FINANCIAL PLANNING COALITION

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attention: Conflicts of Interest Rule
Room N-5655

Office of Exemption Determinations
Employee Benefits Security Administration
Attention: D-11712 and D-11713

United States Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

RE: Definition of the Term "Fiduciary" - Delay of Applicability Date, RIN-1210-AB79

Ladies and Gentlemen:

The Financial Planning Coalition (Coalition),[1] comprised of the Certified Financial Planner Board of Standards (CFP Board), Financial Planning Association® (FPA®) and National Association of Personal Financial Advisors (NAPFA), submits the following comments to supplement those filed on March 15, 2017 (hereinafter "Original Comment Letter"),[2] on the proposal by the Department of Labor, Employee Benefits Security Administration (hereinafter the Department) for a 60-day delay to the applicability date for the definition of the term "fiduciary" under the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code (IRC) (hereinafter "Delay Rule").[3] CFP Board is a non-profit certification and standard-setting organization, which sets competency and ethical standards for over 76,000 CERTIFIED FINANCIAL PLANNER™ professionals throughout the country.[4] FPA® is the largest membership organization for CFP® professionals and those who support the

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[1] The Coalition is a collaboration of the leading national organizations representing the development and advancement of the financial planning profession. Together, the Coalition seeks to educate policymakers about the financial planning profession, to advocate for policy measures that ensure financial planning services are delivered with fiduciary accountability, and to enable the public to identify trustworthy financial planners.

[2] Letter from Kevin R. Keller, Chief Executive Officer, CFP Board, Lauren Schadle, Executive Director / Chief Executive Officer, FPA®, and Geoffrey Brown, Chief Executive Officer, NAPFA, to Office of Regulations and Interpretations, Employee Benefit Security Administration, U.S. Department of Labor (Mar. 15, 2017), *available at* http://financialplanningcoalition.com/wp-content/uploads/2017/03/FinancialPlanningCoalition_Comment-RIN-1210-AB79.pdf.

[3] Definition of the Term "Fiduciary" - Delay of Applicability Date, 82 Fed. Reg. 12319 (Mar. 2, 2017) (to be codified at 29 C.F.R. pt. 2510).

[4] CFP Board's mission is to benefit the public by granting the CFP® certification and upholding it as the recognized standard of excellence for the delivery of competent and ethical personal financial planning services. CFP® professionals voluntarily agree to comply with CFP Board's rigorous standards including education, examination, experience and ethics and subject themselves to disciplinary oversight of CFP Board.

financial planning process in the U.S. with over 23,000 members nationwide.[5] NAPFA is the nation's leading organization of fee-only comprehensive financial planning professionals with more than 2,500 members.[6]

The Coalition believes that a strengthened fiduciary rule under ERISA is essential for America's Retirement Investors and is workable for Advisers,[7] and we strongly support implementation of the Department's final fiduciary rule (hereinafter "Final Rule").[8] For those who truly want to strengthen retirement security and ensure that Advisers protect their clients' best interests, allowing the Final Rule to be implemented without modification is the best way to achieve those goals. The Final Rule is fully consistent with the principles of a true fiduciary standard under ERISA. Modifying the Final Rule is unnecessary, unwarranted and will only serve to derail this long overdue reform necessary to protect and preserve Americans' retirement savings.

The Coalition brings a unique perspective to this discussion. Coalition stakeholders and members have committed to provide financial planning services under a fiduciary standard of conduct.[9] CFP® professionals hold registrations and/or licenses across business models as investment adviser representatives, registered representatives of broker-dealers and/or insurance agents and in many instances hold dual or multiple registrations or licenses. Regardless of business model, or compensation model, they are obligated to provide financial planning services under a fiduciary standard of conduct. The views stated in this comment letter are based on the real-world experience of the Coalition in applying the fiduciary standard across business and compensation models.

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5 With a national network of 91 chapters and state councils, FPA® represents tens of thousands of financial planners, educators and allied professionals involved in all facets of providing financial planning services. FPA® works in alliance with academic leaders, legislative and regulatory bodies, financial services firms and consumer interest organizations to represent its members.

6 NAPFA members adhere to some of the highest standards in the profession and annually each advisor must sign and renew a Fiduciary Oath and subscribe to the Association's Code of Ethics. NAPFA-affiliated advisors are committed to the organization's core values of competency, commitment to holistic financial planning, compensation under a model that facilitates objective advice, client-centered standard of care, complete disclosure of potential conflicts of interest and explanation of fees.

7 The term "Adviser" as used herein is defined in the Final Rule and includes any individual or entity who is, among other things, a representative of a registered investment adviser, a bank or similar financial institution, an insurance representative and company, or a registered representative of a broker-dealer and broker-dealer. Accordingly, the term "Adviser" is not limited to investment advisers registered under the Investment Advisers Act of 1940 or under applicable state law.

8 Definition of the Term "Fiduciary," 81 Fed. Reg. 20,846 (Apr. 6, 2016) (to be codified at 29 C.F.R. pt. 2510).

9 *See* CFP Board *Standards of Professional Conduct*, Rule of Conduct 1.4 *available at* http://www.cfp.net/for-cfp-professionals/professional-standards-enforcement/standards-of-professional-conduct/rules-of-conduct; NAPFA, "Mission and Fiduciary Oath," *available at* https://www.napfa.org/about/FiduciaryOath.asp.

I. <u>The Department's Rushed Reconsideration Process Contradicts the Prior Comprehensive Process for Promulgating the Final Rule</u>

The Department's review does not meet the requirements of the Administrative Procedure Act (APA)[10] and Executive Orders, which affect the level of regulatory analysis conducted by Federal agencies.[11]

Executive Order 12866, states that the public's opportunity to comment, "in most cases should include a comment period of not less than 60 days."[12] This was reaffirmed by Executive Order 13563: "[t]o the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days"[13] Executive Order 13563 also directs agencies, before issuing a notice of proposed rulemaking, each agency, where feasible and appropriate, shall seek the views of those who are likely to be affected, including those who are likely to benefit from and those who are potentially subject to such rulemaking.[14]

The Coalition is disturbed that not only were many affected groups not contacted, public reports reflect that only those groups opposing the rule may have been involved in the process. If news reports are accurate, Final Rule opponents have already been given a significant procedural advantage by being directly involved in the drafting of the Presidential Memorandum[15] on which the reconsideration proposal is based. A lobbyist for the Financial Services Roundtable acknowledged, for example, having taken part in reviewing and making recommendations on the Presidential Memorandum.[16]

The Department's rushed reconsideration process also directly contradicts the thoughtful and comprehensive process followed by the Department when promulgating the Final Rule. The Department's Final Rule thoroughly addresses issues raised by firms, industry organizations and consumer and public interest organizations concerning the Department's initial fiduciary rule proposal published in 2015.[17] Specifically, the Department listened to and addressed these concerns, and then issued a final, comprehensive rulemaking that included: a revised definition of who is a "fiduciary" under ERISA which extends the applicability of fiduciary duty to all retirement assets; principles-based Prohibited Transaction Exemptions (PTEs) to provide flexibility across business models for Advisers to adhere to a fiduciary standard; and a Regulatory Impact Analysis

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[10] 5 U.S.C. §§ 501 *et seq.*

[11] Executive Order 12866, "Regulatory Planning and Review," 58 FR 51735, Oct. 4, 1993; Executive Order 13563, "Improving Regulations and Regulatory Review," 76 FR 3821, Jan. 21, 2011.

[12] Executive Order 12866, "Regulatory Planning and Review," 58 FR 51735, Oct. 4, 1993.

[13] Executive Order 13563, "Improving Regulations and Regulatory Review," 76 FR 3821, Jan. 21, 2011.

[14] *Id.*

[15] Presidential Memorandum on Fiduciary Duty Rule, Feb. 3, 2017, *available at* https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-memorandum-fiduciary-duty-rule.

[16] Charles Lane, "Trump Thwarts Action On Dodd-Frank Investor Protection," WSHU PUBLIC RADIO, Feb. 5, 2017, http://bit.ly/2kLoCyK.

[17] Definition of the Term "Fiduciary," 80 Fed. Reg. 21,928 (Apr. 20, 2015) (to be codified at 29 C.F.R. pt. 2510).

that, consistent with APA requirements, identified the costs, benefits and the economic justification for the Final Rule.

As the expert agency, the Department engaged in a rulemaking process that worked precisely as intended. The Department initially re-proposed its fiduciary rule on April 20, 2015 and provided a 75-day comment period, ending on July 6, 2015. The Department extended the comment period to July 21, 2015, to allow interested persons additional time to comment on the new proposal and proposed related exemptions. The Department held four days of public hearings (August 10 - 13, 2015) in Washington D.C. during which more than 75 speakers testified. The Department published the hearing transcript on its website on September 8, 2015, and provided additional opportunities to comment on the proposed regulation, exemptions, and hearing transcript until September 24, 2015.[18]

The record supporting the Final Rule is both substantial and comprehensive. The Department received more than 3,000 individual comment letters and more than 300,000 submissions as part of 30 separate petitions on the proposal. These comments and petitions "came from consumer groups, plan sponsors, financial services companies, academics, elected government officials, trade and industry associations, and others, both in support of, and in opposition to, the proposed rule and proposed related exemptions."[19] The Department also "held numerous meetings with interested stakeholders at which the Regulatory Impact Analysis was discussed."[20]

Additionally, throughout the comment process, former Secretary Perez and Department staff held hundreds of meetings with Members of Congress, financial services firms and organizations and consumer groups. In fact, both Republicans and Democrats commended the Department for its willingness to listen to all viewpoints.

The Final Rule addresses concerns raised by firms, industry organizations, consumer and public interest organizations, and Members of Congress. The process worked as it should have. Companies and organizations, which were initially skeptical, later stated publicly that the Department listened carefully to and responded to their concerns.[21]

Under well-settled principles of federal administrative law, a federal agency may not announce a position that abruptly changes direction from prior agency pronouncements without providing a reasoned explanation for the change.[22] Courts have held that "an agency must explain why the

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18 Final Fiduciary Rule, 81 Fed. Reg. at 20,958.

19 *Id.*

20 RIA, *supra* note 27, at 6.

21 *See, e.g.*, NAIFA, Fiduciary (Retirement Accounts), *available at* http://www.naifa.org/advocacy/federal-issues-positions/fiduciary-(retirement-accounts) ("NAIFA's efforts … resulted in meaningful improvements to the final regulation and related exemptions"); Financial Services Institute (FSI), Final DOL Fiduciary Rule Summary, *available at* http://www.financialservices.org/uploadedFiles/FSI_Content/Docs/DOL/Final_DOL_Fiduciary_Rule_Summary.pdf ("[T]he final rules are responsive to FSI's comments in a number of respects.").

22 Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 42 (1983) ("an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance"); Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 808 (1973) (an agency has a duty to "explain its departure from prior norms"); Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) ("Unexplained inconsistency is … a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act.").

original reasons for adopting the rule or policy are no longer dispositive"[23] and that "[w]hen an agency departs from its own prior precedent without explanation … its judgment cannot be upheld."[24] Accordingly, the Department must address why it believes the current process for the Delay Rule is adequate; any failure to do so would be an "arbitrary and capricious" act under the APA.[25]

II. **The Department Must Ensure the Regulatory Impact Analysis Adequately Accounts for Investor Harm**

The Department's reconsideration must adequately take into account the scope of harm to investors from any modification or repeal of the Final Rule.

Courts have held when an agency relies on a cost-benefit analysis as part of its rulemaking, a serious flaw undermining that analysis can render the rule unreasonable.[26] The Department has not adequately explained what environmental changes, if any, led the Department to believe the Final Rule and Regulatory Impact Analysis, completed barely one year ago, are now inadequate or defective.

The prior regulatory framework allowed Advisers to make recommendations that placed Advisers' interests ahead of Retirement Investors' interests. Because of this misalignment of interests, Retirement Investors often faced financial harm, in the form of higher costs and lower savings. Based on a careful review of the evidence, the Department concluded the underperformance associated with conflicts of interest – in the mutual fund segment alone – could cost IRA investors between $95 billion and $189 billion over the next 10 years, and between $202 billion and $404 billion over the next 20 years.[27]

While the Department recognized in its Regulatory Impact Analysis that some businesses "may need to undertake major changes to adviser incentive structures and loyalties, and/or lose market shares to businesses more prepared or willing to align adviser and investor interests and honor fiduciary norms,"[28] it also concluded that Retirement Investors *"could lose 6 to 12 and as much as 23 percent of the value of their savings by accepting conflicted advice."*[29]

In the Delay Rule proposal, the Department found investor gains would be reduced by $104 million, using a three percent discount rate and $87 million, using a seven percent discount rate. Compliance

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23 Brae Corp. v. United States, 740 F.2d 1023, 1038 (D.C. Cir. 1984) (citing *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42).

24 Manin v. NTSB, 627 F.3d 1239, 1243 (D.C. Cir. 2011).

25 Seldovia Native Ass'n, Inc. v. Lujan, 904 F.2d 1335, 1345 (D.C. Cir.1992) (requiring the agency "to show not only that its new policy is reasonable, but also to provide a reasonable rationale supporting its departure from prior practice").

26 Nat'l Ass'n of Home Builders v. Envtl. Prot. Agency, 682 F.3d 1032, 1040 (D.C. Cir. 2012); *see also* City of Portland v. Envtl. Prot. Agency, 507 F.3d 706, 713 (D.C. Cir. 2007) (noting that the court "will [not] tolerate rules based on arbitrary and capricious cost-benefit analyses").

27 U.S. Dep't of Labor, *Fiduciary Investment Advice: Regulatory Impact Analysis*, p. 9, April 2016, *available at* https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/conflict-of-interest-ria.pdf.

28 *Id.* at 309.

29 Final Fiduciary Rule, 81 Fed. Reg. at 20,949 (emphasis added).

costs for the industry would only be $8 million, using a three percent discount rate and $9 million, using a seven percent discount rate.

A recent Economic Policy Institute analysis concludes that for "every seven days that the fiduciary rule's applicability is delayed, it will cost retirement savers $431 million over the next 30 years. Thus, the costs of a 60-day delay to retirement savers is $3.7 billion, and each additional 30-day delay will add $1.85 billion to that estimate."[30] For example, if the Final Rule is delayed for six months, it will cost investors $11.1 billion over the next 30 years and a one-year delay will cost investors $22.2 billion over the next thirty years. If the Final Rule is repealed or weakened through modification, the costs incurred by Retirement Investors could increase exponentially.

The Coalition believes the distinction between sunk and on-going costs for firms and Advisers and future compounded costs for investors is critical. While firms and advisors will incur up-front and on-going compliance costs for implementation, Retirement Investors' losses will be compounded over the life of the investment product; even if investors quickly act to unwind conflicted advice, they could incur substantial fees from extricating themselves from certain products.

Investors who receive conflicted advice will have no recourse under ERISA if the Final Rule is modified or repealed, while firms that proceed with implementing the Final Rule will not be required to unwind these changes even if the rule is modified or repealed. This contention is affirmed by a recent report reflecting that firms have shown "a willingness to cut losses on DoL compliance spending."[31] At the same time, a recent Order from the Northern District of Texas District Court cited Lisa Bleier, Managing Director for Public Policy and Advocacy and Associate General Counsel at the Securities Industry and Financial Markets Association ("SIFMA"), in saying that "the industry will not incur certain compliance costs until the rules actually become applicable" and "industry members have not committed to whether they will use BICE or stop using the commission-based compensation model altogether, and that many firms have not made other irreversible compliance decisions."[32]

The Department needs to address why it believes any modification or repeal is warranted when, under its own current and previous analyses, investor harm greatly outweighed any cost savings for the industry.

III. **Modification or Repeal of the Final Rule is Contrary to ERISA's Language and Purpose**

The Supreme Court has repeatedly held that the validity of a regulation will only be sustained if it is "reasonably related to the purposes of the enabling legislation."[33]

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[30] Letter from Heidi Shierholz, Director of Policy at the Economic Policy Institute, to Office of Regulations and Interpretations, Employee Benefit Security Administration, U.S. Department of Labor (Mar. 17, 2017), *available at* http://www.epi.org/publication/epi-comment-on-the-proposal-to-extend-the-applicability-date-to-the-fiduciary-rule/.

[31] Andrew Shilling, "Asset managers focus on SEC compliance over DoL rule," Mar. 17, 2017, FinancialPlanning.com, *available at* https://www.financial-planning.com/news/asset-managers-focus-on-sec-compliance-over-dol-rule.

[32] Chamber of Commerce of the United States v. Hugler, 2017 U.S. Dist. LEXIS 39806, *14-15 (N.D. Tex. Mar. 20, 2017).

[33] Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268, 280-81 (1969); AFL-CIO v. Brock, 835 F.2d 912, 918 (D.C. Cir. 1987) (rejecting agency's explanation for its change of course in part because there had been no change in underlying statute).

In the Preamble to the Final Rule, the Department stated it was replacing the prior five-part test "with a definition of fiduciary investment advice that better reflects the broad scope of the statutory text and its purposes and better protects plans, participants, beneficiaries, and IRA owners from conflicts of interest, imprudence, and disloyalty."[34] In the Northern District of Texas, the Court held that the prior five-part test, which will continue to apply under a delay, is at "odds with the statute's text and its broad remedial purpose, especially given today's market realities and the proliferation of participant-directed 401(k) plans, investments in IRAs, and rollovers of plan assets to IRAs" and that the Department's current rule "better comports with the text, history, and purposes of ERISA."[35] The Court further reasoned "ERISA was enacted on the premise that the then-existing disclosure requirements did not adequately protect Retirement Investors, and more stringent standards of conduct were necessary."[36]

The Department must address these issues and clearly explain why it believes any modification or repeal of the Final Rule is consistent with the language and purpose of ERISA; any failure to do so would be an "arbitrary and capricious" act under the APA.[37]

IV. The Department's Final Rule Meets the Requirements of the Presidential Memorandum

The Presidential Memorandum directs the Department to review the Final Rule and to consider, among other things: (1) "Whether the anticipated applicability of the Fiduciary Duty Rule has harmed or is likely to harm investors due to a reduction of Americans' access to certain retirement savings offerings, retirement product structures, retirement savings information, or related financial advice;" (2) "Whether the anticipated applicability of the Fiduciary Duty Rule has resulted in dislocations or disruptions within the retirement services industry that may adversely affect investors or retirees;" and (3) "Whether the Fiduciary Duty Rule is likely to cause an increase in litigation, and an increase in the prices that investors and retirees must pay to gain access to retirement services."[38]

The Coalition believes any reconsideration or repeal of the Final Rule is unwarranted and unnecessary. The Final Rule (i) provides greater protection for investors; (ii) has not resulted in substantial dislocation in the financial services industry; and (iii) will likely not lead to any substantial increase in litigation.

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34 Final Fiduciary Rule, 81 Fed. Reg. at 20,946.

35 *Chamber of Commerce of the United States*, 2017 U.S. Dist. LEXIS 17619 at *22.

36 *Id.* at *41 (citing H.R. Rep. No. 93-533 (1973) ("Experience...has demonstrated the inadequacy of the...Disclosure Act in regulating the private pension system for the purpose of protecting rights and benefits due to workers. It is weak in its limited disclosure requirements and wholly lacking in substantive fiduciary standards.")).

37 NLRB v. Indianapolis Mack Sales and Serv., Inc., 802 F.2d 280, 284 (7th Cir. 1986) ("When an agency changes course, a reviewing court must be satisfied that the agency was aware of, and has given sound reasons for, the change, and that it has shown that the new rule is consistent with the statutory duties.").

38 Presidential Memorandum on Fiduciary Duty Rule, Feb. 3, 2017, *available at* https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-memorandum-fiduciary-duty-rule.

a. **Expansion of Fiduciary Protection under the Department's Final Rule Protects Consumers**

The Final Rule increases ERISA fiduciary-level advice to retirement plans, plan beneficiaries and IRA owners; addresses the long-standing misalignment of interests in the marketplace; reduces consumer confusion; and substantially increases protections for Retirement Investors.

The Department's Final Rule specifically addresses the misalignment of interests in the marketplace by closing the loopholes in the prior five-part test for defining a fiduciary Adviser under ERISA, thereby requiring all Advisers who provide advice related to retirement assets to be fiduciary Advisers under ERISA. Requiring fiduciary accountability for all advice related to retirement assets builds in needed protections for Retirement Investors. Fiduciary Advisers will help Retirement Investors navigate complex products and services in the financial marketplace by providing recommendations in the Retirement Investors' best interests. Requiring all ERISA Advisers to be fiduciaries also ameliorates Retirement Investors' inability to identify a fiduciary Adviser, and reduces the likelihood of conflicting and confusing marketing and disclosure practices.

Specifically, the Final Rule removed the prior requirement that advice be provided "on a regular basis" to trigger a fiduciary obligation under ERISA. The application of full fiduciary protection to one-time advice concerning retirement assets is a critical investor protection reform. It ensures that a Retirement Investor, who may consult an Adviser for an important one-time investment decision (e.g., whether or not to distribute assets from an employer-sponsored retirement plan) will receive advice that is solely in his or her best interest.

The Final Rule also removes the "mutual understanding" requirement from the five-part test in the prior rule and establishes that "reliance" should be based upon the reasonable expectation of the Retirement Investor. Because the Final Rule does not require a "meeting of the minds" concerning the extent to which a Retirement Investor will rely on the advice when making an investment decision, an Adviser will no longer be able to escape his or her fiduciary obligations by claiming the advice provided was "solely incidental" to the recommendation, or that the advice was not the "primary basis" for the Retirement Investor's decision-making.

The Final Rule extends the fiduciary standard to advice provided to IRA owners.[39] Thus, the Final Rule requires fiduciary-level advice for the rollover of assets from employer-sponsored retirement plans to IRAs (including both the initial rollover decision, either from an employer-based plan or existing IRA, and the allocation of assets in the IRA). This is an important and much needed investor protection reform.[40] For many Retirement Investors, the decision on whether and how to rollover

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[39] The Final Rule fits squarely within the Department's responsibility to regulate advice regarding IRAs, which was established in 1978. Reorganization Plan No. 4 of 1978, 43 Fed. Reg. 47713 (Oct. 17, 1978). This responsibility was confirmed by Congress in 2006 by the addition of a statutory investment advice exemption to ERISA and the Internal Revenue Code (IRC) through the Pension Protection Act of 2006 ("PPA"). 29 U.S.C. § 1108(g) and 26 U.S.C. § 4975(d)(17), respectively, as added by PPA.

[40] Advisers often obfuscate fees associated with rollover recommendations and IRAs. FINRA, Regulatory Notice 13-23, *Brokerage and Individual Retirement Account Fees*, Jul. 2013, *available at* http://www.finra.org/sites/default/files/NoticeDocument/p304670.pdf ("Broker-dealers' marketing campaigns often emphasize that fees are not charged in connection with their retail brokerage accounts and IRAs. Nevertheless, while certain types of fees may not be charged, others will be.").

employer-sponsored retirement assets will be the single most important financial decision they will ever make, with the potential to seriously affect their standard of living in retirement. There are many well-documented abuses concerning these important retirement decisions.[41]

The Coalition believes these reforms, which specifically address the misalignment of interests in the marketplace, close the loopholes in the prior five-part test for defining a fiduciary adviser under ERISA which otherwise would allow for the sale of financial products that are not in the Retirement Investors' best interest. This is a necessary step to restore consumer trust in the industry by holding Advisers accountable, under a fiduciary standard of conduct, for the advice they provide to Retirement Investors.

i. <u>The Prior Regulatory Framework Allowed Advisers' Interests to be Misaligned with Consumers' Interests</u>

While some segments of the financial services industry are highly regulated, the current patchwork regulatory framework, which has evolved over decades, does not adequately protect consumers of retail financial advice.

Importantly, the prior fiduciary definition under ERISA included significant loopholes that allowed Advisers to provide advice and sell financial products that may have been "suitable" for Retirement Investors, but were not in their best interest.[42] For example, under the less rigorous "suitability standard" applicable to broker dealers under federal law (the Securities Exchange Act of 1934), an Adviser who is a stockbroker is required merely to recommend products that are "suitable" for a customer, but is not required to recommend products that are in the customer's best interest. Thus, an Adviser who is a stockbroker can legally recommend products that are more expensive to a customer and that pays more to the Adviser. In addition, compensation practices, which were completely legal under the prior regulations, provided substantial incentives to Advisers to place the interests of the Financial Institution and the Adviser ahead of the Retirement Investor's interests. Very simply, absent the fiduciary protections provided under the Final Rule, the current patchwork regulatory framework would continue to allow the interests of Financial Institutions and Advisers to remain misaligned with the interests of our nation's Retirement Investors.

Contrary to many in the financial services industry who claim that the Final Rule is unnecessary and that there are only a few "rogue" Advisers harming Retirement Investors, the misalignment of interests is a systemic problem. For example, the Financial Industry Regulatory Authority (FINRA) noted in an October 2013 Report that conflicts of interest are pervasive and "widespread across the

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[41] Government Accountability Office, *Labor and IRS Could Improve the Rollover Process for Participants*, GAO-13-30 (Mar. 2013) ("GAO Report") *available at* http://www.gao.gov/assets/660/653506.txt. The GAO Report found that Advisers "encouraged rolling 401(k) plan savings into an IRA even with only minimal knowledge of a caller's financial situation" and that Advisers claimed that 401(k) plans had extra fees and that IRAs "had no fees," or argued that IRAs were always less expensive, notwithstanding the fact that opposite is generally true.

[42] These loopholes arise from the current regulatory system where broker-dealer registered representatives and insurance agents, unlike investment advisers, are not regulated as fiduciaries when providing investment advice, even though broker-dealer registered representatives and insurance agents often hold themselves out as financial advisors and offer virtually identical services to investors.

financial services industry."[43] In addition, FINRA's recent 2015 Examination Priorities letter states "[a] central failing FINRA has observed is firms not putting customers' interests first."[44]

Retirement Investors are harmed – primarily in the form of higher costs and lower retirement savings – when they receive conflicted advice that puts the Adviser's interest ahead their own. To illustrate the magnitude of harm to Retirement Investors, the Department published a comprehensive Regulatory Impact Analysis that accompanied the Final Rule, which illustrated the harmful impact of conflicts of interest, including increased costs to Retirement Investors under the prior regulatory framework.[45]

The evidence of harm to Retirement Investors from a misalignment of interests is evident in examples of conflicted advice reported by CFP® professionals in CFP Board's Senior Exploitation Study, conducted by APCO Insight, in August 2012.[46] The study was conducted to obtain deeper insights and analysis into CFP® professionals' experiences with seniors who have been financially exploited. The study found over half of the CFP® professional respondents (56 percent or nearly 1,500) personally had worked with an older client who previously had been subjected to unfair, deceptive or abusive practices.[47] Of these, 76 percent reported financial exploitation that involved equity indexed or variable annuities.[48]

For example, a California-based CFP® professional reported on a seventy-year-old woman who was repeatedly sold annuity contracts by insurance company Advisers with high commissions of 20 to 25 percent, which would likely exceed reasonable compensation under a fiduciary standard of conduct. Some of the contracts also had twenty-year surrender charges, restricting the client's access to these assets until she was ninety years old. The CFP® professional estimated that this client lost over $10,000 and, although he helped her remove her assets from the annuity products and write letters of complaint to the insurance companies, he did not expect her to recover any of her lost funds.

The harm to consumers resulting from the misalignment of interests is especially important with respect to retirement assets. Congress enacted ERISA in 1974 to establish special rules to protect Americans' retirement assets in tax-preferred retirement savings vehicles. In doing so, Congress

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[43] FINRA, "Conflict of Interest Report," Oct. 2013, *available at* https://www.finra.org/file/conflict-interest-report.

[44] FINRA, "2015 Examination Priorities Letter," Jan. 6, 2015, *available at* http://www.finra.org/sites/default/files/p602239.pdf ("Conflicts of interest are a contributing factor to many regulatory actions FINRA (and other regulators) have taken against firms and associated persons").

[45] RIA, *supra* note 27.

[46] APCO Insight, *Certified Financial Planner Board of Standards: Senior Financial Exploitation Study*, Aug. 2012, *available at* http://www.cfp.net/docs/news-events---supporting-documents/senior-americans-financial-exploitation-survey.pdf?sfvrsn=0. Research included both a quantitative online survey and qualitative in-depth interviews. CFP® professionals were invited to participate in the online survey via email from CFP Board. From July 24 – August 7, 2012, 2,649 CFP® professionals completed the survey. The theoretical sampling error for the full sample is ±1.9 percentage points at a 95 percent confidence interval.

[47] *Id.*

[48] *Id.* Variable annuities were included in the FINRA Exam Priorities Letter for 2015 and Secretary Perez has also spoken about the risks to consumers arising from the recommendation of these products. Mark Schoeff Jr., "Perez calls out variable annuities in argument for DOL fiduciary rule," InvestmentNews, Jun. 24, 2015, *available at* http://www.investmentnews.com/article/20150624/FREE/150629958/perez-calls-out-variable-annuities-in-argument-for-dol-fiduciary-rule.

recognized that it was in the public interest to encourage all Americans to save for a secure and dignified retirement.[49] Given the importance of maximizing Americans' retirement assets, Congress intentionally established requirements for financial advice under ERISA that are distinct from and more rigorous than those that apply under insurance and securities laws to non-retirement assets, including the explicit requirement that advice be in the sole interest of the plan and plan participants. The Department's Final Rule closed loopholes in its prior regulations that allowed for conflicted advice by non-fiduciary Advisers related to retirement assets in contravention of Congress' express intent.

ii. Retirement Investors Cannot Easily Identify Fiduciary Advisers

In addition to a regulatory framework that permits conflicted financial advice by non-fiduciary Advisers, Retirement Investors face additional challenges in the current financial services marketplace. First, consumers are unable to distinguish Advisers who provide fiduciary-level services from those who do not. Second, Advisers exacerbate consumer confusion with marketing and communications practices that do not clearly and openly disclose the standard of conduct under which they are operating or their conflicts of interest.

A landmark 2008 SEC-sponsored study conducted by the RAND Center for Corporate Ethics, Law, and Governance found that "[e]xisting studies suggest that investors do not have a clear understanding about the distinction between broker-dealers and investment advisers and their different levels of fiduciary responsibility."[50] Subsequent studies confirm persistent and pervasive consumer confusion about financial industry titles and standards of conduct.

A study conducted by InfoGroup, on behalf of the Financial Planning Coalition, Consumer Federation of America ("CFA"), American Association of Retired Persons ("AARP"), and the North American Securities Administrators Association ("NASAA"), found the following:

- three out of five U.S. investors mistakenly think "insurance agents" have a fiduciary duty to their clients;
- two out of three U.S. investors are incorrect in thinking stockbrokers are held to a fiduciary duty;
- three out of four investors are wrong in believing that "financial advisors" – a ubiquitous term used by financial services and insurance firms to describe their salespersons – are held to a fiduciary duty; and

[49] 29 U.S.C. § 1001 (2012) ("It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.").

[50] Angela Hung, et al., RAND Corp., *Technical Report, Investor and Industry Perspectives on Investment Advisers and Broker-Dealers*, Jan. 3, 2008, *available at* http://www.rand.org/pubs/technical_reports/TR556.html.

- 75 percent of investors incorrectly believed the fiduciary standard is already in place for "financial planners."[51]

A study conducted by Fondulas Strategic Research, on behalf of the Coalition, found significant consumer confusion about the various titles associated with financial planning. A full 82 percent of consumers believe a "financial planner" is essentially the same as a "financial advisor," and there is only slightly less confusion among the titles "financial planner," "wealth manager" and "investment advisor."[52]

Misleading advertising in the financial services marketplace further exacerbates consumer confusion. While many firms claim they support a fiduciary standard of conduct and represent their services as unbiased and un-conflicted, their regulatory filings reveal a different truth.

For example, one large financial services firm advertises on its website that their Advisers "recommend unbiased solutions that are in your best interests." The firm's Form ADV brochure, however, states "the differences in compensation create an incentive for financial advisors to recommend products for which they receive higher compensation" and their Advisers have a "conflict of interest based on an incentive to recommend investment products **based on the compensation received, rather than based on your needs."**

Another large insurance firm, presumably to avoid being subject to the fiduciary duty under the current five-part test of ERISA, states in its Form ADV "[a]ny recommendations provided by your Planner for your IRAs or any retirement plan assets you have the right to self-direct are **not intended to be the sole or primary basis for your investment decisions**." Additionally, the firm's code of conduct emphasizes that, rather than acting in the client's best interest, Advisers must act in the best interest of the firm.

Marketplace practices, including the "alphabet soup" of financial service titles which typically suggest that consumers are receiving advice and not being sold a product, make it virtually impossible for consumers to identify and choose an Adviser who is obligated to provide advice under a fiduciary standard of conduct. Consequently, consumers who want and would benefit from advice in their best interest are harmed because they cannot identify a qualified fiduciary Adviser.[53]

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[51] InfoGroup, *U.S. Investors and the Fiduciary Standard*, Sept. 15, 2010, http://www.hastingsgroup.com/fiduciarysurvey/docs/091510%20Fiduciary%20survey%20report%20FINAL2.pdf.

[52] Fondulas Strategic Research, *Quantitative Survey: Consumers' Beliefs About Financial Planners*, Jan. 2014 (on file with the Coalition).

[53] CFP Board's television advertisement in support of its public awareness campaign, known as the DJ ad, further illustrates how easily consumers can be misled. In filming the ad, CFP Board exposed real consumers, who were looking for financial advice, to a DJ who was made over into a "financial planner" and armed with industry jargon. Remarkably, the vast majority of people believed they were meeting with a real financial advisor, and many described him as being knowledgeable, capable and trustworthy. This experiment illustrates the vulnerability of the average consumer and the need for increased investor protection regulations. http://www.letsmakeaplan.org/if-theyre-not-a-cfp-pro-you-just-dont-know/the-experiment.

iii. Consumers Want Advice in Their Best Interest

Research confirms that consumers want advice in their best interest, and that consumers believe all Advisers, regardless of how they are licensed, should be required to act in consumers' best interests. For example, the September 2010 InfoGroup study found 91% of respondents thought "a stockbroker and an investment adviser (who) provide the same kind of investment advisory services … should have to follow the same investor protection rules" and 97% agreed "when you receive investment advice from a financial professional, the person providing the advice should put your interests ahead of theirs and should have to tell you upfront about any fees or commissions they earn and any conflicts of interest that potentially could influence that advice."[54]

It is no surprise that a wide range of organizations representing seniors, investors, financial entities, public interest groups, civil rights leaders, labor unions, consumer groups, professional organizations, women's groups and others support the Department's Final Rule. AARP and others have provided the Department with hundreds of thousands of signatures of consumers who also support the Final Rule.[55]

b. Implementation of the Final Rule Has Not Lead to Substantial Dislocation in the Industry

Many in the financial services industry who claim they support a best interest standard contend that the Final Rule is "unworkable." The Coalition believes, based on our experience applying the fiduciary standard to CFP® professionals across business models, the Final Rule is both workable and essential to protect America's Retirement Investors. Importantly, as noted above, the Department worked with industry and the public to ensure that the Final Rule increases fiduciary protections for tax-preferred retirement assets and is workable across financial services business models.

i. The Final Rule is a Workable, Business-Model Neutral Solution that Preserves Consumer Choice

Opponents claim the Final Rule is unworkable because it will eliminate the broker-dealer and insurance business models. Contrary to this argument, the Final Rule and accompanying principles-based PTEs preserve the ability of Retirement Investors to choose how they pay for retirement advice without requiring them to lose their right to best interest recommendations. The Department crafted a principles-based, business-model exemption – the Best Interest Contract (BIC) Exemption – that provides the terms under which Financial Institutions and Advisers can receive sales-based compensation for advice and still comply with the ERISA fiduciary standard.

Opponents further argue the Final Rule, as a practical matter, will force Advisers into a fee-based model. The Coalition's collective experience with operating under a fiduciary standard of conduct refutes that argument. CFP Board and FPA are business-model and compensation-model neutral,

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[54] InfoGroup, *U.S. Investors and the Fiduciary Standard*, Sept. 15, 2010, http://www.hastingsgroup.com/fiduciarysurvey/docs/091510%20Fiduciary%20survey%20report%20FINAL2.pdf.

[55] AARP provided the Department with 31,205 signatures on April 21, 2015. CREDO, MoveOn, Public Citizen and Americans for Financial Reform (AFR), collectively, provided the Department over 230,000 signatures on July 16, 2015.

while NAPFA, which endorses CFP Board's *Standards of Professional Conduct* and promotes the fee-only compensation model, advocates that Advisers should be held to a fiduciary standard of conduct regardless of business model or compensation model.

CFP Board's *Standards of Professional Conduct* require CFP® professionals, when providing financial planning services, to do so under a fiduciary standard of conduct.[56] CFP® professionals provide fiduciary-level financial planning services under a variety of business and compensation models, including commissioned-based compensation and revenue-sharing models. CFP Board established a Business Model Council for the purpose of working with firms to understand their business models and provide guidance to firms on how their CFP® professionals can comply with the fiduciary standard under different business models. Our experience shows Advisers can, and many currently do, successfully provide fiduciary-level service under a variety of business models.

While not identical to the Final Rule, many of the current requirements of CFP® professionals are similar to requirements under the BIC Exemption such as to act in the best interest of the client; to exercise reasonable and prudent judgment; to execute a written contract with the client; to identify and mitigate conflicts of interest between the client and the CFP® professional and the CFP® professional's employer; to provide written disclosures including the full costs of products and services and the compensation to the CFP® professional and/or employer; and to comply with applicable regulatory requirements.[57] These similarities are reflected in the chart below.

	BIC	Analogous CFP Board Rule or Standard (if providing Financial Planning)
Fiduciary	Yes	Rule of Conduct 1.4 - Yes
Written Contract	Yes	Rule of Conduct 1.3 - Yes
Fee/Costs	Point of Sale Disclosure and Annual Disclosure	Rule of Conduct 2.2(A) and Practice Standards 100-1 and 500-1 - CFP® Professional shall disclose accurate and understandable information related to costs and compensation and any material changes to that information
Conflicts	Must Provide Written Notification of Conflicts of Interest	Rule of Conduct 2.2(B) and Practice Standards 100-1, 400-3, and 500-1 - CFP® Professional shall disclose a summary of likely conflicts of interest
Prudent Standards	Yes	Rule of Conduct 4.4 - CFP® Professional shall exercise reasonable and prudent professional judgment
Compliance with Applicable Law	Yes	Rule of Conduct 4.3 - CFP® Professional shall comply with all applicable regulatory requirements
Policies to Mitigate Conflicts	Yes	Rule of Conduct 4.1 - CFP® Professional shall provide professional services with integrity and objectivity

[56] CFP Board *Standards of Professional Conduct*, Rule of Conduct 1.4, *available at* http://www.cfp.net/for-cfp-professionals/professional-standards-enforcement/standards-of-professional-conduct/rules-of-conduct.

[57] CFP Board *Standards of Professional Conduct*, Rules of Conduct 1.3, 1.4, 2.2, 4.1, 4.3 and 4.4, *available at* http://www.cfp.net/for-cfp-professionals/professional-standards-enforcement/standards-of-professional-conduct/rules-of-conduct.

Based on our experience, the Coalition believes that firms and Advisers are able to establish policies and procedures designed to implement the types of obligations required under the Final Rule. This will enable Advisers to continue to provide services under business models that include brokerage and insurance firms with commission-based or revenue-sharing compensation arrangements.

ii. **The Final Rule Will Not Drive Firms and Advisers Out of Business**

Opponents' claim the Final Rule will drive firms and Advisers out of business. CFP Board heard these same arguments in 2007 when it established a fiduciary standard for CFP® professionals when providing financial planning services. At that time, major firms throughout the country as well as industry organizations representing the brokerage and insurance industries raised significant concerns with CFP Board. They asserted that CFP Board's fiduciary requirement was unworkable with their business models and that CFP® professionals would be forced to rescind their certification if required to operate under a fiduciary standard.

Contrary to these predictions, the number of CFP® professionals has grown by more than 40 percent to over 76,000 since CFP Board established a fiduciary standard. CFP® professionals, many working at large firms representing a cross-section of business models, proudly promote that they deliver fiduciary-level services when providing financial planning. In addition, the opponents' argument that Advisers will cease providing services to Retirement Investors, who collectively have $14.4 trillion in 401(k) plans and IRAs, defies credibility.[58] Our experience implementing a fiduciary standard across business models demonstrates that firms and Advisers will adjust their policies and practices accordingly. Firms and Advisers have affirmed these developments through public announcements and earnings calls with financial analysts.

- In March 2017, Merrill Lynch Wealth Management outlined plans to transition its defined-contribution-plan business over to a fiduciary model.[59]

- In March 2017, Morgan Stanley Wealth Management announced a partnership with the record keeper Ascensus to provide a product that helps Advisers service small 401(k) plans in a fiduciary capacity when the Final Rule becomes applicable.[60]

- In February 2017, Aegon stated it "continue[s] to take all the steps and make sure that we can implement the rules, including no changes as was originally

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[58] ICI, "Retirement Assets Total $24.9 Trillion in First Quarter 2015," Jun. 24, 2015, *available at* https://www.ici.org/research/stats/retirement/ret_15_q1; *see also* ICI Research Perspective, "401(k) Plan Asset Allocation, Account Balances, and Loan Activity in 2013," Dec. 2014, Vol. 20, Num. 10 (According to the Investment Company Institute, the average 401(k) account balance was $72,383 at the end of 2013).

[59] Barron's, "Merrill Details Fiduciary Shift for 401(k) Business," Mar. 16, 2017, http://www.barrons.com/articles/merrill-details-fiduciary-shift-for-401-k-business-1489681716.

[60] Grag Iacurci, "Morgan Stanley debuts fiduciary product for small 401(k) plans, with eye toward DOL rule," Mar. 9, 2017, available at http://www.investmentnews.com/article/20170309/FREE/170309904/morgan-stanley-debuts-fiduciary-product-for-small-401-k-plans-with.

planned for April for this year," and it has "already started launching new products that address that new environment."[61]

- In February 2017, Primerica stated "[o]ver the past year, [it has] devoted significant resources preparing for the implementation of the Department of Labor's fiduciary rule" and it has been "developing robust Investment and Saving Product systems and processes to comply with the DOL rule."[62]

- In February 2017, American Equity Life Insurance stated "when we look at our IMOs or NMOs at American Equity there - we determine that a very large percentage of them will have a path to be a financial institution either because they own a broker dealer or they own a registered investment advisor or they've filed for financial institution status with the DOLs. So, I'm not - I think based on no statistics, we are comfortable that there is a path for our producers to have their business fall under BIC."[63]

- In February 2017, CNO Financial stated "the diversity of our distribution channels and product and our robust compliance culture have lessened any meaningful disruption to our business model as a result of adopting the [Final Rule]. Our core strategy for implementation remains with no material deviations expected until changes if any are definitive."[64]

- In February 2017, American Financial stated the "company continues to implement product and process changes needed to comply with the Department of Labor Fiduciary Rule and is proceeding under the premise that the DOL rule becomes effective in April of 2017 in its current form" and that while it "continues to believe the adjustments required of the company and its distribution partners to comply with the [Final Rule] will impact 2017 premiums, we do not believe the [Final Rule] will have a material impact on AFG's results

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61 Aegon's (AEG) CEO Alex Wynaendts on Q4 2016 Results - Earnings Call Transcript, Feb. 17, 2017, *available at* http://seekingalpha.com/article/4047300-aegons-aeg-ceo-alex-wynaendts-q4-2016-results-earnings-call-transcript?part=single.

62 Primerica's (PRI) CEO Glenn Williams On Q4 2016 Results - Earnings Call Transcript, Feb. 9, 2017, *available at* http://seekingalpha.com/article/4044467-primericas-pri-ceo-glenn-williams-q4-2016-results-earnings-call-transcript?part=single.

63 American Equity Investment Life Holding's (AEL) CEO John Matovina On Q4 2016 Results - Earnings Call Transcript, Feb. 9, 2017, *available at* http://seekingalpha.com/article/4044412-american-equity-investment-life-holdings-ael-ceo-john-matovina-q4-2016-results-earnings-call?part=single.

64 CNO Financial's (CNO) CEO Ed Bonach on Q4 2016 Results - Earnings Call Transcript, Feb. 8, 2017, *available at* http://seekingalpha.com/article/4043951-cno-financials-cno-ceo-ed-bonach-q4-2016-results-earnings-call-transcript?all=true&find=%22department%2Bof%2Blabor%22.

or operations. We believe that our business model, which we adopted many years ago, positions us well in a changing regulatory environment."[65]

- In February 2017, Ameriprise stated that a substantial number of projects were well underway in anticipation of the April deadline and it has already spent $11 million implementing the Final Rule.[66] Ameriprise did confirm that while it may adjust depending on a delay or modification of the Final Rule, it is moving from 12b-1 fees to advisory shares and using institutional share classes, regardless of what happens with the Final Rule.[67]

- In February 2017, Lincoln Financial stated "[e]ven if the existing rule was to turn out, the rule had to be interpreted; technology changes. And so the distribution partners have been a little bit slow to communicate to their own advisors where we're going to end up. So I think that the DOL issue has probably had a lot more impact. And whether or not it's delayed, I think that confusion will go away on April 17 when everybody has to implement their final plans."[68]

- In February 2017, UBS stated "we didn't expect the rule as it came out, with a big caveat that there still is a lot of detail that needs to be filled in, to have a substantial impact on our business, apart from the cost to comply."[69]

- In January 2017, Stifel stated "[r]egarding the Department of Labor, we are closely watching developments in Washington, D.C. and believe the rule would be delayed so that it could be reviewed by the new administration. If the rule is not delayed while disruptive we have plans to meet its requirements."[70]

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[65] American Financial Group's (AFG) CEO Carl Lindner III on Q4 2016 Results - Earnings Call Transcript, Feb. 2, 2017, *available at* http://seekingalpha.com/article/4042203-american-financial-groups-afg-ceo-carl-lindner-iii-q4-2016-results-earnings-call-transcript?part=single.

[66] Ameriprise Financial's (AMP) CEO Jim Cracchiolo on Q4 2016 Results - Earnings Call Transcript, Feb. 2, 2017, *available at* http://seekingalpha.com/article/4042184-ameriprise-financials-amp-ceo-jim-cracchiolo-q4-2016-results-earnings-call-transcript?part=single.

[67] *Id.*

[68] Lincoln National's (LNC) CEO Dennis Glass on Q4 2016 Results - Earnings Call Transcript, Feb. 2, 2017, *available at* http://seekingalpha.com/article/4042175-lincoln-nationals-lnc-ceo-dennis-glass-q4-2016-results-earnings-call-transcript?part=single.

[69] UBS Group's (UBS) CEO Sergio Ermotti on Q4 2016 Results - Earnings Call Transcript, Feb. 1, 2017, *available at* http://seekingalpha.com/article/4041582-ubs-groups-ubs-ceo-sergio-ermotti-q4-2016-results-earnings-call-transcript?all=true&find=%22department%2Bof%2Blabor%22.

[70] Stifel Financial's (SF) CEO Ron Kruszewski on Q4 2016 Results - Earnings Call Transcript, Jan. 31, 2017, *available at* http://seekingalpha.com/article/4041170-stifel-financials-sf-ceo-ron-kruszewski-q4-2016-results-earnings-call-transcript?all=true&find=%22department%2Bof%2Blabor%22.

- In November 2016, Allianz stated while there will still outstanding issues related to the Final Rule, Allianz is fully working on being prepared when the Final Rule is implemented.[71]

- In November 2016, Prudential stated "[w]e do see across the industry that there has been some pressure on fees that goes across active and passive strategies for the past few years. The DOL rule will continue to support and possibly accelerate that trend. We still see ourselves as being very, very competitive in that context."[72]

These are examples of firms, some of whom initially opposed the fiduciary rulemaking,[73] that are complying with the Final Rule and will be prepared to serve their customers under the new standard. However, while the Coalition applauds these firms for moving forward to act in the best interest of their clients, without the Final Rule and the Best Interest Contract in place, there will not be a uniform method of enforcement and industry compliance would be voluntary.

iii. The Final Rule has been a Catalyst for Compliance Technology

Contrary to opponents' claims that the Final Rule is unworkable, risk management tools are being introduced to help Advisers comply with the requirements of the Final Rule. Financial technology (fintech) vendors have introduced new software that helps Advisers assess risk tolerance, establish client-centric investment policies, identify best interest investment options, and automate back-office compliance functions. A partial list of these emerging compliance technologies is described below.

- Morningstar has launched a new service for broker-dealers wanting to outsource certain 401(k) compliance functions.[74]

- RiXtrema has introduced software that guides Advisers through the process of rolling client assets from qualified retirement plans into IRAs overseen by the Adviser.[75]

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[71] Allianz (ALIZF) Q3 2016 Results - Earnings Call Transcript, Nov. 11, 2016, *available at* http://seekingalpha.com/article/4022719-allianz-alizf-q3-2016-results-earnings-call-transcript?all=true&find=%22department%2Bof%2Blabor%22.

[72] Prudential Financial (PRU) Q3 2016 Results - Earnings Call Transcript, Nov. 3, 2016, *available at* http://seekingalpha.com/article/4019019-prudential-financial-pru-q3-2016-results-earnings-call-transcript?part=single.

[73] Definition of the Term "Fiduciary," 80 Fed. Reg. 21,928 (Apr. 20, 2015) (to be codified at 29 C.F.R. pt. 2510).

[74] Greg Iacurci, *Morningstar Launching 401(k) Service for Broker-dealers Worried About DOL Fiduciary Risk*, Fiduciary Focus, Aug. 8, 2016, *available at* http://www.investmentnews.com/article/20160808/FREE/160809924/ morningstar-launching-401-k-service-for-broker-dealers-worried-about.

[75] RiXtrema, IRAFiduciaryOptimizer, https://rixtrema.net/irafiduciaryoptimizer/index.

- Fi360[76] has developed a "powerful, web-based software solution that provides the analytical, management, and reporting features needed to help investment professionals manage and document a prudent investment process."[77]

- AssetMark, a leading provider of innovative investment and consulting solutions serving financial advisors, has "launched a comprehensive assessment tool that will assist advisors in determining their preparedness to comply with the DOL fiduciary rule."[78]

- DST Systems, a leading provider of strategic advisory, transformative technologies, and operations outsourcing to the financial industry, offers the DOL Fiduciary Rule Surveillance Module that "contains a library of tests that have been specifically designed to help financial services firms perform analysis of transactions and investor account holdings, in their efforts to comply with their obligations under the DOL Fiduciary Rule."[79]

- Orion Advisor Services offers a "fee-benchmarking tool [that] will help advisers see how their fees compare to the industry, ensuring they are charging fair, reasonable fees."[80] Fiduciary Benchmarks has introduced a tool to help advisers collect and evaluate client data and that will recommend retirement products in the client's best interest, incorporating a tool that determines fee reasonableness."[81]

- Riskalyze provides a product that allows firms to monitor Advisers by "equipping [their] supervision and compliance teams to see accounts lacking documented BICE compliance, or with mismatched risk, high-risk positions or high volumes of 401k rollovers."[82]

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76 Fi360, http://www.fi360.com/about-fi360. "With extensive education, certification, software, and practice management offerings, Fi360 is a one-stop shop equipped to provide individuals and organizations with the training, tools, and resources necessary to become more successful."

77 Fi360, Tools, http://www.fi360.com/products-services/tools-overview.

78 AssetMark, "AssetMark Launches Assessment Tool to Gauge Advisor Readiness for Department of Labor (DOL) Fiduciary Rule," Oct. 19, 2016, *available at* https://www.assetmark.com/~/media/assetmark/files/press%20releases/dol_assessment_tool_press_release_am22634_m00000_10_14_16_final.pdf.

79 DST Systems, "Surveillance Tool Supports DOL Fiduciary Rule Compliance," https://www.dstsystems.com/-/media/Files/pdfs/AM-SS-SurveillanceToolSupportsDOLFiduciaryRuleCompliance.ashx.

80 Orion Advisor Services Launches Industry's First Fee-Benchmarking Tool, http://www.prnewswire.com/news-releases/orion-advisor-services-launches-industrys-first-fee-benchmarking-tool-300382855.html.

81 Fiduciary Benchmarks, IRA Benchmarking Services, http://www.fiduciarybenchmarks.com/ira-benchmarking/.

82 Riskalyze, DOL Compliance Solutions, https://www.riskalyze.com/dol.

- PIEtech, the creator of financial planning software MoneyGuidePro, built a "tool to see how well clients' portfolios are aligned with their best interests, including retirement goals and concerns, insurance needs, and health-care costs."[83]

- National Securities Clearing Corporation (NSCC), which provides clearing, settlement, and risk management services for virtually all broker-to-broker trades, has implemented enhancements to the Alternative Investment Product Services ("AIP") to "provide enhanced support regarding the Department of Labor fiduciary rule"[84] and has implemented an "an automated service to facilitate data exchange between insurance carriers and distributors" to mitigate compliance burdens for the annuities industry.[85]

- Advicent, the leading provider of software as a service (SaaS) technology solutions for the financial services industry, has launched Narrator® Clients and Narrator® Advisor to empower a collaborative and proactive client-advisor relationship and provide advisors a way to remain compliant and offer advice with the client's best interest in mind.[86]

- InvestCloud, the first financial platform designed ground up for the Cloud, has developed products that "allow[] firms to replicate the low-cost brokerage experience with a modern digital advice platform" and "allow[] firms to scale the delivery of client advice, regardless of service model and account size."[87]

- Pershing LLC, a BNY Mellon Company, is providing compliance solutions and resources to help financial services firms comply with the Department's Final Rule.[88]

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83 Alessandra Malito, MoneyGuidePro creator releases DOL fiduciary-focused software," InvestmentNews, Jul. 21, 2016, available at http://www.investmentnews.com/article/20160721/FREE/160729982/moneyguidepro-creator-releases-dol-fiduciary-focused-software.

84 NSCC, DOL Fiduciary Rule and Share Class Conversion Enhancements, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwjgu9aRverSAhUr2oMKHYK3DVcQFggdMAA&url=http%3A%2F%2Fwww.dtcc.com%2Fglobals%2Fpdfs%2F2017%2Ffebruary%2F08%2Fa8330&usg=AFQjCNEzSmmofIBzES4ZPXvSc_UA9KU86A.

85 Robin Choudhury, "New "Insurance Profile" Service to Support DOL Fiduciary Rule Compliance," Sept. 13, 2016, *available at* http://www.dtcc.com/news/2016/september/13/new-insurance-profile-service-to-support-dol-fiduciary-rule-compliance.

86 Advicent, "DOL rule compliance: the proof is in the plan," Aug. 4, 2016, *available at* http://www.advicentsolutions.com/en/Resources/Blog/DOL-rule-compliance-the-proof-is-in-the-plan.

87 InvestCloud, "InvestCloud Solves DOL Issues with Digital Advice Platform," Apr. 18, 2016, https://www.investcloud.com/Membership/Apps/BB2ViewContent_Input_App.aspx?IX_OB=KeyRead&BB2ViewMainContent_Input_App.Id=1215619&BB2ViewContentHead_Input_App.Id=1215619.

88 Pershing, "BNY Mellon's Pershing Launches New Solutions and Resources to Help Firms Comply with the DOL Conflict of Interest Rule," Jun. 8, 2016, https://www.pershing.com/news/press-releases/2016/pershing-launches-new-solutions-and-resources-to-help-firms-comply-with-the-dol-conflict-of-interest-rule.

- Financial Services Institute (FSI), who opposes the Final Rule, is providing its members "five critical tools to assist firms in complying with the BIC exemption of the Department of Labor's (DOL) fiduciary rule."[89]

The Department's fiduciary rulemaking has encouraged the development of these and other cutting-edge compliance technologies designed to help Advisers satisfy the Final Rule's fiduciary requirements. The financial marketplace has responded and, we anticipate, will continue to innovate. The Department, to meet its obligations under the APA must evaluate the impact of these new compliance products in its Regulatory Impact Analysis and quantify the cost savings likely to be achieved by the industry.

iv. The Final Rule Has Been a Catalyst for Industry Product Innovation

The Coalition believes the Final Rule has been a catalyst for product innovation in the industry, as firms and Advisers have devised new tools and strategies — assisted by modern software and new technology-based tools — to accommodate even those with only a few thousand dollars to invest.

For example, firms in the annuities sector have developed innovative products. Four of the top ten fixed-indexed annuity sellers (including the top seller) are developing fee-based fixed-indexed annuities, "forging ahead into virtually uncharted territories for product development."[90] One of those firms, Voya Financial, also has introduced new fixed-indexed annuity products with lower surrender fees.[91] The company explained these products are more "flexible" and "fit better with new trends, customer preference and the market."[92] These changes support the prediction of one indexed-annuity consulting firm that any negative effect will disappear "[o]nce the industry has had time to adjust," for "[t]he bottom line is that consumers want indexed annuities' guarantees; they want protection from market volatility and the ability to outpace CDs as well."[93]

The U.S. Securities and Exchange Commission (SEC) recently approved a proposal from Capital Group to create a new class of mutual fund shares for its American Funds that will greatly ease compliance with the DOL rule while preserving investors' ability to get commission-based advice.[94] The approved "clean shares" will allow the broker, rather than the fund, to determine how much to charge for their services. In addition, many other fund firms are responding to the Final Rule by issuing transaction or "T" shares that both dramatically reduce commissions for broker-sold funds and reduce the compensation-related conflicts associated with those funds. With "T" shares carrying

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89 FSI, *DOL Fiduciary Rule Resources*, *available at* http://www.financialservices.org/DOL-Fiduciary-Rule-Resources/.

90 Greg Iacurci, *Insurers Developing Fee-based Fixed-indexed Annuities Post-DOL Fiduciary Rule*, Fiduciary Focus, Jul. 14, 2016, *available at* http://www.investmentnews.com/article/20160714/FREE/160719964/insurers-developing-fee-based-fixed-indexed-annuities-post-dol.

91 Nick Thornton, *Voya Rolls Out New, Less Expensive FIAs*, BenefitsPro, Jun. 15, 2016, *available at* http://www.benefitspro.com/2016/06/15/voya-rolls-out-new-less-expensive-fias?page_all=1&slreturn=1470760535.

92 *Id.*

93 Arthur D. Postal, *Industry Insiders React Cautiously to DOL Fiduciary Rule*, LifeHealthPro, Apr. 7, 2016, *available at* http://www.lifehealthpro.com/2016/04/07/industry-insiders-react-cautiously-to-dol-fiduciar?slreturn=1470762278.

94 John Waggoner, "American Funds gets SEC approval for clean shares," Jan. 13, 2017, http://www.investmentnews.com/article/20170113/FREE/170119955/american-funds-gets-sec-approval-for-clean-shares.

a maximum sales load of 2.5 percent, compared with an industry standard for "A" shares of 4.75 percent (and as high as 5.75 percent), and 12b-1 fees of just 0.25 percent, investors will also benefit from these dramatic reductions in cost.[95]

The Coalition believes any modification or repeal of the Final Rule may halt or impair these innovations. For example, according to multiple firms, work to create "T" shares has been delayed or suspended pending the outcome of the Delay Rule proposal.[96] Importantly, "firms are expected to wait and see how the review plays out before deciding whether to proceed with the T shares' development."[97]

The Department, to meet its obligations under the APA, must clearly explain why it believes a modification or repeal of the Final Rule would not halt or impair these innovations, and quantify the harm to consumers that will result from their inability to purchase these less expensive, more consumer friendly, financial products.

v. The Final Rule Will Not Diminish Availability of Services to Middle-Income Americans

Opponents claim that the Final Rule will force Advisers to stop serving middle-income Americans. Contrary to that assertion, reliable empirical data, replicated in numerous studies, as well as current marketplace practices, demonstrate that the Final Rule's fiduciary obligations will not force Advisers to abandon middle-income households, and will not leave them without adequate investment advice alternatives. Research studies that compare fiduciary and non-fiduciary services show just the opposite – there is no statistically significant difference in the delivery of services to middle-income Americans.

A February 2014 study, conducted by Princeton Survey Research Associates International ("PSRAI") on behalf of the Coalition, examined the experience and attitudes of financial advisors who have switched from a suitability standard to a fiduciary standard of conduct or who operate under both standards.[98] PSRAI conducted online interviews with a sample of 1,852 advisors drawn from Coalition stakeholders that included a broad representation of various business and compensation models.[99]

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[95] John Rekenthaler, Lower-Cost T Shares Coming to a Fund Near You, Morningstar, Jan. 6, 2017, http://beta.morningstar.com/articles/787395/lower-cost-t-shares-coming-to-a-fund-near-you.html.

[96] Michael Wursthorn and Sarah Krouse, "New Class of Mutual Fund Shares in Limbo as 'Fiduciary' Rule Is Delayed," Wall Street Journal, Mar. 5, 2017, *available at* https://www.wsj.com/articles/new-class-of-mutual-fund-shares-in-limbo-as-fiduciary-rule-is-delayed-1488736422.

[97] *Id.*

[98] Princeton Research Associates International, *Fiduciary Standard Survey*, Feb. 2014, *available at* http://financialplanningcoalition.com/.

[99] Respondents included investment adviser representatives (29%), broker-dealer registered representatives (28%) and dually registered investment adviser/broker-dealer registered representatives (26%). *Id.* at 8. 45% of respondents reported that that clients typically pay through fees; 47% report both commissions and fees; 5% report commissions only. *Id.* at 9. The margin of error at the 95% level of confidence is plus or minus 2.5 percentage points. *Id.* at 8.

Of particular focus in the study were those respondents who switched from a suitability to a fiduciary standard (15%) and those who operate under both a suitability and fiduciary standard in their practice (48%) (hereinafter referred to collectively as "fiduciary respondents").[100] These advisors offer a more experienced (and arguably a more credible) view of the real impact of transitioning from suitability to a fiduciary standard.[101] Focusing just on the findings related to the availability of services and products and types of clients served,[102] 80 percent of the fiduciary respondents reported an increase or no change in range of services when delivering services to their customers under a fiduciary standard of conduct; 69 percent reported an increase or no change in range of products when delivering services to their customers under a fiduciary standard of conduct; and 72 percent reported an increase or no change in the number of clients served. Broken down by assets, 88 percent reported an increase or no change in clients with $100,000 - $999,999 assets under management when delivering services to their customers under a fiduciary standard of conduct, and 59 percent reported no change or an increase in clients with less than $100,000 assets under management when delivering services to their customers under a fiduciary standard of conduct.[103]

A June 2013 study conducted by the Aité Group, on behalf of the Coalition, compared financial professionals who operated under a fiduciary standard of conduct with those who did not.[104] Among other things, the study examined differences between broker-dealer registered representatives who had a fiduciary practice (i.e., who managed assets as a fiduciary for over half of their client assets and hereinafter referred to as "fiduciary registered representatives") and other registered representatives. While there were significant differences on many factors,[105] the study found there was no statistically significant difference between fiduciary registered representatives and other registered representatives in terms of working with mass-market clients (those with less than $100,000 in investable assets). In fact, the study found fiduciary registered representatives work with a comparable percentage of mass-market clients to that of other registered representatives.[106]

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[100] *Id.*at 9.

[101] The SEC specifically asked for data on Advisers who switched standards. *See* SEC Request for Data and Other Information, *Duties of Brokers, Dealers and Investment Advisers*, File No. 4-606, Exchange Act Release No. 69013 (Mar. 1, 2013) at 49. While this study was done with reference to the SEC's fiduciary rulemaking, respondents' views on operating under both standards can be informative to the application of the DOL fiduciary rule as well.

[102] The study looked at a many other factors, including the respondents' views on the fiduciary standard and the impact of extending the fiduciary standard to broker-dealers registered representatives. For example, among those who switched to a fiduciary standard, large majorities reported that the change has been mostly positive for their clients (81%), for their practice (81%) and for them personally (87%).

[103] *Id.* at 18.

[104] *Aité Fiduciary Study Findings*, in the letter from the Financial Planning Coalition, Jul. 5, 2013, to the SEC in response to the SEC Request for Data and Other Information, *Duties of Brokers, Dealers and Investment Advisers*, File No. 4-606, Exchange Act Release No. 69013 (Mar. 1, 2013), *available at* http://www.sec.gov/comments/4-606/4606-3126.pdf. The Aité Group, a leading third party researcher and data aggregator in the financial services industry, surveyed 498 broker-dealer registered representatives and registered investment adviser representatives who worked in a cross section of firms (wirehouse, bank-affiliated, independent and insurance affiliated broker-dealers, online brokerage, independent RIA firms, and self-clearing firms). The margin of error at the 95 percent confidence level is generally 4 percentage points.

[105] *Id.* The study found that the registered investment advisers and the fiduciary registered representatives, who deliver services to their customers under a fiduciary standard, experience stronger asset growth, stronger revenue growth, and obtain a greater share of client assets than the other broker-dealer registered representatives.

[106] *Id.*

A July 2012 study by Professors Michael Finke and Thomas Langdon compared the availability of broker-dealer services in the several states that already hold broker-dealer registered representatives to a full fiduciary standard when dealing with all customers, with those states that do not hold broker-dealer registered representatives to a fiduciary standard. The study found "no statistical differences between the two groups in the percentage of lower-income and high-wealth clients, the ability to provide a broad range of products including those that provide commission compensation, [or] the ability to provide tailored advice and the cost of compliance."[107]

In short, relevant and reliable studies simply do not support opponents' argument that a fiduciary standard would affect their ability to serve middle-income clients.

Moreover, opponents' claim is inconsistent with current and evolving marketplace practices.[108] There are individual Advisers as well as existing and emerging business models that successfully provide low-cost service to middle-income Americans under a fiduciary standard of conduct. Today, there are thousands of CFP® professionals and FPA and NAPFA members who provide fiduciary-level services to American consumers, under business models requiring no or very low minimum assets under management.

While some firms and Advisers may decide it is not profitable to serve middle-income Retirement Investors under the requirements of the Final Rule, the Coalition believes that with $14.4 trillion currently in 401(k) plans and IRAs, there is a compelling economic incentive for the vast majority of firms and Advisers to develop new and innovative business models to successfully serve this population.

In testimony before the Department in August 2015, Ray Ferrara, CFP®, Chairman and CEO of ProVise Management Group LLC,[109] stated "ProVise has successfully served middle-class clients under a fiduciary standard for years. The [rule] still allows us, and everyone else to, provide advice using a commission or fee model. For anyone claiming that they are unable to serve middle-class clients under the re-proposed rule, ProVise and scores of CFP® professionals and FPA and NAPFA members across the country would be happy to help fill the gap."[110]

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[107] Dr. Michael Finke and Thomas Langdon, *The Impact of the Broker-Dealer Fiduciary Standard on Financial Advice*, Journal of Financial Planning, Jul. 2012, *available at* https://www.onefpa.org/journal/Pages/The%20Impact%20of%20the%20Broker-Dealer%20Fiduciary%20Standard%20on%20Financial%20Advice.aspx

[108] Opponents' claim that Advisers who serve lower and middle-income Americans only provide commission-based advice is also not supported by industry data. For Advisers whose core market are investors with less than $100K AUM, only 24% were commission-only, while 35% were fee-and-commission mix (10% to 50% in fee-based revenue) and 32% were fee-based (greater than 50% to 90% in fee-based revenue). *Cerulli Advisor Metrics 2014: Capitalizing on Transitions and Consolidation*, Cerulli Associates (2014), at 100.

[109] Provise is a financial planning firm that provides advisory, brokerage and insurance services under compensation models that include flat fee, assets under management and/or commissions. The firm's minimum requirement for assets under management to serve clients on a fee basis is $25,000. For clients with less than $25,000, the firm provides commission-based services.

[110] Written Testimony of V. Raymond Ferrara, CFP®, on behalf of the Financial Planning Coalition, before the Employee Benefit Security Administration, U.S. Department of Labor (Aug. 10, 2015), *available at* http://www.dol.gov/ebsa/pdf/1210-AB32-2-WrittenTestimony5.pdf.

Recent developments also have shown how the Final Rule is transforming how fee and commission-based advice is offered, with enormous potential benefits for all investors, not just those saving for retirement. Several examples are described below.

- Charles Schwab recently introduced Schwab Intelligent Portfolios® where Schwab will "build, monitor and automatically rebalance a portfolio of low-cost exchange traded funds."[111] Additionally, "[y]ou can get help from a Schwab investment professional anytime, 24/7" and the service only requires $5,000 in assets to enroll with "$0 advisory fees, account service fees or commissions charged."[112] With $25,000 in assets, you can enroll in Schwab Intelligent Advisory™ that "combines personal advice from a Planning Consultant, who is a Certified Financial Planner™ professional, with [Schwab'] powerful online planning tool."[113] This service does not charge commissions and fees "are 0.28% of assets enrolled except cash."[114]

- Edward Jones has reduced its minimum asset requirement for multiple accounts: the minimum for Edward Jones' Guided Solutions Flex account has been reduced from $100,000 to $25,000 for clients who want to purchase stocks and to $50,000 for clients who want to individual bonds; the Advisory Solutions account, which allows investments in mutual funds and ETFs, has been reduced from $50,000 to $25,000; and the minimum investment of $5,000 for the Guided Solutions Fund account has not changed.[115]

- Bank of Oklahoma (BOK Financial) is going to provide managed accounts, which have a minimum of $10,000, so would be available to a broad range of clients and has decided to offer a digital solution for some of its customers.[116]

- Advisor Group,[117] one of the largest networks of independent broker-dealers in the United States, recently reduced fees on its advisory and brokerage platform and introduced "a new advisory product that gives clients access to institutional money managers with minimums as low as $5,500 with no IRA custodial fee; and a mutual fund only, no transaction fee platform for

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111 Charles Schwab, Investment Advice, https://www.schwab.com/public/schwab/investment_advice?mboxDisable=true.

112 *Id.*

113 *Id.*

114 *Id.*

115 Andrew Welsch, "Fiduciary ready: Edward Jones unveils compliance plans," OnWallStreet.com, Aug. 19, 2016, *available at* https://www.onwallstreet.com/news/fiduciary-ready-edward-jones-unveils-compliance-plans.

116 Mark Kowalczyk, "Tackling compliance with the new fiduciary rule," BAI.org, Oct. 13, 2016, https://www.bai.org/banking-strategies/article-detail/tackling-compliance-with-the-new-fiduciary-rule.

117 Advisor Group is comprised of FSC Securities Corp., Royal Alliance Associates Inc., SagePoint Financial Inc., and Woodbury Financial Services Inc.

commission accounts that eliminates IRA custody and transaction fees with a select group of mutual funds."[118]

- LPL, the nation's leading independent broker-dealer, has lowered advisory fees and minimums across several platforms and streamlined the process to move accounts from brokerage to advisory, where appropriate for the client and has introduced a robo-inspired, low-cost advisory solution that couples a digital investment platform with advisor review and advice, allowing Advisers to compete in the space while maintaining the human component.[119]

The Department, to meet its obligations under the APA, must address this and other evidence of the benefits (both quantitative and qualitative) resulting from the Final Rule; any failure to do so would be an "arbitrary and capricious" act under the APA.

c. Implementation of the Final Rule Will Likely Not Lead to Substantial Increase in Litigation

The Coalition commends the Department for recognizing, as part of the Final Rule, the right of Retirement Investors to hold fiduciary Advisers accountable for providing advice in their best interest through a private right of action for breach of contract.

We believe this provision is an appropriate and necessary enforcement mechanism that strengthens the Final Rule. This option is especially important for advice regarding IRA investments. Under the prior rule, neither the Department nor a Retirement Investor who was harmed could hold an Adviser accountable for losses suffered by a Retirement Investor. The threat of private action will provide a strong incentive for Advisers and firms to meet their fiduciary obligations under the Final Rule and have practices and procedures in place to mitigate conflicted advice.

The Coalition further believes there will not likely be a substantial increase in litigation. Individual claims could still be brought in arbitration. For example, IRAs are currently subject to breach of contract claims; brokers and insurance agents are currently subject to a fiduciary duty in certain circumstances; and FINRA rules prohibit class-action waiver provisions in brokerage contracts.

i. The Final Rule Allows Individual Arbitration

The Final Rule allows for inclusion of mandatory pre-dispute arbitration clauses in the Best Interest Contract. Importantly, the Final Rule does not ban class-action waiver provisions, but prevents firms and Advisers using class-action waiver provisions from relying on the BIC exemption.

Additionally, the decision of whether a firm or Adviser relies on the BIC exemption is purely voluntary. Advisers will not be forced to rely on the BIC exemption; they can simply stop providing conflicted advice. The Department has provided the exemption so that Advisers can keep their current business

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118 Bruce Kelly, "With DOL fiduciary looming, Advisor Group reduces fees on its brokerage and advisory platform," Jan. 10, 2017, *available at* http://www.investmentnews.com/article/20170110/FREE/170119997/with-dol-fiduciary-looming-advisor-group-reduces-fees-on-its.

119 LPL, Communicating Change, https://lplfinancial.lpl.com/content/dam/lpl-www/PDF/WP-Communicating-Change.pdf.

model; however, they are not forced to do so. In a recent decision from the U.S. District Court for the District of Columbia, the court clearly stated that "economic considerations that cause an individual to reject a certain option because it is less favorable in some ways and more favorable in others does not transform an otherwise voluntary decision into a coerced one."[120]

ii. <u>IRAs Currently Subject to Breach of Contract Claims</u>

Opponents argue the BIC exemption subjects firms and Advisers to additional liability for IRA products. In fact, and contrary to this assertion, IRAs, securities, and insurance products are subject to breach of contract claims. For example, in its comment letter to the Department in September 2015, the American Council of Life Insurers (ACLI), stated "[i]nsurers are familiar with the idea of an enforceable contract between a financial institution and its customer. All annuity owners have contractual rights enforceable against the insurer and recourse to state insurance departments and state courts. State laws provide annuity owners with important consumer protections."[121]

Although there is no statutory private right of action under the Internal Revenue Code (IRC), aggrieved parties can proceed with state-based contract claims under the IRA Agreements entered into by the investor and the firm, and can proceed with common law claims, such as breach of fiduciary duty and negligence.[122] This is an important distinction, because unlike employer-sponsored plans, IRAs are not subject to the broad preemption provisions under ERISA.[123] Two court cases illustrate this point.

First, In *Estate of Pauli v. Wachovia Bank*, the Superior Court of New Jersey held "[t]he terms of the IRA Agreement set forth the contract rights between plaintiffs, as Mr. Pauli's successors, and Wachovia."[124] Second, In *Mandelbaum v. Fiserv, Inc.*, the Federal District Court for District of Colorado found "no dispute exists regarding the IRA Agreements' existence, and the parties agree that the IRA Agreements are unambiguous and that Colorado law governs the contract interpretation. Therefore, the IRA Agreements must be enforced according to their express terms."[125] When discussing the *Mandelbaum* holding, a well-known ERISA expert law firm, which has filed multiple comment letters with respect to the Final Rule, stated "the court clearly stated that there is no private cause of action against fiduciaries under section 408 of the Code. However, as to the fiduciary,

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120 Huron v. Berry, 12 F. Supp. 3d 46, 53 (D.D.C. 2013) (citing Grocery Mfrs. Ass'n v. EPA, 693 F.3d 169, 177 (D.C. Cir. 2012) (explaining that, if a fuel manufacturer chose to meet its renewable fuel requirements by introducing the contested new fuel over another type of fuel due to cost considerations, that choice to incur potential injury would be "grounded in economics" and "most certainly not" caused by the challenged EPA waivers)).

121 Letter from James Szostek, Vice President, ACLI, to Office of Regulations and Interpretations, Employee Benefit Security Administration, U.S. Department of Labor (Sept. 24, 2015), *available at* https://www.acli.com/-/media/ACLI/Files/Fiduciary-Rule-Public/09242015_Supplemental_Letter_DOL_Fiduciary.ashx?la=en.

122 *See id.*

123 29 U.S.C. § 1144 (2012).

124 Estate of Pauli v. Wachovia Bank, N.A., 2015 N.J. Super. Unpub. LEXIS 1036 (2015).

125 787 F. Supp. 2d 1226, 1242-43 (2011).

negligence and contract-based arguments, the court relied heavily on the terms of the IRA Agreements between the account holders and the defendants."[126]

These cases reflect that although investors cannot bring a private claim under the IRC, they can bring state law claims under the operating contract and bring claims under common law theories. As noted above, this is an important distinction, because instead of providing a statutory private right of action for aggrieved investors under the IRC; the Department has provided a contract as a condition of the BIC exemption and the investor will bring a state-law claim based upon compliance with the contract, rather than compliance with the statutory duties under the IRC.

Because an aggrieved investor would bring a breach of contract claim, rather than a claim under the IRC, the terms of the BIC contract would be enforceable under state law.[127] For example, if an aggrieved investor believes the broker did not provide advice in his or her best interest, the investor would allege the broker did not meet his or her obligations under the contract, rather than alleging the broker violated a provision under the IRC.

iii. Brokers and Insurance Agents Currently Subject to Claims of Breach of Fiduciary Duty in Certain Circumstances

Opponents argue the Final Rule and the BIC subject firms and Advisers to additional fiduciary liability. However, courts have found when brokers and insurance agents are holding themselves out to their clients as trusted financial advisors and providing services beyond purely transactional assistance, they may owe a fiduciary duty to their clients.[128] The cases cited below illustrate this point.

- In *Maybank v. BB&T Corp.*, the Court held the agent to a fiduciary duty because the client engaged the agent to devise a retirement investment plan that reflected the client's goals of diversification, steady income, tax sheltering, and ability to protect wealth for heirs.[129]

- In *Tonzi v. Nichols*, the Court found a fiduciary relationship existed because the defendant, who was the client's accountant and financial advisor for over twenty years, advised him to roll over 401(k) and invest in viatical contracts.[130]

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[126] Groom Law Group, *Federal Court Relieves IRA Trustees of Liability for Madoff Investments*, Apr. 27, 2011, *available at* http://www.groom.com/media/publication/998_FISERV%20-%20Liability%20of%20IRA%20custodians.pdf.

[127] The state law would be based on the choice of law provision in the contract. As noted above, because the Department has allowed mandatory pre-dispute arbitration agreements to continue, these claims will most likely be heard in FINRA arbitration.

[128] The application of the fiduciary duty at common law depends on the actual financial sophistication of the client or the specific communications between the Adviser and the client.

[129] Maybank v. BB&T Corp., Civ. A. No. 6:12-cv-00214-JMC, 2012 U.S. Dist. LEXIS 108480, at *7-12 (D.S.C. Aug. 3, 2012).

[130] Tonzi v. Nichols, 24 Misc. 3d 1249[A], 899 N.Y.S.2d 63, *2-4, 2009 NY Slip Op 51924[U] (N.Y. Sup. Ct. 2009).

- In *Lee v. Hasson*, a Texas Court of Appeals found the “facts of [the] case present a rare example of the type of close personal relationship of trust and confidence that gives rise to a legally cognizable fiduciary duty.”[131]

- In *Mathias v. Rosser*, Mathias advised Rosser to invest money in three nursing homes he owned.[132] The Court found “the evidence established that Rosser was a licensed stockbroker and held himself out as a financial advisor, and that plaintiff was an unsophisticated investor who sought investment advice from Rosser precisely because of his alleged expertise as a broker and investment advisor. Further, Rosser testified that plaintiff had relied upon his experience, knowledge, and expertise in seeking his advice.”[133] Based upon these facts, the court found a fiduciary relationship existed between Mathias and Rosser.

- In *Nat’l Western Life Ins. Deferred Annuities Litig.*, the U.S. District Court for the Southern District of California noted under California law, an insurer does not owe a strict fiduciary duty to its insured.[134] However, because the sales agents held themselves out as objective financial planners, the Court found a special relationship, fiduciary in nature, was created between Plaintiffs and Defendants.[135] The Court also stated the deferred annuities being offered were “complex financial instruments which the average person cannot understand.”[136]

- In *Johnson v. John Hancock Funds*, the Tennessee Court of Appeals held “if the transaction is non-discretionary and at arm's length, i.e., a simple order to buy or sell a particular stock, the relationship does not give rise to general fiduciary duties. However, if the client has requested the broker or advisor to provide investment advice or has given the broker discretion to select his or her investments, the broker or advisor assumes broad fiduciary obligations that extend beyond the individual transactions … When a stock broker or financial advisor is providing financial or investment advice, he or she is required to exercise the utmost good faith, loyalty, and honesty toward the client.”[137]

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131 Lee v. Hasson, 286 S.W.3d 1, 19 (Tex. Civ. App. 2007).

132 Mathias v. Rosser, 2002 WL 1066937 (Ohio App. 10 Dist. 2002).

133 *Id.* at *5.

134 In re Nat'l Western Life Ins. Deferred Annuities Litig., 467 F. Supp. 2d 1071, 1086 (S.D. Ca. 2006).

135 *Id.* at 1087.

136 *Id. See also Estate of Migliaccio*, 436 F. Supp. 2d 1095, 1107 (C.D. Cal. 2006) (“a deferred annuity is not merely a life insurance policy but a ‘complex investment product’ which requires a purchaser to rely on the agent for superior knowledge.”).

137 Johnson v. John Hancock Funds, 217 S.W.3d 414, 428-29 (Tenn. Ct. App. 2006).

- In *Burdett v. Miller*, the Seventh Circuit held "if a person solicits another to trust him in matters for which he holds himself out as expert and trustworthy, and if the other, who is not an expert, accepts the offer and reposes her trust in the first, a fiduciary relationship is established."[138]

- In *U.S. v. Williams*, a self-employed insurance seller took advantage of his position as a financial advisor to gain the trust of an 87-year-old man and convinced him to grant power of attorney, with which he stole about $400,000. The court held the financial advisor was employed as a fiduciary, specifically noting that the elderly man relied upon the fiduciary as his trusted advisor.[139]

- In *Hatleberg v. Norwest Bank Wisconsin*, when a broker held out as either an "investment planner," "financial planner," or "financial advisor," the Wisconsin Supreme Court held a fiduciary duty may arise in such circumstances.[140]

- In *Opper v. Hancock Sec. Corp.*, the broker claimed since he was a "principal," he did not have any fiduciary duty towards the client.[141] The Southern District Court of New York (confirmed on appeal by the 2nd Circuit) held "the confirmation-slip label 'as principal' or 'as broker' was as a practical matter for defendant's unilateral determination. Conforming to SEC requirements, it served only to show whether the broker in the particular trade had chosen to buy from plaintiff or sell to him for its own account. While the disclosure served, and serves, as an obviously desirable protection for the customer, it is equally obvious the choice of function in this respect cannot be (and was never intended to be) a means by which the broker may elect whether or not the law will impose fiduciary standards upon him in the actual circumstances of any given relationship or transaction."[142]

Furthermore, empirical data also reflects that broker-dealers may be subject to fiduciary claims in private securities arbitration. Since broker-dealers are not regulated under the Advisers Act, they are not subject to the Advisers Act fiduciary standard of conduct.[143] However, since 2010, there have been over 11,000 claims brought against broker-dealers for violation of a fiduciary standard of

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138 Burdett v. Miller, 957 F.2d 1375, 1381 (7th Cir. 1992); *see also* EBCI Inc. v. Goldman, Sachs & Co., 832 N.E.2d 26 (N.Y. 2005) (when an arm's length relationship becomes advisory and one person was induced to and did repose confidence in another, the relationship becomes fiduciary).

139 U.S. v. Williams, 441 F.3d 716, 724 (9th Cir. 2006).

140 Hatleberg v. Norwest Bank Wisconsin, 700 N.W.2d 15 (Wisc. 2005).

141 Opper v. Hancock Sec. Corp., 250 F. Supp. 668, 674 (S.D.N.Y. 1966).

142 *Id.* at 674.

143 SEC STAFF, STUDY ON INVESTMENT ADVISERS AND BROKER-DEALERS: AS REQUIRED BY SECTION 913 OF THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT (Jan. 2011), http://www.sec.gov/news/studies/2011/.

conduct.[144] The empirical data demonstrate that customers alleging a violation of fiduciary duty in private securities arbitration actions do so because they believe, erroneously, that broker-dealers owe them a fiduciary standard of conduct. The Coalition contends there is not likely to be an increase in the number of claims brought; the only difference will be that consumer expectations will match the legal standard Advisers are held to under the Final Rule.

The Department, to meet its obligations under the APA, must address this issue, including an estimate of the number of registered representatives of broker-dealers and insurance agents who would be held to a fiduciary standard because of the manner in which they hold themselves out to the public and the services they provide, and must also provide an accurate estimate of the number of claims brought against brokers in FINRA arbitration for breach of fiduciary duty; failure to do so would be an "arbitrary and capricious" act under the APA.[145]

iv. FINRA Currently Prohibits Class-Action Waiver Provisions in Brokerage Contracts

Adopted in 1992, FINRA rules include a clause, similar to the BIC exemption clause, banning class action waivers in brokerage contracts.[146] The FINRA complaint described below illustrates this point.

In February 2012, FINRA filed a complaint against Schwab alleging that the firm violated FINRA Rule 2268(d)(3)[147] and FINRA Code of Arbitration Procedure for Customer Disputes (FINRA Customer

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144 *Dispute Resolution Statistics*, FINRA http://www.finra.org/ArbitrationAndMediation/FINRADisputeResolution/AdditionalResources/Statistics/index.htm.

145 Office of Management and Budget (OMB) Circular A-4 requires the agency to identify a baseline so it can evaluate the costs and benefits relative to that baseline. OMB, Circular A-4, To the Heads of Executive Agencies and Establishments, Sept. 17, 2003, http://bit.ly/2mSuQOh. To determine how many Advisers will be subject to additional litigation, the Department must attempt to quantify how many Advisers are currently subject to a fiduciary duty or subject to a claim for breach of fiduciary duty.

146 FINRA (and its predecessors NYSE and NASD) has never opened its forum to class or derivative actions against brokerage firms, and brokerage firms cannot require customers to waive class or derivative claims. For judicial interpretations of earlier versions of the NASD rule, see In re Piper Funds, 71 F.3d 298, 302 (8th Cir. 1995), Nielsen v. Piper Jaffray, 66 F.3d 145, 147 (7th Cir. 1995). For cases applying the comparable rule for industry arbitrations, see Good v. Ameriprise Finan., Inc., 2007 WL 628196 (D. Minn. Feb. 8, 2007), Clark v. First Union Sec., Inc., 153 Cal. App. 4th 1595 (2d Dist. 2007).

FINRA has stated two reasons for its position on class actions. One is based on pragmatic concerns: "the judicial has already developed the procedures to manage class action claims. Entertaining such claims through arbitration at [FINRA] would be difficult, duplicative and wasteful." Exch. Act Rel. 34-3171 (Oct. 28, 1992). FINRA"s second reason is policy-oriented: "class actions are better handled by the courts and that investors should have access to the courts to resolve class actions efficiently." *Id.*

147 FINRA Rule 2268(d)(1) states that "[n]o predispute arbitration agreement shall include any condition that ... limits or contradicts the rules of any self-regulatory organization." *See also* FINRA Rule 2268(d)(3) ("No pre-dispute arbitration agreement shall include any condition that . . . limits the ability of a party to file any claim in court permitted to be filed in court under the rules of the forums in which a claim may be filed under the agreement.").

Code) Rule 12204(d)[148] by placing a class-action waiver provision in its customer agreements and attempting to limit customers' ability to bring or participate in class actions.[149]

The Hearing Panel issued its decision in February 2013.[150] The Hearing Panel's decision concentrated primarily on two issues: (1) whether Schwab's Waiver conflicts with FINRA rules, and (2), if so, whether the FAA preempts FINRA rules. The Hearing Panel found that both FINRA Rules 2268(d)(3) and (d)(1), acting in conjunction with Rule 12204 of the FINRA Customer Code, banned the use of class action waivers by FINRA members. However, the Hearing Panel ultimately concluded these Rules may not be enforced. The Hearing Panel found enforcement was foreclosed by the FAA, as construed by the Supreme Court in *AT&T Mobility LLC v. Concepcion*[151] and other decisions.

FINRA's Board of Governors overruled the Hearing Panel decision: "We uphold these FINRA rules and find that Schwab's inclusion of a mandatory waiver of participation in judicial class actions, as well as its restriction of an arbitrator's power to join together individual claims violates NASD and FINRA rules. Because we determine that the FAA does not preclude FINRA's enforcement of its rules, we reverse the Hearing Panel's dismissal of the first two causes of action. We remand this matter to the Hearing Panel to determine appropriate sanctions."[152]

It is important to note that FINRA focused on the rulemaking history. FINRA specifically focused on the intent behind Rule 12204 and found the SEC stated "in all cases, class actions are better handled by the courts and that investors should have access to the courts to resolve class actions efficiently" and "without access to class actions in appropriate cases, both investors and broker-dealers have been put to the expense of wasteful, duplicative litigation."[153] "After reviewing the rule language and rulemaking history, [FINRA] determine[d] that Rule 12204 of the Customer Code was intended to preserve investor access to the courts to bring or participate in judicial class actions, and that through its Waiver, Schwab violated FINRA Rules 2268(d)(l) and (d)(3), and Rule 12204 of the Customer Code."[154]

It is also important to note this action was mainly brought about by customer complaints. Schwab admitted in news articles "[o]ver the last year, we heard clearly that a number of our clients and members of the general public have strong feelings about maintaining access to class-action

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148 FINRA Customer Code Rule 12204(a) states that "[c]lass action claims may not be arbitrated under the Code." FINRA Customer Code Rule 12204(d) states that "[a] member or associated person may not enforce any arbitration agreement against a member of a certified or putative class action with respect to any claim that is the subject of the certified or putative class action until: (1) The class certification is denied; (2) The class is decertified; (3) The member of the certified or putative class is excluded from the class by the court; or (4) The member of the certified or putative class elects not to participate in the class or withdraws from the class according to conditions set by the court, if any."

149 Dept. of Enforcement v. Charles Schwab & Company, Inc., Disciplinary Proceeding No. 2011029760201 (FINRA OHO Feb. 21, 2013), available at http://www.finra.org/web/groups/industry/documents/ohodecisions/p258285.pdf.

150 Dept. of Enforcement v. Charles Schwab & Company, Inc., Disciplinary Proceeding No. 2011029760201 (FINRA OHO Feb. 21, 2013), *available at* http://www.finra.org/web/groups/industry/documents/ohodecisions/p258285.pdf.

151 AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

152 *Id.*

153 *Id.* at 14 (quoting October 1992 Approval Order, 1992 SEC LEXIS 2767, at *5-6).

154 *Id.* at 15.

lawsuits. In a business like ours where our reputation and public trust are key to our success, we take perspectives like those very seriously."[155] The Coalition contends the reputational risk faced by companies will be more important than any judicial decision.

v. **Class Certification is a High Bar**

Final Rule opponents assert that the Department has underestimated the costs to the financial services industry, including costs from class action lawsuits arising from the BIC Exemption. Contrary to their arguments, given the significant barriers to the use of class actions to enforce the BIC Exemption, the Coalition contends there will be no substantial increase in litigation under the Final Rule.

Rules 23(a) and (b) of the Federal Rules of Civil Procedure govern the requirements for class certification.[156] Plaintiffs seeking to certify a class under Federal Rule of Civil Procedure 23 must plead and prove: (1) an adequate class definition, (2) ascertainability, (3) numerosity, (4) commonality, (5) typicality, (6) adequacy and (7) at least one of the requirements in Rule 23(b), namely: (a) separate adjudications will create a risk of decisions that are inconsistent with or dispositive of other class members' claims, (b) declaratory or injunctive relief is appropriate based on the defendant's acts with respect to the class generally, or (c) common questions predominate and a class action is superior to individual actions. It is important to note the plaintiff bears the burden of proving the prerequisites to class certification have been met by a preponderance of the evidence.[157]

1. **Adequate Class Definition**

The requirement of an adequate class definition includes several concepts. First, the class definition must be precise and unambiguous.[158] Second, it "must be sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member of the proposed class."[159] Finally, it must not be "defined so broadly as to include a great number of members who for some reason could not have been harmed by the defendant's allegedly unlawful conduct."[160]

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155 Jed Horowitz and Suzanne Barlyn, "Schwab drops ban on clients filing class-action lawsuits," Reuters, Apr. 24, 2014, http://www.reuters.com/article/2014/04/24/schwab-classaction-settlement-idUSL2N0NG1XJ20140424.

156 FED. R. CIV. P. 23(a), (b).

157 Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011) ("Rule 23 does not set forth a mere pleading standard." Instead, a plaintiff "must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc.").

158 Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 591-92 (3rd Cir. 2012).

159 Young v. Nationwide Mut. Ins. Co., 693 F.3d 532, 537-38 (6th Cir. 2012).

160 Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 824-25 (7th Cir. 2012).

2. Ascertainability

Although a plaintiff need not identify individual class members prior to class certification, he must show there is an available method to identify class members based on objective criteria.[161] This method must be "reliable and administratively feasible, and permit[] a defendant to challenge the evidence used to prove class membership."[162] The ascertainability requirement "eliminates serious administrative burdens that are incongruous with the efficiencies expected in a class action."[163]

3. Numerosity

Rule 23(a)(1) requires the plaintiff to show "the class is so numerous that joinder of all members is impracticable." A finding of numerosity must be based on direct or circumstantial evidence and not on speculation, even if it is "tempting to assume" there must be a large number of class members.[164] Numerosity should be shown for each proposed class and subclass.[165] The courts apply no strict numerical test for determining impracticality of joinder, although, as a general benchmark, classes of less than 20 are insufficiently numerous and classes of 40 or more satisfy the numerosity requirement.[166]

4. Commonality

Rule 23(a)(2) requires the plaintiff to show "there are questions of law or fact common to the class." The Supreme Court has held that merely reciting a list of common questions is insufficient. Instead, "[w]hat matters ... [is] the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." The class members' claims "must depend upon a common contention .... of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."[167] A court deciding the commonality of factual issues must rigorously analyze the plaintiff's contention that they can be proven on a class wide basis, including any evidence offered to back up that contention.[168]

5. Typicality

Rule 23(a)(3) requires the plaintiff to show "the claims or defenses of the representative parties are typical of the claims or defenses of the class." The Supreme Court has held the class representative

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161 *Marcus*, 687 F.3d at 592-93.

162 Carrera v. Bayer Corp., 727 F.3d 300, 307 (3rd Cir. 2013).

163 *Marcus*, 687 F.3d at 593.

164 *Marcus*, 687 F.3d at 595-97. *See also* Vega v. T-Mobile USA, Inc., 564 F.3d 1256, 1267-68 (11th Cir. 2009); Golden v. City of Columbus, 404 F.3d 950, 966 (6th Cir. 2005).

165 *Id.* at 595.

166 *See* Gen. Tel. Co. of the NW. v. EEOC, 446 U.S. 318, 330 (1980); Hayes v. Wal-Mart Stores, Incorporated, 725 F.3d 349, 357 (3d Cir. 2013); Consol. Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 483 (2d Cir. 1995).

167 *Dukes*, 131 S. Ct. at 2551.

168 *See, e.g.*, M.D. v. Perry, 675 F.3d 832, 839-45 (5th Cir. 2012).

had to "possess the same interest and suffer the same injury as the class members."[169] It is usually sufficient to show the claims of the named plaintiff and class members "arise from the same event or pattern or practice and are based on the same legal theory."[170] They need not be identical and some variation is permissible.[171] However, significant differences in the underlying facts may preclude a finding of typicality.[172]

6. <u>Adequacy</u>

Rule 23(a)(4) requires the plaintiff to show "the representative parties will fairly and adequately protect the interests of the class." The adequacy requirement seeks to "uncover conflicts of interest between named parties and the class they seek to represent."[173] It calls for a determination of whether the "interests and incentives between the representative plaintiffs and the rest of the class" are aligned or antagonistic.[174] Intra-class conflicts may arise when class members seek conflicting remedies[175] or some class members actually benefit from the challenged conduct.[176] Where an intra-class conflict is alleged, the court should determine whether it is fundamental and real rather than speculative.[177]

7. <u>Risk of Inconsistent Decisions</u>

Rule 23(b)(1) applies when adjudication of the named plaintiff's claim creates a risk of disposing of or impairing the claims, interests or rights of absent class members. Rule 23(b)(1)(A) applies when the defendant is legally obligated to treat all members of the class alike, as in the case of a utility government or taxing authority, and separate actions would create a risk of imposing incompatible standards of conduct upon it. Rule 23(b)(1)(B) applies when the action threatens to impair or dispose of the rights and interests of absent class members, as in the case of lawsuits filed by shareholders or against trustees, or where there is a limited fund available to pay damages.

8. <u>Declaratory or Injunctive Relief</u>

Rule 23(b)(2) applies when class members seek declaratory or injunctive relief and do not assert individualized claims for damages. It requires "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Rule 23(b)(2) requires not only that the defendant have engaged in a common course of conduct that is applicable to all class members,

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169 General Tel. Co. of Sw. v. Falcon, 457 U.S. 147, at 157, n.13 (1982).

170 Ault v. Walt Disney World Co., 692 F.3d 1212, 1216 (11th Cir. 2012).

171 *Id.*

172 *See, e.g.*, Stearns v. Ticketmaster Corp., 655 F.3d 1013, 1019-20 (9th Cir. 2011).

173 Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625 (1997).

174 Dewey v. Volkswagen Aktiengesellschaft, 681 F.3d 170, 183 (3rd Cir. 2012).

175 *Amchem*, 521 U.S. at 626.

176 *Dewey*, 681 F.3d at 184.

177 *Id.*

but also that the class members' claims and interests are cohesive.[178] Rule 23(b)(2) only authorizes classwide declaratory or injunctive relief and does not allow the court to award individualized relief.[179]

9. **Predominance And Superiority**

Rule 23(b)(3) applies to individualized claims for damages and requires the plaintiff to establish predominance and superiority. Rule 23(b)(3) requires the court to find "questions of law or fact common to class members predominate over any questions affecting only individual members." A court may find a lack of predominance if the plaintiffs cannot prove injury,[180] causation[181] or an element of a substantive claim[182] on a class wide basis. Predominance may also be lacking if the defendant can assert individualized defenses to class members' claims[183] or different state laws with material variations apply to different class members' claims.[184]

Rule 23(b)(3) also requires the court to find "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." The superiority requirement ensures that classes will only be certified under Rule 23(b)(3) if they will "achieve economies of time, effort, and expense, and promote ... uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results."[185]

vi. **Summary**

The preceding section illustrates the substantial procedural and practical impediments to certify a plaintiff class and to bring a class-action lawsuit against an ERISA fiduciary. For ERISA plans, a recent Supreme Court decision confirmed that "most claims for breach of fiduciary duty under ERISA, brought by participants in 401(k) and other defined contribution plans seeking monetary relief, cannot be certified as mandatory class actions under Rule 23(b)(1)(B). Rather, such claimants must satisfy the more rigorous requirements, and the more robust protections, of Rule 23(b)(3) before their claims can proceed on a class basis."[186] For IRA accounts, it will be even more difficult to meet the requirements for Rule 23, given the individualized nature of the accounts raises the possibility of numerous plaintiff-specific variations at the root of the injury.

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[178] Gates v. Rohm & Haas Co., 655 F.3d 255, 264-69 (3rd Cir. 2011).

[179] *Dukes*, 131 S. Ct. at 2557.

[180] In re Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244, 252-53 (D.C. Cir. 2013).

[181] *Marcus*, 687 F.3d at 603-05.

[182] Howland v. First Am. Title Ins. Co., 672 F.3d 525, 530-35 (7th Cir. 2012).

[183] *Carrera*, 727 F.3d at 307.

[184] Pilgrim v. Universal Health Card, LLC, 660 F.3d 943, 947-49 (6th Cir. 2011).

[185] *Amchem*, 521 U.S. at 615.

[186] BNA, "Workplace Law Report," http://www.gibsondunn.com/publications/Documents/Perry-Blankenship-ERISAClassActions.pdf (citing LaRue v. DeWolff, Boberg & Assocs., 128 S. Ct. 1020, 1025-26 (2008) and Ortiz v. Fibreboard Corp., 527 U.S. 805, 832-47 (1999)).

d. **Opposition Comment Letters May Inadvertently Mislead the Department With Respect to Current Law and Empirical Evidence**

The Coalition notes opposition comment letters filed in connection with this rulemaking and described briefly below. For the reasons stated, the Coalition believes these comment letters contain information which, if not clarified, could mislead the Department.

(i) Financial Services Institute

The comment letter filed by the Financial Services Institute (FSI) appears to inaccurately describe a study it cites therein. FSI states "[a] February 2017 study prepared by the Lockton Companies indicated that the costs to get through a motion to dismiss range from $500,000 - $750,000. Beyond that, discovery costs alone can reach between $2.5 million and $5 million."[187] However, the study specifically states "**[o]ne insurer** indicated that getting a case through the motion-to-dismiss stage costs between $500,000 and $750,000. Moreover, due to the number of documents involved and fact-intensive nature of these cases, completing discovery can cost between $2.5 million and $5 million."[188] The Coalition believes that since FSI failed to disclose that only one insurer provided the cost figure, the Department may be misled into assuming that the cost figure was derived from an empirical study of the entire industry.

FSI also states in its letter "[t]he BICE would subject financial advisors to a myriad of actions and potential remedies under the various laws of fifty different states. This contrasts with ERISA's carefully reticulated preemption structure which is intended to avoid subjecting parties to this very issue."[189]

FSI is correct that Congress, to assure uniformity of the laws governing employee benefit plans, placed their regulation under federal jurisdiction. Section 514 of ERISA states the Act "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 USCS § 1003(a)] and not exempt under section 4(b) [29 USCS § 1003(b)]."[190]

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[187] Letter from David Bellaire, General Counsel, FSI, to Office of Regulations and Interpretations, Employee Benefit Security Administration, U.S. Department of Labor (Mar. 17, 2017), *available at* https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/01060.pdf.

[188] Lockton Companies, "Fiduciary Liability Claim Trends," Feb. 2017, http://www.lockton.com/whitepapers/Boeck_Fiduciary_Liability_Claim_Trends_Feb_2017.pdf (emphasis added).

[189] FSI Comment Letter, *supra* note 187 at 7. The Insured Retirement Institute makes a similar claim by stating "[a]llowing state courts to interpret ERISA fiduciary standards of care is contrary to congressional intent as reflected in ERISA § 514(a) and is likely to result in inconsistent interpretations that will be particularly problematic for employers with employees in multiple states."

[190] 29 U.S.C. § 1144(a) (2012). The term "State" includes "a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans"[190] State laws include "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." 29 U.S.C. § 1144(c)(1) (2012).

However, while broad in their application, ERISA preemption provisions allow for a number of exemptions. The preemption provisions generally do not apply to state criminal law.[191] The preemption provisions do not apply to any state law that regulates insurance, banking, or securities or plans established solely to meet state workers' compensation, unemployment compensation, or disability insurance laws.[192] The Coalition contends that FSI, by omitting these exemptions, overstates ERISA's preemption provision in its comment letter.

(ii) Financial Services Roundtable

The Financial Services Roundtable (FSR) comment letter cites recent statements by the Acting Chair of the U.S. Securities Exchange Commission (SEC) that the Final Rule is primarily an invitation to litigation and the "risks and burdens of such litigation will only further increase compliance costs and the cost of advice to, and products for, Retirement Investors." [193] However, FSR fails to mention the information presented in Section IV(c) above that the Final Rule includes the same arbitration provisions that are included in current FINRA rules (allowance for individual arbitration and banning class-action waiver provisions); the difficulty of bringing class-action lawsuits; and the empirical evidence reflecting brokers are currently subject to fiduciary claims in private securities arbitration. Additionally, Morningstar advises "[r]egardless of whether the fiduciary rule goes into effect in 2017 as originally planned, the trends driving the rule show no signs of slowing. Investor preferences for transparency, fee-based investing, and lower cost investments will continue to shape the advice industry. Nor will curious clients stop questioning what kind of advice they're receiving. Addressing these trends now will strengthen your business, helping you **reduce your exposure to risk.**"[194] The Department should consider this clarifying information when considering the merits of FSR's comments.

V. Department's Specific Requests

In the Delay Rule, the Department has made a number of specific requests for comment. The Coalition has responded to a number of these questions in the discussion of the Presidential Memorandum above; however, for those we have not addressed, the Coalition provides further comment below.

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[191] 29 U.S.C. § 1144(b)(4) (2012).

[192] 29 U.S.C. § 1144(b)(2) (2012).

[193] Letter from Richard Foster, Senior Vice President, FSR, to Office of Regulations and Interpretations, Employee Benefit Security Administration, U.S. Department of Labor (Mar. 13, 2017), *available at* https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/00552.pdf.

[194] Morningstar, "Your Role in the Rule: A Checklist to Help Advisors Respond to the DOL Fiduciary Rule," Feb. 2017, *available at* http://images.mscomm.morningstar.com/Web/MorningstarInc/%7Bf7243ff5-1f26-4b72-bbc9-6b39b61a06db%7D_BD_checklist_021517.pdf (emphasis added).

a. It is Inappropriate to Compare the Department's Final Rule to the United Kingdom's Retail Distribution Review

The Department has requested comment on whether the United Kingdom can serve as an example for the compliance landscape in the United States under the Final Rule.

The Coalition believes that comparing the Final Rule to the United Kingdom's Retail Distribution Review (RDR)[195] is inappropriate. Unlike the RDR, the Department's Final Rule does not ban commissions, does not impose more stringent competency standards for Advisers and does not impose increased regulatory fees for Advisers.[196]

Opponents have also misrepresented the effects of the RDR on the U.K. financial industry. In a December 2014 report, the Financial Conduct Authority (FCA) conducted a post-implementation review of the RDR. The FCA review cites the Europe Economics' final report on the impacts of the RDR. The Europe Economics' report found, among other things: (1) "[t]he RDR has initiated a move towards increased professionalism among advisers;" (2) "[t]he ban on third-party commissions has reduced product bias; (3) "[c]harges for retail investment products have been falling post-RDR;" (4) "[c]osts of complying with the RDR have been in line with or lower than expectations;" (5) "[t]he market is adjusting to offer advice which is more tailored to consumers' demands … there is little evidence that the availability of advice has been reduced significantly, with the majority of advisers still willing and able to take on more clients;" (6) "[t]hose consumers who are receiving full advice now are more likely to be receiving better quality advice due to advisers being better qualified and the reduction in product bias;" and (7) "[t]he RDR has led to improvements in the disclosure of information provided by firms to consumers."[197]

In October 2015, the FCA published a "Call for Input" that invited interested parties to comment on a variety of issues with the potential to affect the supply and demand of financial advice in the UK market.[198] A March 2016 report reflected a majority of those who commented on the matter in response to the Call for Input felt that the RDR had been successful in increasing professionalism in the advice industry.[199] Additionally, a majority of respondents to the Call for Input who commented on this matter agreed that the post-RDR adviser approach to charging produced good outcomes for consumers, and there was not a case for a return to the pre-RDR rules on charging structures.[200] The report also found that "[a] number of firms currently in the advice market are also planning to increase the number of customers they serve."[201]

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[195] Financial Services Authority, "Retail Distribution Review: Independent and restricted advice," Jun. 2012, *available at* https://www.fca.org.uk/publication/finalised-guidance/fg12-15.pdf.

[196] *Id.*

[197] FCA, *Post-implementation review of the Retail Distribution Review – Phase 1*, Dec. 2014, available at http://www.fca.org.uk/static/documents/post-implementation-review-rdr-phase-1.pdf.

[198] FCA, *Financial Advice Market Review: Final Report*, Mar. 2016, *available at* https://www.fca.org.uk/publication/corporate/famr-final-report.pdf.

[199] *Id.* at 19.

[200] *Id.* at 46.

[201] *Id.* at 20.

b. The Department Previously Rejected a Number of Alternatives to the Final Rule

The Department has requested comment on whether any changes should be made to the Final Rule to reduce compliance burdens.

In its Regulatory Impact Analysis, the Department discussed the regulatory alternatives that it considered before settling on the Final Rule. These alternatives included: (1) excluding IRAs in whole or part from the rule; (2) not issuing the PTEs; (3) adopting the statutory definition of fiduciary advice; (4) relying heavily on disclosure as an adequate consumer protection; (5) deferring this rulemaking until the SEC takes related actions; (6) treating certain ESOP valuations as fiduciary advice; (7) conditioning the PTEs on disclosure alone; (8) issuing a streamlined, "low-fee" PTE; (9) issuing a prescriptive PTE in lieu of the proposed "best interest contract" exemption; (10) prohibiting mandatory binding arbitration; (11) adjusting the date by which affected advisers must comply; and, (12) delaying the Re-Proposed Rule's compliance date.[202] The Department found "[t]he qualitative and, where possible, quantitative assessments of these alternatives … suggest that none would protect plan and IRA investors as effectively as the Department's new proposal. Compared with the alternatives, the new proposal is expected to deliver additional investor gains that far exceed any additional compliance costs."[203]

The Department has not adequately explained what environmental changes, if any, led the Department to believe that the Final Rule and Regulatory Impact Analysis completed barely one year ago are now inadequate or defective. The Department, to satisfy its obligations under the APA, must revisit its previous analysis and provide a legally adequate explanation of why it believes any modification or repeal would "protect plan and IRA investors as effectively" as the Final Rule; any failure to do so would be an "arbitrary and capricious" act under the APA.[204]

VI. Conclusion

The Coalition opposes any modification or repeal of the Final Rule that would prevent its prompt implementation and thus prevent the Department from taking critically needed steps to enhance protections for Retirement Investors. We believe there is no justification for applying different standards of care to Advisers who are offering the same services to Retirement Investors; a strengthened fiduciary rule is necessary and appropriate for firms and Advisers under ERISA and IRC. Importantly, while many Advisers seek to do what is best for their customers, others take advantage of regulatory gaps to steer their clients into high-cost, substandard investments that pay the Adviser well but eat away at Retirement Investors' nest eggs over time. The Coalition believes

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[202] U.S. Dep't of Labor, *Fiduciary Investment Advice: Regulatory Impact Analysis*, Apr. 14, 2015, *available at* http://www.dol.gov/ebsa/pdf/conflictsofinterestria.pdf.

[203] *Id.* at 208.

[204] *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42 ("an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance"); *Atchison, Topeka & Santa Fe Ry. Co.*, 412 U.S. at 808 (an agency has a duty to "explain its departure from prior norms"); *Brand X Internet Servs.*, 545 U.S. at 981 ("Unexplained inconsistency is … a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act."); *Seldovia Native Ass'n, Inc.*, 904 F.2d at 1345 (requiring the agency "to show not only that its new policy is reasonable, but also to provide a reasonable rationale supporting its departure from prior practice").

requiring an Adviser to work in the retirement investor's best interest is an essential and long overdue reform. We urge the Department to refrain from modifying or repealing the Final Rule and promptly begin its implementation.

The Coalition appreciates the opportunity to comment on the Department's Delay Rule. We would be happy to meet with the Department to discuss these important issues further. If you have any questions regarding this comment letter or the Coalition, please contact Maureen Thompson, Vice President of Public Policy, CFP Board, at (202) 379-2281 or MThompson@cfpboard.org.

Sincerely,

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