly retirement plan contribution of \$100 could very well pay significantly more under a fee-based model (i.e., non-conflicted advice) than a commission-based arrangement. And this example is not anomalous. A recent NAIFA survey shows that for 78% of our members, *more than half* of their current clients would experience increased costs if their accounts were shifted from commission-based to fee-based arrangements; and for about 41% of our members, *more than 80%* of their clients would see such an increase.

Generally, under a brokerage model, investors pay a one-time commission when an asset is purchased or when “new money” in the account is invested. Under a fee-based model, on the other hand, investors can wind up paying regular (e.g., annual) fees for account “management” services based on the amount of all of the assets under management, not just “new money.” Thus, for some investors, the fee-based arrangement will likely result in unnecessary charges—for example, annuity purchasers, young investors who buy and hold assets for a long period and do not require any real level of “management,” or investors who simply transfer money between investments in the same fund family (a move for which many commission-based advisors receive no compensation).

Ultimately, these fee-based arrangements only make sense—and in fact, are only currently used—for accounts with high balances. Indeed, advisory fee-based accounts usually carry account balance minimums. The Oliver Wyman study estimates that 7 million current IRAs would not qualify for an advisory account due to low balances.<sup>31</sup> The study also reports that 90% of 23 million IRA accounts analyzed in 2011 were held in brokerage accounts, and found that retail investors face increased costs—73% to 196%, on average—shifting to fee-based advisory compensation arrangements.<sup>32</sup>

Not surprisingly, fee-based advisors have been supportive of the Rule and PTEs—as consistently reflected in testimony during the Department’s public hearing held in August 2015—because they benefit from it.<sup>33</sup> They will not be impacted by the onerous PTEs, while their competitors

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<sup>31</sup> Oliver Wyman Study *supra* note 15, at 6; *see also, Id.* (Recently announced fee-based account minimums range from \$20,000 to \$100,000, but an Investment Company Institute study from 2014 shows that over 42% of IRAs in America have balances of less than \$20,000, and almost 74% have less than \$100,000—leaving a large portion of IRA accounts ineligible for this type of arrangement.).

<sup>32</sup> Oliver Wyman Study, at 7.

<sup>33</sup> For a variety of reasons, high-wealth investors and their advisors will not be negatively impacted by the Rule/PTEs like low- and middle-income Americans and their advisors. Many wealthy investors are accustomed to, and are comfortable with, fee-based arrangements. Unlike small savers, they are able to pay substantial up-front fees and they carry high account balances commonly required by fee-based advisors. Further, while the cost of doing business for commission-based advisors will increase substantially (through the cost of implementing new PTE compliance requirements, higher errors and omissions insurance premiums, litigation

will be, and they will continue serving the same clients under the same business arrangements. Commission-based advisors, on the other hand, will be burdened with a complex new regime (with its attendant costs) and the prospect of losing clients, or at the very least, increasing their clients' costs. In effect, then, the Department's Rule and PTEs create "winners" and "losers" among both advisors and consumers—those who will operate under the status quo and those who will incur substantial new costs, obligations, and risks under an overly onerous PTE.

2. *Compliance costs will be passed on to consumers.*

Under the third option, for advisors who keep commission-based arrangements and rely on a PTE, low-and middle-income and small business clients will still wind up paying more. The *high* cost of compliance with the PTEs (particularly the BIC exemption, upon which many of our members ultimately will have to rely) will be borne by someone. Inevitably, the regulated entities (e.g., broker-dealers, advisors, registered reps) will pass on some of those costs to consumers.

The compliance costs associated with the Rule and PTEs are not to be underestimated. They constitute the most expensive regulatory action of 2016, and the second most expensive non-environmental rule since 2005.<sup>34</sup> The Financial Services Institute estimates that total *start-up* costs (to firms and clients) to implement the Rule/PTEs will be nearly \$3.9 billion.<sup>35</sup> And the Securities Industry and Financial Markets Association estimates that annual compliance costs will range from \$240 million to \$570 million over the next ten years.<sup>36</sup>

But the cost burden on advisors and their clients goes further. New litigation exposure under the BIC exemption—particularly personal liability exposure for individual advisors—will dramatically increase the overall risk and cost of doing business, not to mention actual litigation expenses. According to a recent survey of NAIFA members, roughly 23% of respondents have already seen an increase in E&O premiums and another 60% expect to see such an increase.

Anticipated litigation-related costs (and fears) align with current market realities. In 2016, nearly 4,000 FINRA arbitration cases were filed by consumers alleging broker-dealer

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expenses, etc.) and those costs will likely be passed on to consumers with those accounts, fee-based advisors and their clients will not see such cost increases. In other words, wealthy Americans' investor-advisor relationships, costs, and product choices will largely be untouched, but smaller savers will pay a significant price.

<sup>34</sup> Milloy, Meghan, American Action Forum, *supra* note 30.

<sup>35</sup> Kelly, Bruce, InvestmentNews, *DOL fiduciary rule to cost the securities industry \$11B by 2020: study* (Sep. 21, 2016) available at <http://www.investmentnews.com/article/20160921/FREE/160929978/dol-fiduciary-rule-to-cost-the-securities-industry-11b-by-2020-study> (last visited Apr. 13, 2017).

<sup>36</sup> *Id.*

wrongdoing (only 158 of those cases were decided in favor of the consumer)—meaning that broker-dealers spent a lot of time and money defending these cases.<sup>37</sup> Additionally, under the BIC exemption, class action lawsuits are permitted, which by some estimates could cost \$70 million to \$150 million per year beyond other ongoing costs of compliance.<sup>38</sup>

It is impossible to accurately measure and evaluate the true cost of litigation exposure/risk under the current BIC exemption. It is certain, however, that to the extent *any* parts of the Rule or exemption requirements are unclear, litigation risk arises and the various *state* courts will be interpreting those grey areas.<sup>39</sup> This potential patchwork of lawsuits and legal interpretations will impact the cost of doing business, product offerings, and advisor-client relationships in the short and long term.

### C. Fewer Guaranteed-Income Products Will Be Sold

The Rule and PTEs also will result in fewer annuity products being sold, which again, is especially harmful to low- and middle-income consumers.<sup>40</sup> We are aware of only three ways to receive guaranteed income in retirement—annuities, Social Security, and defined benefit pensions—which explains why annuity products have always been trumpeted by the Department. Somewhat ironically, however, the Rule and PTEs foist heightened burdens on advisors who offer annuity products to non-fee-paying clients.

The PTEs' structure for annuities is particularly complex and confusing (i.e., splitting up rules and requirements for annuities by type of product between the BIC exemption and PTE 84-24), which will only make offering these products more difficult and costly.<sup>41</sup> Further, as noted

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<sup>37</sup> Milloy, Meghan, American Action Forum, *supra* note 30.

<sup>38</sup> *Id.*

<sup>39</sup> For example, although the preamble to the current BIC exemption states that a recommendation in the “best interest” of the client does not equate to the cheapest or best performing investment, state courts—not the Department—will be interpreting those very questions under the text of the PTEs.

<sup>40</sup> Notably, high-end, fee-for-service providers do not sell annuity products because their client base can self-annuitize extensive investment portfolios. On the other hand, low- and middle-income Americans rely heavily on annuity products of all kinds to provide them income security in retirement. The disproportionate burden, discussed in detail above, placed by the Department on advisors to middle-market clients could very well be a boon to more expensive providers who are hoping to capitalize on advisors exiting the market and potentially capture clients on the upper-middle-market cusp.

<sup>41</sup> It is worth noting that annuity products are already subject to multiple layers of regulation. Because they are insurance products, they are heavily regulated at the state level. States have product content and marketing rules in place, as well as sales practices requirements. Additionally, the NAIC has model regulations (adopted by almost all of the states) on disclosures

above, because fixed and independent annuities often are distributed through the independent IMO channel, there is a lot of uncertainty and potential for harmful disruptions with respect to this market segment.<sup>42</sup>

On a practical level, when clients are interested in annuity products, advisors typically educate and advise them on the various product options available. Under the Department's current structure, an advisor who recommends to an IRA owner an indexed or variable annuity product, and, alternatively, a fixed annuity product is under two separate compliance regimes with quite different requirements (i.e., would have to execute a contract for one recommendation, but not the other). This likely will lead to (understandable) consumer confusion and may result in advisors choosing to avoid discussion of guaranteed-income products altogether.

Further, for those annuity products that fall under the BIC exemption, firms and/or advisors are likely to avoid promoting them because of the onerous compliance obligations and risk of litigation (including costly class action suits). Ultimately, the result will be fewer recommendations and sales of vital guaranteed-income products.

## **II. THE DEPARTMENT SHOULD REDO ITS COST-BENEFIT ANALYSIS**

Based on the foregoing, it is essential that the Department revise its cost-benefit analysis of the Rule and PTEs. While the Department's rule-making agenda to date has been driven by the purported cost of "conflicted advice," there are other notable costs to be considered. The Department's earlier Regulatory Impact Analysis neglected, for instance, to account for many of the harmful consequences discussed above. Missing from the initial analysis are key elements such as:

- Acknowledgement and evaluation of the impact of reduced annuity sales for long-term retirement security for low- and middle-income savers;
- The full value of professional advice (versus robo or no advice) to investors, and the cost of losing access to such advice;
- Recognition that high management fees and advisory account models are not better than commission-based arrangements for many consumers, and will actually *increase* costs for many investors;
- Forward-looking, long-term costs of increased litigation risk, including limitations on product offerings and advice based on firm and advisor risk tolerances, actual litigation

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and suitability in annuity transactions. And of course, at the federal level, the SEC and FINRA regulate the sale of variable annuities. The Department should not add on top of this structure another complex, confusing and costly layer of regulation.

<sup>42</sup> As explained more fully in NAIFA's filed comment letter, the proposed rule for IMOs issued by the Department in early 2017 is entirely unworkable because very few independent firms can satisfy the proposed minimum book of business threshold. Even if the Department were to finalize an IMO rule tomorrow, however, there are mere weeks before the existing Rule/PTEs become applicable, so market disruptions are at this point inevitable.



expenses, and a potential patchwork of state court interpretations of the Rule and PTEs; and

- Recognition that consumers understand that sellers of products have a business interest in the transaction, but have numerous rationales for seeking out professional services anyway (e.g., convenience, personal relationships, peace of mind, quality recognition, etc.).

NAIFA believes that when these factors are accounted for properly, the benefits of the current Rule and PTEs do not outweigh the costs. Instead, on the whole, consumers are worse off under the Rule/PTEs, and the current structure will not help alleviate the retirement crisis in the U.S. (but rather, may ultimately be counterproductive).

### **III. THE DEPARTMENT SHOULD WITHDRAW THE RULE AND PTEs AND DEVELOP A NEW PRINCIPLES-BASED STRUCTURE**

NAIFA urges the Department to withdraw the overly burdensome and disruptive Rule and PTEs, and replace them with a principles-based regime with reasonable compliance obligations. Paring back unnecessary and unduly complex compliance obligations (with their attendant costs) will:

- help ensure that investors can work with the advisor of their choice under compensation arrangements that make sense for them;
- minimize anti-competitive regulatory biases toward certain business models and products;
- preserve consumer choice between investment products; and
- in general, reduce the likelihood that low- and middle-income investors will suffer adverse consequences.

Below are our recommendations for a more workable and beneficial best interest structure.

- A. The Definition of “Investment Advice Fiduciary” should Cover Only Those Providing Actual Personalized Investment Advice to Avoid Harming Consumers with Less Education and Diminished Awareness of Professional Products, Services and Professionals.

We urge the Department to avoid the paternalism embedded in the current Rule, and its unnecessary interference with pre-advice communications between advisors and prospective clients (or even existing clients). A new rule should not diminish the availability of effective education, marketing, or professional referrals—all of which benefit consumers tremendously and do not present conflict of interest concerns. Ultimately, imposition of compliance obligations related to fiduciary investment advice should be reserved for those individuals providing actual *advice*.

- B. The New Structure should be Principles-Based and not Overly Prescriptive or Burdensome to Avoid Market Disruptions and Harm to Consumers.

As discussed at length above, the sheer complexity and cost of the Rule and PTEs, particularly the BIC exemption, is causing market disruptions and negative consequences for consumers. A less disruptive approach can and should be employed to achieve the Department’s ultimate objective—establishment of a best interest standard of care for retirement investment advisors, while maintaining access to professional advice and products that encourage retirement savings and long-term security.

1. *Retain a Best Interest Standard.*

The Department should retain a “best interest” standard for advisors and firms in the retirement investment space—a move publicly supported by NAIFA and other industry groups. Any such standard should, however:

- allow for varying perspectives and opinions among industry professionals with respect to products and recommendations (i.e., avoid de facto elimination of entire classes of products from the marketplace);<sup>43</sup> and
- to the greatest extent possible, align with existing standards in the industry.

To illustrate, industry professionals’ perspectives and opinions vary widely with respect to proprietary products and variable annuity products, which may create distinct problems (i.e., litigation risk) under a “prudent person” best interest standard. Regardless of advisors’ differing sentiments, however, consumers want to buy—and in fact seek out—variable annuity and proprietary products because they provide unique benefits to investors.<sup>44</sup> Thus, any best interest

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<sup>43</sup> FINRA—well acquainted with drafting and enforcing a standard of conduct for broker-dealers—agrees with both of NAIFA’s concerns. In its letter to the Department regarding the proposed Rule and PTEs, FINRA noted that “[r]easonable and qualified financial advisers may reach different conclusions about which factors are more significant and which product best meets the criteria that the financial adviser believes are most relevant. . . . A requirement to recommend the ‘best’ product would impose unnecessary and untenable litigation risks on fiduciaries.”

<sup>44</sup> For instance, variable annuities provide guaranteed life income and an opportunity for investors (who may not otherwise have the opportunity) to take advantage of upside in the market. NAIFA members’ clients’ primary concern with respect to retirement planning is out-living their savings. Variable annuities, like other annuity products, provide invaluable protection against longevity risk. Further, consumers who invest in variable annuity products to maximize their retirement security have the opportunity (like wealthier investors who put their savings in other vehicles) to enjoy a greater variety of investment choices and benefit from positive market performance.

Propriety products also benefit consumers. Indeed, some investors choose to work with captive advisors because proprietary products from well-known and respected financial institutions provide consumers with peace of mind and high-quality investment options. Additionally, advisors who sell proprietary products are experts regarding those products and can offer

standard should account for intra-industry differences in opinion and preserve consumer choice with respect to various products.<sup>45</sup>

Further, to achieve consistency within the industry and minimize consumer confusion, the Department could tie any “best interest” analysis to standards and safeguards already in existence in the industry. For example, the Department could clarify that products approved by FINRA and the SEC and sold in accordance with FINRA guidance satisfy the standard.<sup>46</sup> Alternatively, or additionally, the Department could state that any transaction executed by an advisor which is evaluated and approved by the advisor’s financial institution satisfies the standard.<sup>47</sup> Leveraging these existing tools would strengthen and clarify any “best interest” definition and help avoid needless litigation.

2. *Avoid imposition of costly, unnecessary, and disruptive compliance obligations.*

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consumers extensive information and guidance on their investment options within a fund family. Finally, consumers who work with captive advisors often have a long-standing relationship with the financial institution and the advisor (because, for example, they also have a bank account, home loan, insurance, or other business relationship with the institution), and they feel most comfortable working with a person they know (who also knows them) to protect their retirement savings.

<sup>45</sup> Similarly, “without regard to advisors’ or firms’ interest” language within a best interest standard could be problematic for sellers of proprietary products. For the above reasons, these products are desirable to consumers—who recognize and appreciate sellers’ interest in branded products. Accordingly, any best interest standard should accommodate such sales without exposing firms and advisors to unnecessary litigation risk.

<sup>46</sup> See, e.g., FINRA Regulatory Notice 13-45 (Dec. 2013) *available at* <http://www.finra.org/sites/default/files/NoticeDocument/p418695.pdf> (discussing firm responsibilities under suitability standard with respect to IRA rollovers, including supervisory control systems and training of registered representatives); FINRA Regulatory Notice 12-03 (Jan. 2012) *available at* <https://www.finra.org/sites/default/files/NoticeDocument/p125397.pdf> (discussing characteristics of “complex” products and heightened supervisory and compliance procedures for the sale of such products, including reasonable diligence guidelines, post-approval review processes, registered representative training, and factors to consider in discussions with investors).

<sup>47</sup> Broker-dealers already exercise a good deal of oversight over advisors. Advisors’ transactions are subject to review by the broker-dealer’s compliance personnel, and when the appropriateness of a particular transaction is called into question, the advisor must justify the decision to the broker-dealer’s satisfaction or rescind it.

A best interest regime need not include unduly burdensome and costly compliance obligations in order to be effective. In fact, avoiding such burdens will *strengthen* the efficacy of a best interest standard by protecting consumers from conflicts of interest *and* avoiding market disruptions that take away professional advice, product choices, and compensation arrangements from low- and middle-income savers.

The current Rule and PTEs, especially the BIC exemption, contain needless requirements that are negatively impacting the market and consumers—as we have seen from market reactions so far. For example, under the current BIC exemption, financial institutions must warrant that they do not use differential compensation or any other actions or incentives that would tend to encourage individual advisors not to act in the best interest of their clients. These warranties effectively undermine any compensation-related benefits an advisor could receive for complying with the BIC exemption,<sup>48</sup> and effectively force all investors into flat-fee and wrap account arrangements they do not want and from which they do not benefit.<sup>49</sup> Moreover, the warranties are duplicative because the best interest standard is in place to address precisely the alleged conflicts of interest targeted by the warranties.

Similarly, the contract requirement for IRA accounts under the BIC exemption is unnecessary and is fueling many of the market disruptions we have seen to date (including elimination of entire product lines for certain clients). As discussed in more detail below, regulators already have tools to enforce a best interest standard without resorting to private litigation (a huge cost-driver) as the primary enforcement mechanism.

These are just two examples of unnecessary interference with marketplace dynamics, as well as unnecessary cost-generators, under the current Rule and PTEs. NAIFA urges the Department to develop a best interest structure that does not contain these types of counterproductive requirements.

NAIFA believes that a better model for a principles-based best interest approach would contain certain key consumer protections—e.g., a best interest standard, prohibition on misleading statements, reasonable total compensation for financial professionals—but avoid unnecessarily

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<sup>48</sup> According to the Department, the BIC exemption is designed to allow financial professionals to continue receiving compensation that is ubiquitous in the marketplace (e.g., commissions, 12b-1 fees, revenue sharing, etc.). But this warranty requirement forces those professionals to effectively promise not to employ any of those common compensation arrangements in the first place.

<sup>49</sup> The Department's examples in the preamble of acceptable compensation arrangements (i.e., arrangements that would not violate this warranty) indicate that the Department is forcing everyone to flat-fee and wrap account arrangements. For the reasons discussed in the introduction to this comment letter, those arrangements will not benefit NAIFA members' clients.

intrusive and complex compliance obligations. Such an approach would allow markets to function competitively and offer options to investors, *and* protect consumers (without unwarranted paternalism).

C. PTEs should Be More Broadly Applicable and/or Harmonized to Avoid Regulatory Interference in the Marketplace with Respect to Certain Products and/or Compensation Arrangements.

Under the current regime, there is a vast discrepancy between PTEs with respect to compliance obligations (e.g., PTE 84-24 versus the BIC exemption). Naturally, a large differential in requirements and associated costs will drive firms, advisors, and consumers to certain products and compensation arrangements, and away from others—simply by defining the scope of different PTEs.<sup>50</sup> NAIFA strongly encourages the Department to develop a single over-arching PTE, or alternatively, harmonize requirements between PTEs, which would create a more level playing field for advisors, products, and investors, and would dramatically reduce confusion, compliance difficulties, and costs for advisors who deal with diverse products and clients.

Notably, under a true principles-based approach, there would not and should not be big differences in compliance obligations. Instead, firms and advisors would adhere to the same general consumer protection requirements and would otherwise be permitted to conduct business without unnecessary constraints. Further, given that advisors are compensated similarly (the Department's root concern, it appears, for conflicts of interest) for various products—such as fixed and variable annuity products, regardless of retirement account type—it is not clear how a line-drawing exercise like the current PTE structure (i.e., between products and retirement account types) is justified or helpful.

Here, the current structure places a heavier burden on advisors who serve IRA owners, and particularly, on advisors who sell securities products (including variable annuity products) to those investors. As previously discussed in this letter, annuity products generally are sold to low- and middle-income investors who rely on the income stream from those products, and variable annuities are especially attractive to investors who desire those products' upside potential. As a result, the Department is actually disadvantaging middle market consumers by forcing their advisors to adhere to more onerous and costly requirements under the BIC exemption (or taking away those product options entirely).

Ultimately, the more complicated the compliance regime, the more costly it will be for advisors, financial institutions, and ultimately, consumers. Additionally, the more discrepancy there is between compliance obligations and costs, the more regulatory interference there will be in the marketplace (artificially limiting consumer choice). For these reasons, there should be greater harmonization of requirements across PTEs.

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<sup>50</sup> This already is evident in the above-cited examples of limitations on product offerings and compensation arrangements—all of them designed to avoid the BIC exemption's requirements and litigation risk.

D. Regulators should Retain and Exercise Enforcement Authority.

The current BIC exemption's contract requirement for IRA accounts effectively—and improperly—transfers enforcement authority from federal regulators to private class action attorneys. This transfer will have a very real and harmful impact on the marketplace and investors. Litigation risk—the cost of which cannot fully be measured in advance—already has and will continue to drive firms and advisors away from entire product lines, compensation arrangements, and low- and middle-income clients.

Notably, ERISA and the Code already provide for penalties for firms and advisors who break the rules. Delegation of enforcement authority away from these existing mechanisms to untold litigation threats, including class action suits and potential class settlements, will:

- increase costs for *everyone* in the industry;
- have a dampening impact on advisor-client relationships (e.g., advisors' willingness to recommend otherwise perfectly suitable/desirable products), due to firms' and advisors' personal liability concerns; and
- create unwanted uncertainty around the Department's Rule and PTEs because various state courts will be left to interpret their meaning and bounds.

These developments are undesirable and unnecessary. A new best interest structure can and should avoid them by relying on existing federal enforcement authority, and not delegating such authority to private attorneys and state courts.

**IV. CONCLUSION**

In sum, NAIFA believes that the Department should withdraw the Rule and PTEs pursuant to the President's directive because *all* of the negative consequences referenced in the White House memorandum already are present and will only get worse upon the Rule's/PTEs' applicability. Relatedly, the Department should delay all applicability dates for an additional 180 days while it conducts a new, more balanced cost-benefit analysis. And finally, the Department should design a new best interest structure that actually serves consumers, rather than punishing them with an overly prescriptive compliance regime that limits their choices and increases their costs.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Paul R. Dougherty". The signature is fluid and cursive, with the first name "Paul" being the most prominent.

Paul R. Dougherty, LUTCF, FSS, HIA  
NAIFA President

Exhibit: Chart comparing commission-based and fee-based costs for a small saver

## **Exhibit 1**

**Comparison of Commission-Based and Fee-Based Costs for a Small Saver**



	COMMISSION - A SHARE				FEE BASED EXAMPLES				
	New \$ In	Upfront 5.75% on New Money*	Portion of 12b1 fee broker receives to service acct .25%	Total broker fees paid each year	EOY Balance	EOY Balance	Fee Based Acct 1.5% AUM**	EOY Balance	Fee Based Acct 1.2% AUM**
Year 1	\$ 1,200	\$ 69.00	\$ 3.04	\$ 72.04	\$ 1,215.00	\$ 1,266.00	\$ 18.00	\$ 1,269.60	\$ 14.58
Year 2	\$ 1,200	\$ 69.00	\$ 6.29	\$ 75.29	\$ 2,515.05	\$ 2,535.63	\$ 38.03	\$ 2,543.24	\$ 30.52
Year 3	\$ 1,200	\$ 69.00	\$ 9.77	\$ 78.77	\$ 3,906.10	\$ 3,875.09	\$ 58.13	\$ 3,890.74	\$ 46.69
Year 4	\$ 1,200	\$ 69.00	\$ 13.49	\$ 82.49	\$ 5,394.53	\$ 5,288.22	\$ 79.32	\$ 5,316.41	\$ 63.80
Year 5	\$ 1,200	\$ 69.00	\$ 17.47	\$ 86.47	\$ 6,987.15	\$ 6,779.07	\$ 101.69	\$ 6,824.76	\$ 81.90
Year 6	\$ 1,200	\$ 69.00	\$ 21.73	\$ 90.73	\$ 8,691.25	\$ 8,351.92	\$ 125.28	\$ 8,420.60	\$ 101.05
Year 7	\$ 1,200	\$ 69.00	\$ 26.29	\$ 95.29	\$ 10,514.64	\$ 10,011.28	\$ 150.17	\$ 10,108.99	\$ 121.31
Year 8	\$ 1,200	\$ 69.00	\$ 31.16	\$ 100.16	\$ 12,465.66	\$ 11,761.90	\$ 176.43	\$ 11,895.31	\$ 142.74
Year 9	\$ 1,200	\$ 69.00	\$ 36.38	\$ 105.38	\$ 14,553.26	\$ 13,608.80	\$ 204.13	\$ 13,785.24	\$ 165.42
Year 10	\$ 1,200	\$ 69.00	\$ 41.97	\$ 110.97	\$ 16,786.98	\$ 15,557.28	\$ 233.36	\$ 15,784.78	\$ 189.42
Year 11	\$ 1,200	\$ 69.00	\$ 47.94	\$ 116.94	\$ 19,177.07	\$ 17,612.94	\$ 264.19	\$ 17,900.30	\$ 214.80
Year 12	\$ 1,200	\$ 69.00	\$ 54.34	\$ 123.34	\$ 21,734.47	\$ 19,781.65	\$ 296.72	\$ 20,138.52	\$ 241.66
Year 13	\$ 1,200	\$ 60.00	\$ 61.20	\$ 121.20	\$ 24,479.88	\$ 22,069.64	\$ 331.04	\$ 22,506.55	\$ 270.08
Year 14	\$ 1,200	\$ 60.00	\$ 68.54	\$ 128.54	\$ 27,417.47	\$ 24,483.47	\$ 367.25	\$ 25,011.93	\$ 300.14
Year 15	\$ 1,200	\$ 60.00	\$ 76.40	\$ 136.40	\$ 30,560.70	\$ 27,030.06	\$ 405.45	\$ 27,662.62	\$ 331.95
Year 16	\$ 1,200	\$ 60.00	\$ 84.81	\$ 144.81	\$ 33,923.94	\$ 29,716.71	\$ 445.75	\$ 30,467.06	\$ 365.60
Year 17	\$ 1,200	\$ 60.00	\$ 93.81	\$ 153.81	\$ 37,522.62	\$ 32,551.13	\$ 488.27	\$ 33,434.15	\$ 401.21
Year 18	\$ 1,200	\$ 60.00	\$ 103.43	\$ 163.43	\$ 41,373.20	\$ 35,541.44	\$ 533.12	\$ 36,573.33	\$ 438.88
Year 19	\$ 1,200	\$ 60.00	\$ 113.73	\$ 173.73	\$ 45,493.33	\$ 38,696.22	\$ 580.44	\$ 39,894.58	\$ 478.73
Year 20	\$ 1,200	\$ 60.00	\$ 124.75	\$ 184.75	\$ 49,901.86	\$ 42,024.51	\$ 630.37	\$ 43,408.46	\$ 520.90
TOTAL	\$ 24,000	\$ 1,308.00	\$ 1,036.54	\$ 2,344.54			\$ 5,527.15		\$ 4,521.39

Assumes \$1200 annual deposit earning 7% (net of mutual fund fees).

\*Broker doesn't receive all of this. Some goes to fund family and some to broker dealer. Upfront sales charge is also reduced by breakpoints.

\*\*Most broker dealers have a platform fee of .20%. So the broker receives 1.3% or 1% in these examples.