redefining / standards®

Brian Winikoff
Senior Executive Director and Head of U.S. Life, Retirement and Wealth Management at AXA
1290 Avenue of the Americas
New York, NY 10104

April 17, 2017

FILED ELECTRONICALLY

Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, N.W.
Room N-5655
Washington, DC 20210

Re: RIN 1210-AB79 – Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice; Best Interest Contract Exemption (Prohibited Transaction Exemption 2016-01); Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Prohibited Transaction Exemption 2016-01); Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 84-24, and 86-128

Dear Sir or Madam,

I am a Senior Executive Director and Head of U.S. Life, Retirement and Wealth Management at AXA[1] ("AXA US") and a member of the company's Executive Management Committee. We appreciate the opportunity to provide comments to the Department of Labor (the "Department") in connection with rule RIN 1210-AB79, specifically with respect to the Department's examination of the final rule entitled Definition of the Term "Fiduciary;" Conflict of Interest Rule – Retirement Investment Advice (the "Rule") required by the President's Memorandum to the Secretary of Labor dated February 3, 2017 (the "Trump Memorandum").[2]

The Interim Rule

Before we turn to our comments on the Rule, we are compelled to express our deep concerns with the Department's final rule released April 4, 2017 ("Interim Rule"), which delays until January 1, 2018 certain of the Rule's requirements, but extends only for 60 days the applicability date of the definition of "fiduciary" under the Rule and the Impartial Conduct

[1] "AXA US" is the brand name of AXA Equitable Financial Services, LLC and its family of companies, including AXA Equitable Life Insurance Company (NY, NY), MONY Life Insurance Company of America (AZ stock company, administrative office: Jersey City, NJ), AXA Advisors, LLC (NY, NY) and AXA Distributors, LLC (NY, NY).
[2] White House Office of the Press Secretary, *Presidential Memorandum on Fiduciary Duty Rule* (Feb. 3, 2017), at https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-memorandum-fiduciary-duty-rule.

Standards of the Rule's exemptions. Implementing the Interim Rule deeply concerns us for two reasons: (i) The Interim Rule departs significantly from the letter and spirit of the Trump Memorandum's instructions – which directed the Department to prepare an updated economic and legal analysis concerning the likely impact of the Rule, which, when completed, we believe will conclude that a repeal or substantial changes are warranted to avoid investor harm and market dislocation; and (ii) The Interim Rule provides unclear guidelines for compliance that will likely cause confusion and further disruption in an industry that is already in a state of disruption. Each of these reasons is discussed below.

1. The Interim Rule departs significantly from the President's instructions in the Trump Memorandum

The Trump Memorandum directed the Department to assess whether the Rule may "adversely impact the ability of Americans to gain access to retirement information and financial advice."[3] To this end, the Department was instructed to consider three factors in conducting its analysis: (i) the likelihood of investor harm; (ii) market dislocations in anticipation of the Rule; and (iii) the potential for increased litigation arising from application of the Rule.

We think careful consideration of all three of these factors will show that the Rule is starting – and will continue – to have the following negative impacts throughout the industry:

(a) **Investor harm**: We are already seeing examples of firms reducing their product offerings, leaving consumers with fewer retirement savings options. Media reports indicate that a number of large firms intend to cease offering commission-based retirement products altogether, while others plan to cease serving small-balance accounts. Our registered broker-dealer, AXA Advisors, LLC, is also reducing some of the products and services it currently offers. Meanwhile, almost a third of advisers plan to retire within the next 10 years, a trend exacerbated by the Rule.

(b) **Market dislocations**: Evidence of severe market dislocation already has materialized. The prospect of the Rule taking effect in 2017 has caused a significant decline in sales in the retirement market. For instance, some firms are eliminating commission-based products; and sales of variable annuities – a critical retirement savings tool providing access to guaranteed lifetime income benefits – dropped by over 20 percent from 2015 to 2016 in the wake of the announcement of the Rule in April 2016.[4] As the mere anticipation of the April 2017 effective date of the Rule

[3] *See* Trump Memorandum.
[4] *See* Greg Iacurci, *Department of Labor's Fiduciary Rule Blamed for Insurers' Massive Hit on Variable Annuity Sales*, Investment News (Mar. 28, 2017), at http://www.investmentnews.com/article/20170328/FREE/170329922/department-of-labors-fiduciary-rule-blamed-for-insurers-massive-hit (citing data from LIMRA).

constricted the retirement services marketplace, the Interim Rule will only accelerate this negative trend. Indeed, we have seen similar results in the U.K., where the number of available advisers has dropped and the market has become increasingly segmented.[5]

(c) **Increase in litigation expense**: We continue to believe that, because the Rule does not provide for a centralized and proven mechanism for dispute resolution that inhibits frivolous litigation, litigation costs will go up and those costs will be borne by both industry participants and/or consumers.

The Department, relying on supportive comments, concluded in its Interim Rule that the best interest standard under the Rule was among the "least controversial" aspects of the Rule, and this component should go into place, while the rest of the Rule is to be held in abeyance until January 1, 2018. This logic is flawed because while there is no doubt that all sides agree on the importance of having clients' best interests in mind, implementing the Interim Rule, for the reasons noted above, and below, will negatively impact industry participants and consumers. Thus, the heart of the issue before the Department – and the crux of the directive of the Trump Memorandum – is to ensure that the Rule provides enhanced protection without disrupting the market, limiting consumer choice, or increasing the cost of doing business. The Interim Rule not only fails to reflect the thorough, updated analysis contemplated by the Trump Memorandum, it actually accelerates the Rule's negative impacts.

2. The Interim Rule provides unclear guidelines for compliance that will further disrupt the industry

Instead of delaying the Rule in its entirety and allowing for a fair and thorough examination of the entire Rule, the Department has created a lack of clarity that will further disrupt the industry. The Interim Rule effectively:

- Imposes the new fiduciary definition and Impartial Conduct Standards of the Rule's exemptions;

- Allows advisers to utilize the Best Interest Contract Exemption ("BICE") without the requirements of disclosures, representations and a written contract – but they still must abide by the Impartial Conduct Standards;

- Leaves in place the current Prohibited Transaction Exemption 84-24 ("PTE 84-24") – with the addition of the Impartial Conduct Standards.

[5] *See infra* Parts I.B.1., III, 3, App'x at 28.

The result is a confusing hodge-podge that end-runs the purpose of the comment period by grafting the core of the Rule onto existing law without a logical and considered infrastructure. It neither hangs together as a comprehensively designed rule to regulate this important space during the comment period nor gives adequate guidance to industry participants or consumers as to legal and regulatory requirements.

Most troubling about the Interim Rule is that it puts in place the cornerstone of the Rule – the new fiduciary definition – without a complementary framework of workable solutions that would allow industry participants to comply with the Interim Rule while continuing to provide their full range of products and advisory services to consumers. This patchwork environment is harmful to consumers, who rely on their financial advisers to provide cogent, timely advice. Advisers will be hamstrung by the Interim Rule's imposition of a fiduciary relationship accompanied only by uncertainty as to the scope of exemptions and the long-term consequences of providing advice during the period the Interim Rule is in effect. The consequence of such a disruption to advisory services will be far-reaching, but the crux of the reaction is, and will be, reduced products and services in an area universally recognized as needing attention – the retirement savings space.

Not only does the Interim Rule put the most sweeping part of the Rule in place with no coherent framework, it is contrary to the understanding that there would be a review of *all* aspects of the Rule *before* it went into effect.[6] In contemplating the delay, in early March 2017, the Department noted that its proposed extension would make it possible for the Department to take steps such as "completing its examination" and "implementing a revocation or revision of the rule," all "without the rule becoming applicable beforehand."[7] The Department's reasoning was that, absent an extension of the applicability date, if its examination prompted rescinding or revising the Rule, "affected advisers, retirement investors and other stakeholders might face two major changes in the regulatory environment rather than one . . . [which] could unnecessarily disrupt the marketplace, producing frictional costs that are not offset by commensurate benefits."[8] The Interim Rule, however, has the potential for exactly this impact by implementing the core pieces of the Rule the Department has been directed to review. It therefore places industry participants in the untenable position of complying with requirements that the Department is simultaneously reviewing – and that it could rescind or revise. Indeed, as we discuss below, we

[6] The Trump Memorandum explicitly calls for analysis of the "likely impact" of the Rule and whether the "anticipated applicability" has resulted in harm or dislocations in the industry.

[7] Proposed Rule; Extension of Applicability Date, *Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice*, 82 Red. Reg. 12319, 12320 (Mar. 2, 2017).

[8] *Id*. Although the Department in passing invited comments on whether a delay should be applicable only to part of the Rule's provisions, the thrust of the rationale behind the proposed delay was to give the Department time to assess whether significant changes were appropriate, not to implement the Rule in piecemeal. The Department specifically stated that "[u]pon completion of its examination, [it] may decide to allow the final rule and PTEs to become applicable, issue a further extension of the applicability date, propose to withdraw the rule, or propose amendments to the rule and/or PTEs." *Id*. at 12325.

believe that a revocation of the Rule is appropriate and that, absent revocation, substantial changes are needed.

Based on the foregoing, we strongly urge the Department to avoid the unnecessary confusion and market disruption associated with the Interim Rule and issue – before the June 9, 2017 applicability date imposed by the Interim Rule – a delay of the implementation of *all* aspects of the Rule to January 1, 2018, while the Department undertakes its comprehensive review in accordance with the President's directive. The partial implementation contemplated by the Interim Rule is contrary to the Trump Memorandum and will lead to further disruptions in the industry. An extension, on the other hand, will provide much-needed clarity for both industry participants and consumers, and will ensure that the Department fulfills its mandate to conduct an economic and legal analysis of the Rule and its likely impacts. In short, we believe there is little to be gained, and much to be lost, by accelerating the implementation of components of the Rule ahead of the comprehensive review mandated by the Trump Memorandum.

It is with that fulsome examination in mind that we provide the below comments on each of the aspects of the Trump Memorandum, trusting that the Department will give them the fair consideration they are due under this process.

Overview

As described in more detail below, we believe that, following a comprehensive examination of the Rule, the Department should reach the conclusion that the Rule will "adversely affect the ability of Americans to gain access to retirement information and financial advice"[9] and, therefore, the Department should take action to rescind or substantially revise the Rule.

As one of the country's largest life insurance and retirement savings companies with nearly 2.5 million customers nationwide, AXA US is well-positioned to understand the wide-ranging intended and potential unintended consequences of the Rule on both retirement savers and the industries that serve them. For over 150 years, we have been committed to the Administration's priority to "*empower Americans to make independent financial decisions and informed choices in the marketplace, save for retirement and build individual wealth*."[10] We share the Department's objective of ensuring that retirement plan participants, individual retirement savers and their families, as well as small business plan sponsors and potential sponsors have ongoing access to high quality, impartial and affordable retirement savings education and advice.

[9] *See* Section 1(a) of the Trump Memorandum.
[10] *See* first paragraph of the Trump Memorandum; *see also* Core Principal (a) in the "Presidential Executive Order on Core Principles for Regulating the United States Financial System" (Feb. 3, 2017), available at https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-executive-order-core-principles-regulating-united-states

However, we believe that the Rule is a significantly flawed attempt to meet these goals, and will cause precisely the outcomes identified as issues for consideration in the Trump Memorandum, namely:

- *Widespread investor harm due to a reduction in access to important retirement savings offerings, product structures – such as variable annuities, which provide valuable lifetime income options – and information and related financial advice*. For example, the Rule's inherent bias against commission-based investment products means many retirement savers will be forced into more expensive fee-based investments.[11] In addition, high compliance costs and increased liability associated with the Rule will cause some retirement services providers to exit the marketplace entirely, while others will reduce their product and service offerings and refrain from providing anything but the most bare-bones and generic investment education to potential retirement savers.[12]

- *Dislocations and disruptions within the retirement services industry that will adversely affect investors or retirees*. Media reports indicate that investors whose accounts are of insufficient size to be profitable to a firm, given the increased compliance costs, will likely be informed that their financial advisors will no longer be able to serve them once the Rule takes effect.[13] This was the outcome experienced in the U.K., where a similar rule recently went into effect: 11 million consumers there in 2014 alone considered financial advice too expensive and therefore fell into an "advice gap."[14] Here in the U.S., sales of variable annuities fell by 20 percent in 2016 in an otherwise solid market for financial services, and are forecast to drop a further 10-15 percent in 2017, taking into account the 60-day delay.[15] More generally, differing standards of care applicable to agents, brokers, and registered investment advisors will make it more difficult for investors and retirees to navigate among service providers and select the appropriate retirement products and services for their needs.[16]

---

[11] *See, infra* Part I.A.1 (a number of large firms have announced that they will cease offering commission-based products, forcing clients to fee-based options).
[12] *See infra* Part I.A; *see also* Greg Iacurci, *Outsourced 401(k) Fiduciary Services Emerge After DOL Rule*, InvestmentNews (Oct. 3, 2016) at http://www.investmentnews.com/article/20161003/FREE/161009989/outsourced-401-k-fiduciary-services-emerge-after-dol-rule (noting that observers expect broker-dealers to "severely restrict" the number of advisers servicing 401(k) accounts, exit the market entirely, or seek to mitigate risk through outsourcing).
[13] *See infra* Part I.A.3.
[14] Emma Wall, *10 Million Find Advice Too Expensive*, Morningstar (Aug. 28, 2014), at http://www.morningstar.co.uk/uk/news/128424/10-million-find-advice-too-expensive.aspx.
[15] *See* Iacurci, *supra* note 4.
[16] *See, e.g.*, Kim O'Brien, Commentary, *More Waste! Less Fulfilling: Three Flaws With the DOL Fiduciary Rule*, InsuranceNewsNet.com (June 3, 2016) at https://insurancenewsnet.com/innarticle/965883 (noting that once the Rule goes into effect, IRA customers are likely to encounter at least three different types of advisers operating under different rules).

- *An increase in litigation, that likely will increase the prices that investors and retirees must pay to gain access to retirement services and further limit the availability of such services*. The Rule substitutes the current agency-directed enforcement regime with a new prohibited transaction exemption providing for a private right of action under which the terms of the Rule will be litigated in state court. As a result, retirement services providers will have to defend cases in over 50 different jurisdictions that will inevitably lead to over 50 different Rule interpretations and higher compliance costs.[17] These costs ultimately will be passed on to investors, and the marketplace for retirement services may shrink in those states in which unfavorable court outcomes result in an increase in the costs and risks of providing those services.[18]

For these reasons, which we expand upon below in Part I – and which we generally refer to as the "unintended consequences" of the Rule – we urge the Department to rescind the Rule in its entirety. As described in Part II, we recommend the Department work with the Securities and Exchange Commission ("SEC") and the National Association of Insurance Commissioners ("NAIC") to create a single best interest standard of care with a comprehensive disclosure regime that would apply to all product providers, including those servicing retirement plans and IRAs, while affording equal treatment to all retirement products within a specific category. If, however, after its review the Department is not inclined to rescind the Rule, then, as described in Part III, it should substantially revise it to incorporate a best interest standard that protects investors while ensuring they retain access to a vibrant, diverse retirement services marketplace.

We also provide here, in the form of an Appendix, responses to certain of the Department's questions posed in its March 2, 2017 proposed rule for the extension of the Rule's applicability date, which we hope will be helpful to the Department in conducting its updated economic and legal analysis.

Part I The Rule is fatally flawed because it will deprive retirement savers of access to important retirement savings products and services, disrupt the retirement savings marketplace, and dramatically increase the risk and cost of litigation, which will further disrupt the marketplace

AXA US joins the Department of Labor in supporting a standard of care that ensures financial professionals act in the best interest of American retirement savers and at the same time preserves the ability of those retirement savers to access affordable, personalized advice and a wide array of retirement products. In practice, the Rule is inconsistent with this objective and

---

[17] *See infra* Part I.C (discussing increased litigation risk).

[18] *See id*; *see also* Terry Savage, *Fiduciary Rule, Meant to Protect Investors, May Cost Them As Well*, Chicago Tribune (April 7, 2016) at http://www.chicagotribune.com/business/sns-201604071800--tms--savagectnts-a20160407-20160407-column.html (noting that consumers may have fewer choices and pay more under the Rule).

ultimately will harm retirement savers through its unintended consequences, each of which we discuss in detail below, and some of which are already materializing in the marketplace.

A. The Rule reduces access to important retirement savings products and services

1. The Rule's extension of fiduciary status and curtailment of existing exemptions will reduce access to retirement planning products and services

Today, the flexibility of the regulatory framework governing the retirement services marketplace facilitates the provision of a broad spectrum of services to all types of retirement savers at a range of price points. For instance, first-time and younger savers, who often have significant educational needs to help them make informed investment choices, have access to affordable advice and products to help them achieve their retirement savings objectives. For these savers, paying commissions under a transaction-specific compensation model is often more economical than paying out-of-pocket fees for initial or ongoing advice. Self-directed savers, on the other hand, generally do not want to pay for financial advice and prefer to purchase low-cost, "do-it-yourself" investments through automated online or direct-to-consumer channels while retaining the option to seek out and pay for advice when needed. Wealthier retirements savers, in contrast, often elect to pay a fee for ongoing advice based on assets under management, which for them may be more economical than transactional arrangements. In sum, retirement savers have the freedom today to engage and pay for a fiduciary only when they want to, in a marketplace that allows for creative products and innovating payment structures designed to meet the needs of the full range of retirement savers.

The Rule will disrupt this current marketplace – reducing consumer access to products and services – by expanding the application of fiduciary status beyond that which is reasonable or necessary without providing reasonable exemptions under which advisers can be fairly compensated in a way that is also economical for consumers.[19] For more than forty years, fiduciary status has been based on an established framework of regular, individualized advice about the value or advisability of investing and with the understanding that the advice will serve as a primary basis for investment decisions. We support the Department's goal of instituting a broader best interest standard. Under the Rule, however, the definition of Fiduciary captures not only individualized investment recommendations, but also many forms of basic investment education.[20] Indeed, fiduciary status under the Rule may be triggered by simply describing investment choices with reference to specific investment products, identifying specific investment managers, or indicating the value of particular securities or other property. As a result, financial professionals

---

[19] *See, e.g.*, Dale Brown, *Labor Department's Fiduciary Proposal Is Unworkable*, InvestmentNews (July 22, 2015) at http://www.investmentnews.com/article/20150722/BLOG09/150729959/labor-departments-fiduciary-proposal-is-unworkable.

[20] Please see our comment letter submitted July 21, 2015 ("July 21, 2015 Comment Letter"), at 7.

may be reluctant to provide any information beyond the barest list of available types of investments for fear of triggering fiduciary status and the arduous array of requirements and associated compliance costs needed to fit within an exemption.[21]

Were the Rule to provide corresponding exemptions to the extended imposition of fiduciary status – such as a robust Seller's Exception as is currently available – it could potentially provide a structure that AXA US could consider supporting. Instead, however, while greatly expanding the definition of advice subject to fiduciary obligations, the Rule simultaneously limits the ability of financial professionals to receive reasonable compensation by eliminating the established practices under which they have been compensated for providing sound and valuable investment advice to retirement savers for decades. Specifically, in place of the currently available exemptions, the Rule includes the Best Interest Contract Exemption (the "BICE") which mandates that in order to continue serving their clients, advisers and firms must comply with a host of onerous and expensive requirements, including (i) contractually acknowledging that they are fiduciaries, thereby creating a private cause of action for their clients; (ii) warranting that they have adopted certain policies and procedures; and (iii) providing a host of unnecessary and/or duplicative disclosures. Besides being potentially confusing and unnecessary for clients, the costs of implementing these measures is significant and includes not only preparing and implementing complex and nuanced new policies and procedures, but also developing and maintaining complex new IT systems and processes, large-scale, ongoing mailings to clients, and deploying internal and third party resources to plan and execute system updates.

In short, as retirement services providers are forced to reevaluate their business models to account for the substantial and ongoing costs of complying with the BICE, the unintended consequences of the Rule will emerge: Some firms will cease offering certain products and services due to the imbalance between compliance cost and profitability, thereby reducing the range of retirement savings products and services in the marketplace and eliminating access to certain advice channels altogether; others will become more selective in their client base, serving only those clients with sufficient assets under management to make the provision of advice and corresponding compliance costs profitable, and ceasing to offer service to savers with smaller accounts; and, sooner or later, costs of compliance with the Rule – both operational costs and litigation costs borne by industry participants – will be passed on to consumers, placing certain products and services out of reach for lower-income savers.[22]

---

[21] *Id*.

[22] *See* Paul Katzeff, *New DOL Fiduciary Rule Forces Investor to Weigh Their Options*, Investor's Business Daily (Sept. 30, 2016), at http://www.investors.com/etfs-and-funds/retirement/katzeff-re-dol-fiduciary-rule-update/ (effects of the Rule may include fewer products, being forced into fee-based arrangements, and having accounts closed, among others); *see also* Thaya Knight, *DOL's Fiduciary Rule Would "Protect" Investors Right Out of the Market*, The Hill (Feb. 5, 2017) at http://thehill.com/blogs/pundits-blog/finance/317919-the-dol-fiduciary-rule-would-protect-investors-right-out-of-the (the Rule "risks shutting off the principal source of investment advice available to most investors by simply making it too expensive to continue offering this advice").

As a result, retirement savers will be left with an increasingly bifurcated market: one in which wealthier Americans can continue to afford the same advice and services they have always received – whether by paying for ongoing advice through fees based on assets under management or entering into transactions that are subject to the BICE, but where first-time or younger savers, or those of modest means will have fewer affordable options.[23] They will no longer have access to the current array of commission-based products due to firms' unwillingness to accept the cost and risks of the BICE for those savers, and will have limited to no opportunities to receive truly personalized advice and comprehensive financial planning, again due to the compliance costs associated with the expanded definition of fiduciary status and corresponding legal and regulatory risks.[24] Compounding this disparity, retirement services providers will likely also cease offering certain investment education for fear of triggering the Rule, as the risk of crossing the line between investment education and fiduciary recommendations may be too great to shoulder given the potential consequences of fiduciary status imposed by the Rule.[25]

The Department should take notice that these unintended consequences – in particular, the reduction in products and services – already have begun to materialize. Media reports indicate that a number of large firms have announced that they will cease offering commission-based retirement products altogether, forcing clients into fee-based accounts which may require them to pay more in fees than they would under a commission-based compensation structure.[26] Others have stated that they may also cease providing services to small account holders.[27] In sum, as firms grapple with the compliance burden and associated costs, it is becoming clear that the Rule is driving the reaction – and corresponding negative impacts across the market – that we and many other industry participants feared, and as a result, is reducing the range of options retirement savers have to build their retirement savings.

2. The Rule discourages the sale of variable annuities, reducing access to guaranteed lifetime income for retirement savers

[23] *See* July 21, 2015 Comment Letter.
[24] *See, e.g.*, Iacurci, *supra* note 12 (noting that observers expect broker-dealers to "severely restrict" the number of advisers servicing 401(k) accounts, exit the market entirely, or seek to mitigate risk through outsourcing); Savage, *supra* note 18.
[25] *See* July 21, 2015 Comment Letter, at 7.
[26] For example, a fee-based account will result in the same payment to the adviser, based on assets under management, regardless of how frequently the retirement saver trades. For a saver who trades frequently, this arrangement can be beneficial and more cost effective than paying commissions but, for others, who are more passive investors, the fee-based structure may force them to pay significantly more than they would under a single, up-front commission-based arrangement. Worse, this negative affect of this outcome on retirement savers will only be exacerbated by the Rule's acknowledged bias towards passive investments.
[27] ThinkAdvisor, RIAs, *Reps Plan to Drop Small Clients Under DOL Fiduciary Rule: Fidelity* (Mar. 14, 2016), at http://www.thinkadvisor.com/2016/03/14/rias-reps-plan-to-drop-small-clients-under-dol-fid (62% of representatives and advisers surveyed expect to 'let go of or transition' some smaller clients).

As we live longer and save less,[28] Americans are increasingly vulnerable to the risks of outliving their savings.[29] At the same time, defined benefit plans are quickly disappearing and those that still exist are moving towards single-sum cash payments, instead of lifetime income payments.[30] This imbalance creates a gap in retirement savings that is squarely addressed by the variety of variable annuity products available in the marketplace today. Variable annuities serve a vital function as a retirement savings solution by combining the opportunity to participate in potential market gains with a hedge against the risk of losses, and ultimately providing investors with a lifetime income stream that addresses longevity risk. Yet the Rule, in addition to having the effect of reducing the overall range of products, discourages the sale of variable annuities, thus further reducing access to critical longevity protection for retirement savers.[31]

There is clear consensus that the availability of annuity products is essential for American retirement savers. In fact, under the previous Administration, both the Department of Labor and the Treasury Department recognized the clear benefits of, and need for, retirement savers to have access to products offering guaranteed lifetime income streams:

- In February 2012, the Treasury Department and the Department of Labor released administrative guidance aimed at "reducing regulatory barriers to increase interest in lifetime income, encourage innovation among stakeholders, and expand choices for individuals" in order to promote retirement security;[32]

- In July 2014, the Treasury Department issued rules designed to make qualified longevity annuity contracts more accessible through reducing the burden of required minimum distributions;[33]

- The 2015 White House Conference on Aging issued a report noting that one way to improve retirement planning is to facilitate the utilization of annuities,[34] and in January

---

[28] *See, e.g.*, U.S. Dep't of Treasury, *Fact Sheet: Helping American Families Achieve Retirement Security By Expanding Lifetime Income Choices* (Feb. 2012), at https://www.treasury.gov/press-center/press-releases/Documents/020212%20Retirement%20Security%20Factsheet.pdf.
[29] *Id*.
[30] *Id*.
[31] For additional discussion, please see our July 21, 2015 Comment Letter, at 8.
[32] *See, e.g.*, U.S. Dep't of Treasury, *Fact Sheet: Helping American Families Achieve Retirement Security By Expanding Lifetime Income Choices* (Feb. 2012), at https://www.treasury.gov/press-center/press-releases/Documents/020212%20Retirement%20Security%20Factsheet.pdf.
[33] *See*, U.S Dep't of Treasury Press Center, *Treasury Issues Final Rules Regarding Longevity Annuities* (July 1, 2014), at https://www.treasury.gov/press-center/press-releases/Pages/jl2448.aspx.
[34] *See* 2015 White House Conference on Aging, Final Report 6 (2015), available at https://whitehouseconferenceonaging.gov/2015-WHCOA-Final-Report.pdf.

2016, the Obama Administration affirmed its commitment to the principles of expanding consumer choice in workplace retirement plan options;[35] and

- In December 2016, the Department of Labor reiterated in an Information Letter that it, along with the Treasury Department and others, had "identified the need for lifetime income as an important public policy issue," and that it supported initiatives designed to increase utilization of lifetime income options in defined contribution plans.[36]

The Rule undermines the sale of variable annuities by doing away with critical components of the current compensation structure for such products. Specifically, the Rule excludes variable annuities from PTE 84-24, which has for years facilitated the sale of variable annuities, and eliminates the Seller's Exception, which permitted certain communications between insurance companies and large plans without triggering fiduciary status. Because of the time-intensive nature of the sale of variable annuities, it is important that there be a permissible compensation structure that will appropriately incentivize financial professionals to include variable annuities in the suite of offerings they make available to their clients. By removing variable annuities from PTE 84-24 and eliminating the Seller's Exception, the Rule subjects compensation for the sale of variable annuities to the BICE, which, as noted above, is burdensome and costly.[37]

Annuities fill a critical piece of the retirement puzzle by providing access to guaranteed lifetime income benefits. If the Rule remains unchanged, financial professionals will sell fewer variable annuities and insurance companies will be discouraged from developing new products. In fact, the impact of the Rule on the market for variable annuities is already being felt, with sales down over 20 percent in 2016 as companies grappled with coming into compliance with the Rule.[38] Looking ahead, LIMRA forecasts that variable annuity sales will drop a further 10-15 percent in 2017 once the Rule takes effect.[39] This result stands in sharp contrast to stated Labor and Treasury Department policy and to the best interests of American retirement savers.

B. The implementation of the Rule will disrupt the retirement savings marketplace

The existing regulatory framework governing the retirement savings marketplace fosters broad choice and lasting value for retirement savers. The Rule, although it only covers a segment

---

35 *See* The White House Office of the Press Secretary, *Fact Sheet: Building a 21st Century Retirement System* (Jan. 26, 2016), at https://obamawhitehouse.archives.gov/the-press-office/2016/01/26/fact-sheet-building-21st-century-retirement-system.

36 *See* U.S. Dep't of Labor, *Information Letter to Mr. Christopher Spence, TIAA* (Dec. 22, 2016), at https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/information-letters/12-22-2016.

37 *See, e.g.*, Dale Brown, *DOL's Fiduciary Exemption Is Not a Workable Option For Advisors*, InvestmentNews (Dec. 1, 2015), at http://www.investmentnews.com/article/20151201/BLOG09/151209998/dols-fiduciary-exemption-is-not-a-workable-option-for-advisers; for additional discussion, please see our July 21, 2015 Comment Letter, at 9-10.

38 *See* Iacurci, *supra* note 4.

39 *Id.*

of the marketplace (for example, it does not affect non-qualified accounts), will nonetheless force dramatic changes to the business models of firms and financial services professionals which, as we explain below, will cause substantial disruptions both to individual retirement savers and to the marketplace as a whole.

1. **The Rule's expansion of the definition of Fiduciary will disrupt existing client-adviser relationships and may foreclose new ones**

By way of background, advisers today often have a holistic relationship with their clients, providing advice, services and products with respect to both a client's qualified and non-qualified assets. That relationship, which allows for comprehensive, one-stop financial planning, may feature transactional compensation (that is, commission-based); or an ongoing fee-for-service arrangement based on assets under management; or both, depending on the client's unique needs and objectives. Clients who may currently only seek advice from time to time are also free to later change to a fee-based arrangement while still retaining their adviser.

The Rule will disrupt these relationships in several ways. First, as discussed above, the approach adopted by the Department – expanding the definition of Fiduciary while narrowing longstanding exemptions – will have the consequence of reducing the availability of a number of retirement offerings for less wealthy and first time retirement savers, as firms unwilling to bear the financial costs and risks of the BICE pull back from servicing those markets. This in turn may leave many retirement savers with a smaller available mix of products and services that do not meet their personal needs. For instance, retirement savers who are currently free to engage and pay for a fiduciary level of advice when they so choose may lose access to commission-based products entirely, and will instead be forced into paying an ongoing fee for fiduciary advice in order to receive any advice at all, and at a likely significantly higher price than they pay today, potentially disrupting their existing relationship with their adviser or preventing a new relationship from forming. Others with more modest account values may find themselves shut out from fee-based offerings at certain firms and at the same time unable to access transactional advisory services. These retirement savers will no longer have the benefit of personalized face-to-face advice that can be critical in retirement planning.

In addition, the disparate treatment of qualified and non-qualified accounts under the Rule may potentially disrupt existing relationships between clients and advisers. Where an adviser today offers holistic advice to a retirement saver regarding both qualified and non-qualified assets, under the new regime (under which only the qualified assets would be subject to the Rule), that adviser may be required to serve that same retirement saver in a more piecemeal (and thus less effective) manner, or may even cease providing advice with respect to qualified assets altogether – thereby disrupting the saver's comprehensive retirement strategy and directing them to seek alternative options, if any. The lack of relatively affordable alternatives is particularly troubling for first-time and younger savers and those of modest means, as research demonstrates that this segment of the population is unlikely to commit to saving for retirement unless educated and prompted to do so by personalized conversations with financial professionals.[40]

Further, the expansion of the definition of fiduciary advice has additional unintended consequences that may disrupt the marketplace and require careful consideration and analysis. For instance, the Department has issued guidance stating that if an adviser recommends that minimum required distributions – compelled by the Internal Revenue Code – be used to fund a life insurance product, that recommendation is subject to the requirements of the Rule.[41] Imposing the Rule on this type of advice will undoubtedly disrupt the market for financial advice regarding the benefits of life insurance for themselves and their families.

Another overlooked but significant disruption to the retirement services market caused by the Rule will be an acceleration of the decline in the number of financial advisors serving the market. The number of advisers in the U.S. has been on the decline, decreasing in eight of the past nine years.[42] In fact, the financial services industry is predicted to face a shortfall of more than 200,000 advisors by 2022.[43] The average adviser age in the United States is, at 51, the highest it has ever been, with 43 percent of advisers over the age of 55 and with 27 percent of them set to retire within 10 years.[44] The Rule only compounds the detrimental effects of this trend. Industry experts point to the expansion of fiduciary responsibilities and disruption of the traditional compensation model as not only providing the impetus for this expected surge in early retirements[45] but also for dissuading younger people from entering the profession. Consequently, the millennial generation, which is expected receive $30 trillion wealth transfer over the next few decades,[46] will be in critical need of personalized investment and retirement savings advice. As discussed earlier, we saw a similar retirement advice gap in the U.K. following its implementation of the Retail Distribution Review ("RDR") – the U.K. parallel to the Rule.[47]

---

[40] *See, e.g.*, Javier Simon, *Americans Without Advisers Are Far Less Prepared for Retirement*, PlanAdviser (Mar. 28, 2017), at http://www.planadviser.com/Americans-Without-Advisers-Are-Far-Less-Prepared-for-Retirement/ (reporting that only 46% of Americans who have never hired a financial professional have a retirement plan or emergency fund, compared with 77% of those who have hired financial advisers).
[41] *See* Dep't of Labor, *Conflict of Interest FAQs (Part II – Rule)* at 3 (Jan. 2017), at https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/coi-rules-and-exemptions-part-2.pdf.
[42] Chris Hall, *How the Advisor Age Gap Plays Out*, Financial Advisor IQ (Mar. 20, 2017), at https://financialadvisoriq.com/c/1583873/182233.
[43] *See* Emmet Pierce, *Addressing the Shortage of Millennial Financial Advisors*, ThinkAdvisor (Mar. 28, 2017) at http://www.thinkadvisor.com/2017/03/28/addressing-the-shortage-of-millennial-financial-ad.
[44] *See id*; *see also* Hall, *supra* note 42.
[45] *Id*.
[46] *See* Pierce, *supra* note 43.
[47] *See* Ass'n of Professional Financial Advisers, *The Advice Market Post RDR Review* 10-11, 12 (June 2014), available at http://www.apfa.net/documents/publications/APFA-report-the-advice-market-post-RDR-June-2014.pdf (noting that consumers are increasingly being divided into two groups; observing that evidence suggests that advisers are more likely to decline to take on clients if they do not think the relationship will be profitable, and that not all consumers who want in-person advice are able to access it – affecting consumers with smaller amounts to invest the most); *see also* Wall, *supra* note 14.

2. **The Rule does not cover the entire market and to the extent that it does, it conflicts with the current regulatory scheme**

In addition to reducing access to retirement planning, the Rule unnecessarily interferes with the current regulatory scheme by leaving large portions of the market – non-qualified assets – subject to different rules. The current framework, which is comprised of reasonable regulation that appropriately promotes savings, choice, and flexibility, will be replaced by a patchwork of compliance requirements that is confusing, expensive, and inefficient – and that will not advance consumer protection interests.

As an initial matter, it is not clear whether the Department has the ability to regulate IRAs, but, regardless, the Department's authority certainly does not expand beyond ERISA. Accordingly, the scope of products and services subject to the Rule, while affecting millions of retirement plan participants, is still limited to qualified assets subject to ERISA. In contrast, and as discussed in greater detail in Part II of this letter, the SEC has jurisdiction over both qualified and non-qualified assets sold by registered investment advisers, which is precisely why section 913 of the Dodd-Frank Act ("Dodd-Frank") directs the SEC – and not the Department of Labor – to analyze whether the standard of care for brokers, dealers, and investment advisers is adequate.[48]

By implementing its Rule, the Department is creating a bifurcated system with inconsistent standards. The Rule differs from the SEC's best interest fiduciary standard, which pragmatically recognizes that sometimes the client's interest does align with the fiduciary's, and that potential conflicts of interest can be alleviated by simple and straightforward disclosures. In addition, while the Investment Advisers Act of 1940 ("Advisers Act") exempts "incidental" advice from fiduciary status, the Rule mandates that broker-dealers acknowledge fiduciary status prior to any sales transaction, regardless of whether any advice is incidental to the sale. Further, solicitor activity, which is not subject to the requirements of the Adviser's Act, may now separately trigger fiduciary status under the Rule.

The pre-Rule regulatory framework was carefully refined over time to balance the desire for a vigorous, competitive and diverse marketplace with appropriate consumer protections. The Rule purports to provide greater consumer protection, but instead imposes unwarranted requirements that serve only to add significant compliance burdens on already highly-regulated industry participants. This conflicting regulatory regime will undoubtedly disrupt the retirement services marketplace as firms and insurance companies adapt their current offerings – in many cases reducing their product and advice offerings altogether – in an effort to comply.

3. **Costs of compliance will cause industry participants to exit the market**

[48] Dodd-Frank Act s. 913(b).

As discussed above, the costs of compliance with the Rule – which necessitates sweeping changes to firms' procedures and infrastructures – and the complexity of the BICE are causing providers to reduce their offerings, cease service to small accounts or consider exiting the market altogether. This result negatively impacts individual retirement savers as well as the market as a whole.

The freedom of retirement savers to choose when and how to pay for investment advice is exactly why today's marketplace has such a wide variety of products and services available. The varying permissible payment structures available incentivize insurance companies and firms to create products and services for all types of needs and income levels. But, as costs increase under the Rule, certain of those products or services will no longer be economically viable for many savers – leading to the unintended consequences of reduced offerings, elimination of services for smaller accounts, and passed-through compliance costs. For instance, in addition to narrowing the types of products and services offered, some firms may close smaller accounts because those accounts simply do not meet the minimum threshold required for the potential compensation either to be profitable on a fee basis or to outweigh the compliance costs and risk associated with the BICE. Indeed, the decision by a firm to use the BICE or shift to a fee-based model may make economic sense only with respect to its wealthiest clients, where the compliance risks and potential compensation structures are more aligned, while other less wealthy clients are either shut out or forced to computer-based "robo-advisers" or other, less personalized advisory services.

In fact, as a result of the Rule, we also expect to see a greater proliferation of advice provided by robo-advisers. This type of advice, while relatively inexpensive for the consumer, has limitations. First, it is impersonal and cannot be customized to all of a client's potential needs. In addition, it does not provide the type of nuanced market gauge that only a human can offer. During a "flash crash," for instance, retirement savers who as a result of the Rule only have access to a robo-consultant will be unable to interact with a human adviser who can offer the reassurance likely to help them weather such volatility. Without such human support, those investors may engage in irrational sell-offs that will reduce the value of their savings.

For additional perspective on how AXA US and the retirements services marketplace is responding to the Rule, please see our responses to selected Department questions in the Appendix.

C. The Rule will increase litigation, to the ultimate detriment of retirement savers

As many critics of the Rule have previously observed, the prominence of the BICE is likely to cause a dramatic increase in litigation risk which will harm both industry participants and retirement savers.

The litigation risk is two-fold. First, the Rule leaves key terms, such as the definition of reasonable compensation, undefined. Because the BICE requires execution of a contract that will be subject to state law and thus varying interpretations across the 50 states, those key terms are left subject to immense uncertainty in their legal meaning and force. Although there is substantial jurisprudence interpreting ERISA at the federal level, state tribunals are not bound by such guidance; nor by each other's determinations. For example, one ruling in New York may have no impact on what a court in New Jersey will decide, and vice versa – even though a firm in the metropolitan New York area may have clients in both states who signed the same Best Interest Contract (the "BIC"). The result will be an uneven application of the law, at best; at worst, it will lead to inconsistencies across jurisdictions. Either way, the uncertainty for firms using the BICE is unacceptably high.

Second, by providing for enforcement by litigation in the various state forums, the BICE makes it impossible for firms to adequately mitigate their litigation risk. For instance, although the BIC can include a mandatory arbitration provision, the BICE prohibits class action waivers, meaning that firms and advisers can be subject to class action suits at any time, and in relation to any product or service as to which they utilize the BICE to receive compensation. This prohibition, in addition to the inability to provide for liquidated damages in the BIC, places firms squarely in the crosshairs for class action litigation, the costs of which may be so prohibitive as to cause firms to stop offering advice to all but their wealthiest clients, where the trade-off between the increased compliance costs and potential compensation makes economic sense.[49]

This increase in litigation risk is an additional cost borne by firms who utilize the BICE that will likely cause firms to evaluate whether to increase the fees charged to consumers or reduce the scope of their retirement services offerings.[50] As a result, those retirement savers that were once able to access affordable advice tailored to help them reach their retirement goals through commission-based models will be priced out of individualized advice. Instead, they will be routed to robo-advisers[51] or be left to simply their own determinations. Importantly, there is no clear benefit to retirement savers that will result from this increased litigation risk and in fact, the potential differing results across jurisdictions may result in some savers having greater or fewer rights than others, depending upon state law. This disparity will not serve the objectives of the Rule but will simply lead to further confusion and uncertainty.

Part II The Department should rescind the Rule and allow for a unified set of regulations under SEC supervision

---

[49] One report estimates that class-action settlements could amount to $70 million to $150 million annually. *See* Morningstar, *Financial Services: Weighing the Strategic Tradeoffs of the Fiduciary Rule* (Mar. 30, 2017), at http://news.morningstar.com/articlenet/article.aspx?id=798573.

[50] *See* Brown, *supra* note 19.

[51] *See* Wealth Management, *Who's Happy About the DOL Rule*, WeathManagement.com (July 26, 2016) http://www.wealthmanagement.com/blog/who-s-happy-about-dol-rule (noting prediction that there will be a heavier reliance on robo-advisors after implementation of the Fiduciary Rule); Emily Zulz, *DOL Fiduciary Rule: Who Wins, Who Loses*, ThinkAdvisor (June 21, 2016), at http://www.thinkadvisor.com/2016/06/21/dol-fiduciary-rule-who-wins-who-loses (discussing Morningstar analyst expectation for robo-advisor growth as a result of the Fiduciary Rule).

One of the Core Principles in President Trump's Executive Order relating to regulation of the U.S. financial system[52] (the "Executive Order") is that regulation should be "*efficient, effective and appropriately tailored*" (Core Principal (f)). Many of the flaws of the Rule that we described in Section I of this letter also serve to demonstrate how the Rule fails to satisfy this Core Principle. The Rule is inefficient, because the Department's jurisdiction is limited to only a portion of the market for retirement products and therefore a financial professional will often be subject to multiple, varying standards of care.[53] The Rule is ineffective because the additional liability risks it imposes will inevitably cause a substantial reduction in choice of retirement products and services for many retirement savers.[54] Finally, the Rule is poorly tailored to achieve the Department's objective of greater consumer protection and lower fees in the retirement savings marketplace, because the sharply higher compliance and litigation costs borne by financial services providers who already act in the best interest of their clients in the vast majority of cases will be passed on to retirement savers in the form of a reduced range of options for retirement savers to build their retirement savings.[55]

With the Rule standing in clear opposition to Core Principle (f) and poised to produce the undesired outcomes highlighted in the Trump Memorandum, we urge the Department to rescind the Rule. Instead, the SEC, in close coordination with the Department and the NAIC, should craft a standard of care that would apply to all retirement services providers and ensure they always act in the best interest of their clients, but without disrupting the marketplace by burdening those providers with unnecessary and costly compliance requirements and liability risks.

A. The SEC is the appropriate agency for establishing a best interest standard

The SEC already oversees a longstanding, robust best interest standard of care that applies to registered investment advisers. As we noted in our July 21, 2015 comment letter on the proposed Rule, the SEC is already authorized under Section 913 of the Dodd-Frank Act to conduct a rulemaking for purpose of establishing a uniform standard of care for broker-dealers and investment advisers. Encouraging the SEC to move forward and develop a consolidated regulatory framework applicable to all sales of registered and non-registered products by registered advisors and broker-dealers would be in keeping with the intent behind Congress' harmonization directive under Dodd-Frank – based on an SEC finding, namely, that a regulatory regime which facilitates maintaining multiple business models is best for investors. As then-Commodities Futures Trading Commission ("CFTC") Commissioner Scott O'Malia stated in 2013 in the context of cooperation by the CFTC and the Federal Trade Commission in accordance with the Dodd-Frank directive, "We must harmonize our rules to prevent regulatory arbitrage from undermining our comprehensive financial reforms." Instead, the Rule creates confusion and conflict in the very

[52] *See supra* note 10.
[53] *See* Part I.B.2.
[54] *See* Part I.C.
[55] *See* Part I.A.

body of law Congress directed to be harmonized. In addition, harmonization would be consistent with the Executive Order, which promotes the Administration's goal of making regulation "efficient, effective, and appropriately tailored." Instead, the Rule creates confusion and conflict in the very body of law Congress directed to be harmonized.

A harmonized best interest standard promulgated by the SEC would leverage its existing, well-developed regulatory and judicial framework for enforcing standards of conduct for registered investment advisers. It would also avoid the increased compliance and litigation risks associated with conflicting regulatory regimes while giving both retirement savers and service providers the certainty they need when participating in the retirement services marketplace, and would also be more stringent than the current Financial Industry Regulatory Authority ("FINRA") suitability standards applicable to broker-dealers.

To ensure that similar standards of conduct would apply to sales of non-registered products by non-registered financial professionals, we would also encourage the Department to work with the NAIC and state regulators to develop a comparable best interest standard for such sales. The NAIC already has a model suitability standard for annuity sales that could be built upon to incorporate a best interest standard in line with the standard developed by the SEC.

B. An effective best interest standard must contain certain key elements

In contrast to the needlessly complex fiduciary standard set forth under the Rule, an effective best interest standard can readily be adapted from the SEC's existing standard of care for registered investment advisors. A principles-based best interest standard that contains the following elements would protect the interests of investors just as capably as the drafters of the Rule anticipated, while also allowing financial service providers to offer a broad array of investment products and services in a thriving, competitive market:

- **FINRA enforcement with no private right of action**. FINRA has successfully administered regulatory enforcement and oversight of the activities of registered investment advisors and broker dealers for many years. FINRA's rigorous examination and enforcement regime ensures market participants comply with the regulations governing their behavior or face considerable penalty, but does not provide investors with a private cause of action that would unnecessarily burden those participants without enhancing investor protection. State insurance regulators have similarly conducted oversight of sales of non-registered products under longstanding and robust rules with which all industry participants are familiar.

- **Broad range of permissible compensation**. The SEC's existing standard of care is principles-based, and does not favor one form of financial professional compensation over another. Similarly, a best interest standard of care should allow financial services providers flexibility in the forms of compensation that they pay in connection with a transaction, as long as such compensation is fully and clearly disclosed up front and otherwise does not render the transaction unsuitable for the investor.

- **Reasonable and effective disclosure requirements**. The voluminous upfront and ongoing disclosure obligations under the Rule are an unnecessary cost of doing business that far outweigh the benefits they purport to offer. In our experience, investors balk at receiving vast amounts of disclosure and eventually they just ignore it. Instead, we favor a comprehensive disclosure regime under which investors are able to obtain relevant and meaningful information, including important disclosures that cover compensation and conflicts of interest, while avoiding disclosure that is duplicative, costly to deliver or demanding of a substantial amount of company resources to produce.

- **Consistent treatment of qualified and non-qualified investments**. One of the flaws of the Rule is that the Department only has jurisdiction over tax-advantaged investments and proceeds. An SEC-issued standard would be much broader in scope, thereby offering certainty for financial professionals that advice provided with respect to all types of their client's investments are covered by a single standard.

- **Robust seller's exception**. Traditionally, within the regulatory framework governing the retirement services marketplace, pure selling activities have been distinguished from impartial investment advice under a seller's exception, which reflects the market reality that retirement savers can distinguish pure advice from advice provided in the context of sales and marketing of retirement products. This exception enables financial institutions to sell their proprietary products at a variety of price points, helping to ensure that small retirement plans, first-time and younger savers, and modest means savers who cannot afford or choose not to pay for individualized investment advice have access to affordable, high quality service options via a "one-stop shopping" transactional model which offers education, advice and product solutions in one transaction without the need for an ongoing relationship or ongoing advisory fees. This model is critical to engaging and servicing these plans and savers, who in addition to affordable options also often need motivation to enter the market in the first place. The Seller's Exception provides that inspiration and an appropriate entry point to the market by facilitating the use of the transactional model.

- **Standard of care not violated by limited product offerings**. Financial professionals can act in the best interest of their clients without being required to recommend the "least expensive" investment or investment strategy, or to consider all possible investments, products, or investment strategies before making recommendations to their clients.

A harmonized best interest standard of care that is established and administered by the SEC/FINRA, the NAIC and state regulators will therefore meet the requirements of the Executive Order by being (i) efficient, by building off existing and high functioning regulatory frameworks; (ii) effective, by protecting investors while preserving their access to personalized and affordable retirement savings education and advice for all retirement savers; and (iii) appropriately tailored, by ensuring financial professionals act in their client's best interests but without burdening them with unnecessary and costly compliance obligations and liability risks.

Notably, the Interim Rule does none of these things. It purportedly puts in place a fiduciary standard, but fails to provide adequate certainty to either industry participants or consumers as to the practicalities of this standard, which likely will result in confusion, misaligned expectations and increased risk. Making the current version of PTE 84-24 available does little to ameliorate this dilemma, given that firms may not be positioned to administratively comply with its requirements. And while there is no requirement to utilize the BICE until January 2018, firms will need to evaluate the increased risk of continuing to serve their clients without the certainty of the BICE's requirements of written disclosures and representations.

Part III If necessary, the Department must revise the Rule to make it effective and not overly burdensome

AXA US maintains that rescinding the Rule and allowing the SEC and state regulators to develop a uniform best interest standard, as described in Part II of this letter, is the best approach for addressing the serious flaws in the Rule. However, in the event the Department decides to revise rather than rescind the Rule, we believe the Rule should be revised to reflect a simplified, disclosure-based regime that effectively eliminates the current regulatory complexity and uncertainty. We would also urge the Department to reformulate those provisions of the Rule that conflict with existing SEC rules. In order to be consistent with the Core Principles outlined in the Executive Order, we submit that the Rule should be changed as follows:

1. **Restore a meaningful Seller's Exception**. We urge the Department to expand the Seller's Exception to cover small retirement plans and IRAs. The threshold for the exemption from fiduciary status under the Rule – accounts with $50 million or more in assets under management – is an arbitrary proxy for distinguishing fiduciary and non-fiduciary relationships. As long as retirement services providers clearly disclose up front that they are acting as sellers of their own services, they should be allowed to promote and market their own services and products without fiduciary status attaching. We believe small retirement plans and IRA owners are capable of distinguishing sales activity from fiduciary activity and understanding plain English disclosures. In fact, pure selling activities traditionally have been distinguished from fiduciary investment advice under the Seller's Exception, which reflects the common understanding of fiduciary duty and the ability of retirement savers to distinguish pure advice from advice provided in the context of sales and marketing of retirement products. Furthermore, expanding the Seller's Exception

would be consistent with the Administration's goal in the Executive Order to "empower Americans to make independent financial decisions and informed choices in the marketplace."[56]

Without the availability of the Seller's Exception to servicers of small retirement plans and IRAs, affordable high quality options could disappear because, as noted earlier, the price of products and services offered by retirement services providers is likely to increase due to the operational and compliance costs of expanded fiduciary liability. The remaining choice for first-time and younger savers and modest means savers – as well as small business retirement plan sponsors and participants[57] – would be to either pay for ongoing and comprehensive retirement services or essentially go without the advice and expertise of a financial professional, which is really no choice at all for those who cannot afford the former. Indeed, in the U.K., studies have shown that after the implementation of the RDR, investors are increasingly divided into two groups: those wealthy enough to be profitable for advisers and those unable or unwilling to pay the required fees who are left to garner information from public sources; in 2014 11 million consumers had fallen into this "advice gap."[58]

The Department has not made a compelling case to abandon this well-established industry convention, which at a minimum should be reflected in an expanded Seller's Exception that would allow sellers of proprietary products to continue to service this vital market segment with an array of choices for obtaining investment advice that includes the transactional model. We urge the Department to expand the Seller's Exception consistent with the Executive Order to include sales to all retirement plans and IRAs regardless of the amount of assets they have under management.

2. Restore variable annuities to PTE 84-24 (or create a similarly workable PTE). The Department should revert to pre-Rule PTE 84-24 so as to afford equal treatment to all retirement products within a specific category. There is no need for artificial distinctions in the regulation of the sale of fixed and variable annuities; in reality, variable annuities are far more like fixed annuities than mutual funds with respect to features and benefits:

- Both fixed and variable annuities include a fixed (general account) option with interest, mortality-based investment, and retirement income guarantees, and offer life-

[56] *See* Executive Order, *supra* note 10, at (a).

[57] The existence of employer-sponsored workplace savings programs dramatically increases savings rates. According to a study by the American Society of Pension Professionals & Actuaries, the single most important factor in determining if a worker is saving for retirement is whether or not a retirement plan is available at work; a review of participation rates by workers earning $30,000 to $50,000 annually showed that 71.5% of employees with access to a workplace plan save through that plan, whereas only 4.6% save in an IRA where there is no available workplace plan. *See* NATA Net, *Moderate Income Workers Depend on Their 401(k)s*, NAPA-Net.org (Nov. 7, 2012), at http://www.napa-net.org/news/managing-a-practice/industry-trends-and-research/moderate-income-workers-depend-on-their-401ks/.

[58] *See* Ass'n of Professional Financial Advisers, *supra* note 47; Wall, *supra* note 14.

contingent withdrawal options. Mutual funds and other securities investments do not provide these features.

- Nor do mutual funds and other securities investments offer another key feature of both fixed and variable annuities: the ability to draw down principal and income over the investor's life expectancy while the insurance company assumes the attendant longevity risk.

In short, annuities offer virtually the only means by which retirees can access guaranteed lifetime income. Therefore, to ensure that the types of guaranteed living benefits provided by variable annuities – which have proven popular with retirement savers and which provide them with substantial value – remain a part of the robust choice of retirement products available in the retirement marketplace, variable annuities should be restored to PTE 84-24.

3. **Create an effective and not overly burdensome BICE.** The BICE should be revised to better align with the practicalities of the retirement services marketplace and to reduce the regulatory uncertainty it creates in order to increase its utility and make it a truly viable prohibited transaction exemption. In particular, these modifications should:

- Eliminate the overly broad warranty provisions of BICE, which are unnecessary in the context of a best interest standard and would unduly expose financial institutions and advisers to litigation risk;

- Reduce regulatory uncertainty by reverting to SEC and FINRA enforcement regimes that provide for a centralized and proven mechanism for dispute resolution and are already rigorously enforced for fiduciaries, instead of providing for state law-based private causes of action for BIC enforcement; and

- Further reduce regulatory uncertainty with respect to the impartial conduct standard by explicitly stating that reasonableness is to be viewed in relation to customary practices prevailing in the marketplace at the time the compensation was earned.

Should the Department elect to revise the Rule, we would welcome the opportunity to partner with Department to craft a Rule that works effectively for retirement savers and service providers. We are confident that these modifications to the Rule would further the Department's goal of ensuring that all Americans have access to a broad range of high quality retirement products and investment advice at multiple price points without causing extensive and ultimately harmful disruption to the current retirement services marketplace.

* * *

We appreciate the opportunity to provide these comments and hope that the Department finds them useful. As we have stated consistently since the Rule was first proposed in 2015 and repeated in this letter, we support a standard of care that commits financial professionals to acting in the best interest of their clients. However, the Rule imposes a fiduciary standard of care that is excessively costly and burdensome to comply with and is already causing extensive and ultimately harmful disruption to the retirement services marketplace. The implementation of the Interim Rule will only compound this disruption. In closing, we respectfully request that the Department (1) recognize the significant disruptions that will be caused by the Interim Rule, and issue an order – prior to the June 9 implementation date of the fiduciary definition and Impartial Conduct Standards – delaying the Rule in its entirely to January 1, 2018; and (2) after conducting a thorough review of the Rule, rescind the Rule to make way for a more effective and efficient regulatory solution. Absent a revocation of the Rule, we ask that the Department take into consideration our recommendations regarding the substantial revisions needed and revise the Rule accordingly. By rescinding the Rule and either revamping it to make it effective and practical for both retirement services providers and retirement savers, or preferably, working with the SEC, the NAIC and other regulators and industry participants to implement a harmonized and practical best interest standard, the Department will have faithfully complied with the President's directive to craft a regulation that helps Americans make informed financial choices and save for a dignified and comfortable retirement.

Respectfully submitted,

Brian Winikoff

Appendix: Responses to selected Department questions in RIN 1210-AB79

__Question__: ***Are firms making changes to their line-ups of investment products, and/or to product pricing? What are those changes, what is the motivation behind them, and will the changes advance or undermine firms' abilities to serve their customers' needs?***

In order to comply with the Rule, our registered broker-dealer, AXA Advisors, LLC ("AXA Advisors") has determined that it will streamline its product and service offerings, in some instances eliminating products and/or services altogether while in others, limiting the choices available for clients. We believe that these changes are necessary in order to ensure that AXA Advisors, as a broker-dealer that is affiliated with an insurance company, can appropriately supervise and maintain the policies and procedures it will implement in order to comply with the Rule. In addition, given our decision to utilize the BICE for virtually all of our client relationships, these changes are designed to mitigate the significant litigation risk and related uncertainty associated with the BICE. Absent these changes, AXA Advisors would, as a practical matter, be concerned about its ability to fully comply with the Rule.

Overall, while some of these changes may lead to a reduction in fees charged for certain products and/or services, we believe that these changes will alter the manner in which we approach our objective of serving our customers' need by limiting the products and services that we can offer. We feel we have developed a platform with a more limited product set that can address our clients' needs. But at the same time, we believe it is regrettable that in making substantial changes to comply with the rule and manage the new liabilities it creates, we have been forced to limit choices across the board in the qualified space and limit the services we can provide for large groups of our existing customers. While some clients, due to their specific needs, will not be materially impacted by these changes, many more will in fact be materially impacted. In addition, we anticipate that the divergent standards applicable to qualified and non-qualified accounts may cause confusion for some consumers – and advisers – as they endeavor to maintain holistic advisory relationships but must grapple with differing requirements for different accounts.[59] We think it is important to emphasize that, but for the Rule, AXA Advisors would not choose to make these changes.

__Question__: ***Are firms making changes to their advisory services, and/or to the pricing of those services? Are firms changing the means by which customers pay for advisory services, and by which advisers are compensated? For example, are firms moving to increase or reduce their use of commission arrangements, asset-based fee arrangements, or other arrangements? With respect to any such changes, what is the motivation behind them, and will these changes advance or undermine firms' abilities to serve their customers' needs*?**

In addition to the AXA Advisors changes discussed above, media reports of decisions made by various firms in response to the compliance requirements of the Rule state that firms are changing their advisory services in an attempt to come into compliance. And although pricing information is less public, firms almost certainly will need to change their pricing as their advisory models shift as a result of the Rule.

---

[59] *See, e.g.*, O'Brien, *supra* note 16.

Firms are shifting away from commission-based services in favor of fee-based arrangements. Although for some retirement savers, fee-based arrangements may be beneficial, because the cost for trading is based on assets under management as opposed to a set up-front commission cost, for others a fee-based arrangement will be a costlier alternative. For instance, for those retirement savers who trade infrequently, compensation based on assets under management on a yearly basis may ultimately result in far greater payments to an adviser than would a commission-based fee.

It is worth noting that state regulators are beginning to wade into the regulatory space opened up by the Department's rulemaking, which is further complicating the efforts by industry participants to comply with the Rule. Connecticut, where legislation is under consideration that would require certain conflict of interest disclosures by providers of services to retirement plans,[60] provides an example of state activity that could conflict with the interpretation of the Department's Rule. Such examples underscore the importance of cohesive regulation that will promote the interests of consumers in an efficient and productive manner.

Question: ***For those firms that intend to make use of the Best Interest Contract Exemption, what specific policies and procedures have been considered to mitigate conflicts of interest and ensure impartiality? How costly will those policies and procedures be to maintain*?**

As discussed above, AXA Advisors intends to utilize the BICE for virtually all of our client relationships subject to the Rule. As a result of that decision, AXA Advisors has made numerous changes in order to mitigate conflicts of interests, including reducing its product and service offerings – in some instances eliminating products and/or services altogether while limiting the choices available for clients in others, as well as changing its fee and/or compensation structure for many of its product and service offerings. These changes will result in significant direct costs – in the low tens of millions prior to implementation of the Rule, with estimated additional ongoing direct costs in the single-digit millions. On an indirect basis, although it is difficult to quantify the magnitude of such costs, they are no doubt significant: We had projected a reduction of approximately one-fifth of our annuity sales for 2017 alone (assuming Rule implementation on April 10, 2017).

Question: ***Have market developments and preparation efforts since the final rule and PTEs were published in April 2016 illuminated whether or to what degree the final rule and PTEs are likely to cause an increase in litigation, and how any such increase in litigation might affect the prices that investors and retirees must pay to gain access to retirement services? Have firms taken steps to acquire or increase insurance coverage of liability associated with litigation? Have firms factored into their earnings projections or otherwise taken specific account of such potential liability*?**

Media reports indicate that many firms will seek to comply with the Rule by utilizing the BICE, which provides for enforcement by private litigation. Accordingly, there can be no doubt that the Rule will result in increased litigation, the costs of which are certain to be passed on to

[60] *See* Conn. H. 7161, Retirement Plan: Fiduciary: Disclosure Section 403(b) of Internal Revenue Code: Section 457 of Internal Revenue Code.

retirement savers in the form of reduced options for accumulating retirement savings. In particular, the BICE's prohibition against class action waivers in the Best Interest Contract – as well as liquidated damages provisions – will drive costs up significantly. Class actions are extremely expensive to litigate, both because of outside counsel and discovery costs and because of the shifting of internal attention and resources that can be disruptive to running a business, not to mention the significant exposure they present to defendants (made all the more significant by the prohibition against liquidated damages provisions). Notably, even frivolous lawsuits ultimately found to be groundless can be very expensive to defend, and in the absence of a "loser-pay" civil action system, there is limited disincentive to bringing such claims. In order for even the largest firms to cope with such legal and financial uncertainty, the increased expense of litigation in post-Rule marketplace will be costly for industry participants, and, coupled with the expected elimination of certain product offerings, the result once again will be reduced choices for retirement savers.

Question: ***The Department's examination of the final rule and exemptions pursuant to the Presidential Memorandum, together with possible resultant actions to rescind or amend the rule, could require more time than this proposed 60-day extension would provide. What costs and benefit considerations should the Department consider if the applicability date is further delayed, for 6 months, a year, or more*?**

As discussed above, the Department should consider the significant benefits of delaying all aspects of the Rule until January 1, 2018.[61] Specifically, the delay would allow the Department to conduct an updated legal and economic analysis of the impact of the Rule as contemplated by the Trump Memorandum. In addition, a delay of the entire Rule will avoid the confusion and disruption created by the interim Rule.[62] In short, we believe there is little cost to delaying the implementation of all aspects of the Rule an additional six months to provide the Department a chance to thoroughly complete an updated legal and economic analysis, while there is much to be gained by deferring the implementation of the Interim Rule, which we believe will be harmful to industry participants and consumers.

Question: ***How has the pattern of market developments and preparation efforts occurring since the final rule and exemptions were published in April, 2016, compared with the implementation pattern prior to compliance deadlines in other jurisdictions, such as the United Kingdom, that have instituted new requirements for investment advice? What does a comparison of such patterns indicate about the Department's prospective estimates of the rule's and exemptions' combined impacts*?**

The experience of other jurisdictions supports the need to undertake a careful examination of the Rule and its possible consequences. In particular, considering the effect of a similar rule in the U.K. on its retirement services marketplace, implementation of the Rule is likely to have significantly detrimental consequences for retirement savers, thus casting considerable doubt on the Department's prospective estimates of the Rule's impact.

[61] *See supra*, "Interim Rule."
[62] *Id*.

The U.K. parallel to the Fiduciary Rule, a set of recommendations from the Retail Distribution Review ("RDR"), was adopted in 2013 by the U.K. Financial Services Authority ("FSA"). The RDR prohibited investment advisers from receiving commission-based compensation – as here, shifting them to fee-based models. Advisers also were required to provide disclosures regarding whether they were independent or restricted – meaning only offering products from one provider, and had to meet higher qualifications to remain registered as an adviser with the FSA.

When the U.K. rule first became effective, commenters predicted that it would have negative impacts on retirement savers. One study published at the time of the rule's enactment found that overwhelmingly, clients were unlikely to pay for financial advice.[63] In addition, it predicted that both the demand for and the supply of financial advice would diminish.[64] Overall, it estimated that a significant portion of the population would need financial advice but would not have it – a "guidance gap".[65] Another study found that, in the year before the rule was to take effect, the number of FSA-registered advisers dropped from 40,000 to 31,000.[66]

These studies have proven to be more than just academic – the actual ramifications of the rule have now begun to be felt across the financial services industry in the U.K. For instance, a study conducted by Association of Professional Financial Advisers concluded that consumers are increasingly divided into two groups: those consumers who are wealthy enough to be profitable for advisers and so have access to more professionalism and transparent service from advisers today, and those who are unable or unwilling to pay advisory fees and so are increasingly forced to turn to public sources for information and may be worse off than their wealthier counterparts.[67] Another source reported in 2014 that 11 million consumers in the U.K. considered financial advice too expensive and therefore had fallen into the "advice gap" caused by the RDR.[68] And a study performed for the Financial Conduct Authority ("FCA") (the successor to the FSA) found that for those currently without advisers, 52% of respondents say they would seek advice when starting pension or planning retirement, yet only small numbers of consumers would seek advice for modest sums: 4% for an amount of approximately $6,000, and 31% for approximately $25,000.[69] These figures support the conclusion that there are consumers who want retirement planning advice but are unwilling or unable to afford it and that, as a whole, the RDR may be having unintended and detrimental consequences. Not surprisingly, the FCA is continuing to conduct reviews to determine whether the RDR is actually leading to the desired results.[70]

---

[63] *See* Cass Consulting, *The Guidance Gap* 1 (Jan. 2013), available at http://www.cassknowledge.com/sites/default/files/article-attachments/the-guidance-gap.pdf.
[64] *Id*.
[65] *Id*.
[66] *See* Cass Consulting, *The Impact of the RDR on the UK's Market for Financial Advice* 1 (June 2013), at http://www.cass.city.ac.uk/__data/assets/pdf_file/0016/202336/The-impact-of-RDR-Cass-version.pdf [hereinafter Cass Consulting, *Impact*].
[67] *See* Ass'n of Professional Financial Advisers, *supra* note 47.
[68] Emma Wall, *supra* note 14.
[69] MNG Consulting, *Impact of the Retail Distribution Review on Consumer Interaction With the Retail Investments Market* 12 (Sept. 2014), available at https://www.fca.org.uk/publication/research/impact-of-rdr-consumer-interaction-retail-investments-market.pdf.
[70] Financial Conduct Authority, *Post-Implementation Review of the Retail Distribution Review* (Dec. 16, 2014), at https://www.fca.org.uk/news/news-stories/post-implementation-review-retail-distribution-review.

We urge the Department to take note of the experience in the UK, as many of the predicted outcomes there that are now coming to pass are also expected to result from implementation of the Rule here and, in some cases, are already being seen. Indeed, as we have indicated from the outset of the public comment periods regarding the Rule, the Rule is likely to restrict opportunities for retirement savers to obtain even basic investment education and will inevitably cause a dramatic reduction in choice for retirement savers, without meaningfully enhancing consumer protection. In short, notwithstanding the Department's prospective estimates of the Rule's impact, as the U.K. experience demonstrates, the Rule will frustrate its stated goals rather than promote them.

Question: ***To what extent have the rule's and exemptions' costs already been incurred and thus cannot, at this point in time, be lessened by regulatory revisions or delays? Can the portion of costs that are still avoidable be quantified or otherwise characterized? Are the rule's intended effects entirely contingent upon the costs that have not yet been incurred, or will some portion be achieved as a result of compliance actions already taken? How will they be achieved and will they be sustained*****?**

For AXA Advisors, more than one-third of its budget for up-front costs associated with compliance with the Rule has yet to be incurred, and accordingly, could be avoided were the Rule to be revised. In addition, AXA Advisors would not have to expend annual maintenance costs, such as those required for IT updates, mailings, and personnel to oversee compliance with the Rule in that circumstance. Similarly, with respect to compliance actions, a significant portion of the compliance actions taken by AXA Advisors result from its decision to use the BICE with respect to virtually all of its client relationships. Were the Rule and/or the BICE to be significantly revised, AXA Advisors might adjust its planned actions or take different actions which could have different impacts on both the firm and its clients. As discussed throughout our comment letter, many of the Rule's intended effects are made redundant by the existing regulatory framework to which broker-dealers such as AXA Advisors are already subject. Therefore, we believe that consumer protection would remain strong in the absence of the Rule, and at the same time, significant cost savings could be achieved even at this late date with a repeal of or significant revisions to the Rule. Notably, meaningful changes to the Rule could significantly reduce the expected amount of litigation otherwise expected as discussed above.

Question: ***Have there been changes in the macroeconomy since early 2016 that would have implications for the rule's and exemptions' impacts (for example, a reduction in the unemployment rate, likely indicating lower search costs for workers who seek new employment within or outside of the financial industry)*****?**

First, as discussed in Part I of our letter, the disruption caused by the pending implementation of the Rule has resulted in a sharp decrease in sales of variable annuities, one of the only means available to retirement savers to obtain guaranteed lifetime income. With our nation facing a retirement savings crisis, in which one-third of Americans report that they have no retirement savings and, of those with savings, 23 percent report having less than $10,000 saved,[71] this reduction in access to a critical retirement solution will mean an ever-increasing portion of the cost of caring for our country's retirees will ultimately have to be funded by taxpayers.

Second, the trend of increasing allocation to passively managed investments accelerated in 2016: Morningstar noted that "U.S. investors favored passive funds over active by a record margin in 2016," with passive fund strategies in the United States taking in a record $504.8 billion during 2016.[72] This continued flight to passive investments will, in and of itself, raise many systemic risks. For example, studies indicate that an increase in allocations to passively managed investments increase systemic market risk in two primary ways: (1) elevating levels of overall market volatility – driven by increased correlations of stock returns and a reduction of active investors who are willing to take "opposite views" – and leading to higher market risk premiums as investors demand compensation for increased volatility; and (2) creating an inability to detect and remedy deviations in security prices from fair market value (e.g. price bubbles), which results in inefficient markets and ultimately lower returns or even losses for investors. Implementation of the Rule – with its acknowledged bias in favor of such investments – will serve only to exacerbate these risks, which may outweigh any perceived benefits of the Rule to consumers. At the very least, the Department must analyze this risk and the potential consequences of implementing the Rule in an economic environment in which a flight to passive investments is already well underway.

<u>Question</u>: ***In response to the approaching applicability date of the rule, or other factors, has the affected industry already responded in such a way that if the rule were rescinded, the regulated community, or a subset of it, would continue to abide by the rule's standards? If this is the case, would the rule's predicted benefits to consumers, or a portion thereof, be retained, regardless of whether the rule were rescinded? What could ensure compliance with the standards if they were no longer enforceable legal obligations?***

The assumption underlying the Rule seems to ignore that even without the Rule there is substantial regulation already in place to ensure the protection of retirement savers. This existing regulatory scheme – which has offered substantial protection for consumers for years – will continue to provide appropriate regulation and professional oversight were the Rule to be rescinded. In fact, as we have previously stated, implementation of the Rule, which is in many respects incongruous with these other existing regulatory protections, serves only to create an additional compliance burden without providing any meaningful enhancement to consumer protection.

For instance, the SEC regulates the conduct of registered investment advisers through the Advisers Act and related rules and regulations. Importantly, the Advisers Act was part of a framework established by Congress to address abuses it believed existed in the industry. Based in part on an SEC report regarding the potential conflict of interest issues, it imposes a fiduciary

[71] *See* Elyssa Kirkham, *1 in 3 Americans Has Saved $0 for Retirement*, Money (May 14, 2016), at http://time.com/money/4258451/retirement-savings-survey/.
[72] Morningstar, *Morningstar Direct Asset Flows Commentary: United States* 1-2 (Jan. 11, 2017), at https://corporate.morningstar.com/US/documents/AssetFlows/AssetFlowsJan2017.pdf.

duty on advisers to act in the best interest of their clients, including providing full disclosure of all facts material to an engagement, disclosing disciplinary actions, and providing advice suitable to a client's financial situation and investment needs.[73] Thus, were the Rule to be rescinded, registered investment advisers will continue to comply with the fiduciary duties imposed by the Advisers Act, which includes the duty to act in their client's best interest.

FINRA also has regulatory authority over broker-dealers and investment advisers under the Securities Exchange Act of 1934 (the "Exchange Act"). It has established rules and regulations applicable to broker-dealers and investment advisers which provide guidance regarding obligations toward clients with respect to conflicts of interest, suitability and fair dealing, and standards of conduct.[74] FINRA conducts thousands of exams each year, and takes disciplinary action where warranted. Again, even if the Rule were rescinded, the obligations imposed by the Exchange Act would continue to apply to broker-dealers and registered investment advisers, thus ensuring that robust consumer protection would remain in place.

These regulatory frameworks provide consistent and appropriate oversight and robust consumer protection in the marketplace and will continue to do so irrespective of whether the Rule is implemented or rescinded. Thus, even without any best interest rule, there are sufficient protections and oversight regimes in place. The Rule does not add to this framework, but instead threatens to provide a conflicting regime over these already existing standards.

[73] *See* SEC, *Regulation by Investment Advisers by the U.S. Securities and Exchange Commission* 1, 22-28 (Mar. 2013), at https://www.sec.gov/about/offices/oia/oia_investman/rplaze-042012.pdf.
[74] *See* FINRA Rule 2010, Standards of Commercial Honor and Principles of Trade; FINRA Regulatory Notice 13-45, *Rollovers to Individual Retirement Accounts* (Dec. 2013).