April 17, 2017

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

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

Dear Mr. Canary:

Cetera Financial Group, Inc. ("Cetera") is the corporate parent of a complex of seven broker-dealers and five Registered Investment Advisors with more than 8,500 affiliated representatives. Our firms collectively serve more than 2 million retail investors, the majority of whom are middle-class families with a vital interest in saving for retirement. We appreciate this opportunity to provide comments to the Department of Labor (the "Department") in connection with the final regulation defining the term "fiduciary" (the "Regulation") under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), and the Best Interest Contract Exemption (the "BICE"), issued by the Department on April 8, 2016 (collectively, the "Fiduciary Rule").

Since the Fiduciary Rule became effective in April, 2016, the Department has taken additional action with respect to it. On February 3, 2017, President Trump sent a Memorandum (the "Presidential Memorandum") to the Department directing it to review the Fiduciary Rule and make determinations with respect to three separate questions.[1] Apparently in response to that

[1] 82 FR 9675 (February 7, 2017)

655 West Broadway, 12th Floor
San Diego, CA 92101
TOLL-FREE: 866.489.3100
FAX: 310.784.1103
www.cetera.com

directive, the Department has adopted changes to the Fiduciary Rule.[2] The Department has also stated that it intends to perform the review called for by the Presidential Memorandum, but that it is likely to take a number of months to complete. At the conclusion of that process, additional changes to the Fiduciary Rule may be adopted.

We endorse the Department's decision to extend the applicability date of the Regulation from April 10 to June 9, 2017, and to further extend the applicability date for most elements of the BICE until January 1, 2018. However, it appears that the Department has concluded that it does not need to complete its review of the entirety of the Fiduciary Rule prior to implementing the fiduciary standard and Impartial Conduct standards, because those provisions are "among the least controversial aspects of the rulemaking project."[3] We strongly disagree. The Department appears to have concluded that support for a best interest standard is equivalent to support for the approach taken in the Fiduciary Rule. We have serious concerns about the expanded definition of what may constitute fiduciary activity as defined in the Regulation. In addition, allowing these key elements of the Fiduciary Rule to take effect before completion of the Department's review creates a significant risk that the rules will be changed multiple times in a relatively short period of time, which would cause market disruption and confusion for retirement savers and advisers.

There should be no mistake about the impact that implementation of the Regulation on June 9 2017 will have: Despite the delay in applicability dates for aspects of the Fiduciary Rule, the practical effect will be to require all financial advisers to make immediate and substantial changes to the products that they offer and advice they provide to retirement investors. Allowing these key elements of the Fiduciary Rule to take effect before completion of the Department's review creates a significant risk that the rules will be changed multiple times in a relatively short period of time, which would cause market disruption and confusion for retirement savers and advisers. We urge the Department to further extend the applicability date for all aspects of the Fiduciary Rule, including the fiduciary definition and the Impartial Conduct standards until the entire review is completed.

Summary of Comments

1. The Department has adopted revisions to the Fiduciary Rule without completing the review called for by the Presidential Memorandum. This creates an unnecessary risk of multiple subsequent changes, confusion in the marketplace, and unnecessary effort and expense for financial advisers.

2. Even assuming that the Department determines that no substantive changes to the Fiduciary Rule are in order after completing its review, additional time is necessary for

[2] 82 FR 16902
[3] [Cite]

product and operational changes to occur, and the effective dates for all provisions should be delayed until at least July 1, 2018.

3. The Fiduciary Rule applies only to certain categories of accounts and investors. This ignores the fact that most retirement savers also maintain accounts that are not covered by ERISA and creates the possibility of conflicting standards applicable to different types of accounts. A common standard is the only practical method to protect the interests of all investors.

4. The Fiduciary Rule in its present form will adversely affect the ability of Americans to gain access to retirement information and financial advice and should be rescinded. Cetera and numerous others have submitted comments pointing out flaws in the substance of the current rule. It will reduce access to investment advice for many retirement savers by making it economically unfeasible to provide services and by limiting the investment options that will be available to them. It will also increase the cost of these services to investors by requiring financial advisers to make large and expensive operational changes to comply with its many mandates.

5. The Fiduciary Rule will cause significant dislocations or disruptions within the retirement services industry due to the inappropriate expansion of the definition of fiduciary in a manner that is inconsistent with the statutory text of ERISA.

6. The Regulatory Impact Analysis overstated the benefits of the Regulation and underestimated its costs.

****

1. The Department should delay the effective dates for all aspects of the Fiduciary Rule until it completes the review mandated by the Presidential Memorandum.

After receiving the Presidential Memorandum, the Department published a notice seeking comments about whether or not the applicability dates in the Fiduciary Rule should be extended and/or if substantive changes should be made. The period for submission of comments regarding substantive changes to the Fiduciary Rule ends today. The Department has stated that it has already received nearly 200,000 comment letters on this issue, and that more continue to arrive each day. The Department has stated its intention to undertake a thorough review of the Fiduciary Rule as directed in the Presidential Memorandum, and noted that it is likely to take several months to complete this analysis.

The Presidential Memorandum directed the Department to revise or rescind the Fiduciary Rule if it concludes, based on its review, that the Fiduciary Rule will "adversely affect the ability of

Americans to gain access to retirement information and financial advice." In particular, the Department must consider whether the Fiduciary Rule would cause any of the following:

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

During the rulemaking process, many commenters provided input to the Department indicating that the Fiduciary Rule would, in fact, cause all of these to occur. The Department essentially dismissed those concerns when it adopted the final rule. Unfortunately, it has now become apparent that the many of the concerns that were identified are coming to pass. We offer the following examples:

A. Reduction of access to retirement savings offerings

i. The "reasonable compensation" element of the Impartial Conduct standards has led many institutions to conclude that the compensation they receive in connection with sales of investment products of a given category, such as mutual funds, must be substantially identical. Mutual fund sponsors currently offer several different share classes which have different compensation arrangements. Some share classes allow investors to make cost-free exchanges among funds within a fund family, or to receive reductions in sales charges if they purchase specified amounts of certain funds or related funds. Keeping track of these potential differences in features and compensation makes it extremely difficult for a financial institution to determine which share class may be best for a given purchaser.

To address this issue, many mutual fund sponsors have been working to develop new share class structures that will fully levelize the compensation paid to financial institutions in connection with mutual fund sales. In the material accompanying the recent revisions, the Department refers to the development of new share classes such as "T" shares and "Clean" shares and assumes that they will resolve the difficulties that financial advisers have encountered in coping with the Impartial Conduct standards. However, we are informed by fund sponsors that it in many cases it will be several months before these new share classes can be reviewed and declared effective by the SEC. We are also informed that certain platform sponsors, such as clearing brokers, will need six to nine months to in order to

implement the changes needed to offer these new products. This work cannot even begin until the structure of the new mutual fund products is finalized. The Department has stated that clean shares may be a good solution to the regulatory challenges created by the Fiduciary Rule, but has suggested that the 60-day delay in the current applicability dates would be sufficient to implement all of the changes necessary to accommodate clean shares. This is an incorrect and unsupported conclusion. A delay of at least 12 months will be necessary for all of the necessary adjustments to occur.

Many financial advisers have declared their intention to either stop offering mutual fund shares with transaction-based compensation arrangements to retirement investors as of June 9, 2017, or to restrict their mutual fund offerings to a single share class, at least until such time as the new share classes are available. We submit that this is not what the Department intended when it adopted the Fiduciary Rule, and will harm investors. A delay in the applicability date will allow time for the necessary product innovation needed to address the required changes in a way that does not harm investors.

ii. The Fiduciary Rule creates an unlevel paying field in that it favors an economic model based on payment of asset-based advisory fees instead of commissions or other transaction-based compensation. In response to this, many financial institutions have stated their intent to discontinue offering commission-based account options to customers. This will not be in the interest of a large number of retirement savers, especially "buy and hold" investors who neither need nor want to pay for ongoing monitoring of their investments. Most fee-based advisory arrangements also include a grant of investment discretion to the financial adviser, with which some investors are not comfortable. The fee-based model will also makes provision of advice to investors with small account balances economically unfeasible.

B. Increased litigation

The Fiduciary Rule inappropriately utilizes private litigation (or the threat thereof) as its primary enforcement mechanism. The BICE requires that fiduciaries execute a contract, including required representations and warranties, which exposes them to contractual liability. Contrary to the Department's view, the law applicable to fiduciaries providing investment advice is not even remotely consistent across the multiple jurisdictions in the United States. Allowing state courts to interpret ERISA fiduciary standards of care is contrary to congressional intent as reflected in ERISA § 514(a), and is likely to result in

> inconsistent interpretations that will be particularly problematic for financial advisers with clients in multiple states.
>
> The Department acknowledges that it lacks authority to enforce the Regulation with respect to Individual Retirement Accounts ("IRAs"), but the BICE requires financial institutions to enter into contracts that may expose them to liability in class action lawsuits. The preamble to the BICE acknowledges that financial institutions will have no choice but to submit to the terms of this exemption if they choose to offer transaction-based compensation arrangements. That was the Department's objective, since, as it stated in the preamble to the BICE, "banning all commissions, transaction-based payments, and other forms of conflicted payments" (which would otherwise occur under the Rule) "could have serious adverse unintended consequences."
>
> The Department has effectively subcontracted enforcement of the new regulatory scheme to the class action bar in recognition of the fact that it lacks the power to enforce it. Former Assistant Secretary Phyllis Borzi has acknowledged this, saying that "Back in the day, when people wanted to make changes, they passed legislation," but the Fiduciary Rule changes "the way that social change and legal change and financial change is accomplished through congressional action to two different avenues for making changes: The main one being regulation and the second one being litigation." Ms. Borzi further explained that the BIC Exemption "deputiz[es]" consumers to bring "state contract actions" because the Department lacked direct statutory authority over IRAs.

The new final rule provides that the Best Interest standard will become applicable to all covered advice on June 9, 2017. By proceeding with implementation of portions of the Fiduciary Rule without completing the entire review, the Department has made a decision to proceed in direct contravention of the President's instructions. The Fiduciary Rule is a complex set of interrelated provisions. The Department must consider them in their entirety to determine if they would have any of the effects listed in the Presidential Memorandum. By proceeding with implementation of the Best Interest standard prior to performing a complete review, the Department has done one of two things: Either it has prejudged the issues and foreordained the outcome, or it has decided to subject investors and the market for financial advice to the risk that substantive provisions of the rule will be changed multiple times, causing unnecessary expense and disruption. Neither of these are acceptable. In order to comply with the President's directive, the Department must delay the applicability of the entire Fiduciary Rule until a complete review has been done.

2. The timeline for implementation of the Fiduciary Rule is not realistic and the effective dates should be delayed.

Even assuming that no substantive changes are made to the Fiduciary Rule as a result of a review, the timeline for implementation is inconsistent with the Department's past practice in adopting

new regulations. To provide a recent example, the Department granted multiple delays totaling more than two years for service providers to implement new regulations under Section 408(b)(2) of ERISA. The adjustments that will be required by the Fiduciary Rule are far more significant than any others since the enactment of ERISA. The 60 day delay in the effective date for portions of it will help, but does not sufficiently take into account the enormity of the effort that the financial advice industry must undertake to comply with it. No matter what changes are ultimately made after further review, a delay in the applicability dates will give the financial services industry time to develop, test, and implement the many new systems and processes that will become necessary.

3. A common Best Interest standard should apply to all investors and accounts.

Cetera believes and has publicly advocated that financial professionals should act in the best interest of their clients. We embrace the idea that there should be standards for our conduct when delivering advice to all investors. Over the past several months, we have taken a number of steps to develop new advice and compensation models that we believe will more fully align our interests with those of our customers. That being said, we have long-standing concerns about the Fiduciary Rule and its harmful impact on retirement savers.

The approach that the Department has taken is flawed for several reasons. In particular, the Fiduciary Rule applies only to certain categories of accounts. This ignores the fundamental fact that most retirement savers have both tax-qualified and non-qualified accounts. Creating a standard that applies to only a portion of a given investor or household's investment assets creates confusion and the possibility for conflict among the various legal and regulatory regimes. The financial advice industry has been subject to a comprehensive set of laws and regulations for more than 85 years, administered by the SEC, FINRA, and the 50 states. Imposing a new and potentially conflicting set of rules that has limited application is not the correct approach. The investing public and the financial advice industry need a single set of standards that applies to all investors and all accounts. The Fiduciary Rule flies directly in the face of this.

The Department has a role to play in determining what standards should apply to financial advice in connection with retirement savings, but it cannot function in a vacuum. Establishing the applicable standards should be a joint effort involving the Department, the SEC, and the other agencies with regulatory regimes that already exist. We note, for example, the provisions of the "SAVERS" Act, legislation that has been introduced in the current Congress. This legislation provides that the Department may not adopt standards for investment advice until such time as the SEC has an opportunity to conduct its own analysis and decide if such a standard is appropriate for all investors. Authority to enact such a standard is explicitly granted to the SEC under the terms of

the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.[4] Section 913 of the Dodd-Frank Act reflects the intent of Congress that the SEC take the leading role in development of any Best Interest standard. In addition, the Department's jurisdiction is limited to employee benefit plans and, to a limited extent, to IRAs. The Department was granted authority to interpret the definition of "fiduciary" under the Internal Revenue Code and grant exemptions from its prohibited transaction rules pursuant to section 102 of Reorganization Plan No. 4 of 1978, but the Department has no enforcement authority with respect to those rules.

Congress has long recognized that the hallmark of fiduciary status is the existence of a special relationship of trust and confidence. This is evident in the Investment Advisers Act of 1940 (the "Advisers Act"), which draws clear distinctions between fiduciary investment advisers and non-fiduciary broker-dealers. Firms and individuals who "render investment advice merely as an incident to...broker-dealer activities" are expressly exempt from the requirements of the Advisers Act. The courts have consistently upheld this distinction, but the Fiduciary Rule expressly rejects it.

The Fiduciary Rule seeks to regulate the broader financial services industry by creating a new regulatory regime built through a misuse of the Department's exemptive authority. Congress gave the Department the authority to issue exemptions to provide relief from ERISA's prohibited transaction rules when appropriate, but the Fiduciary Rule in its present form represents an attempt to use this exemptive authority to assume regulatory power that is appropriately vested in the SEC, FINRA and the state securities departments.

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

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

Financial professionals play a critical role in helping consumers understand the wide variety of options available in the market and how best to utilize them to prepare for retirement. Americans accumulate more savings when working with a financial professional, saving twice the amount

[4] Pub. L. No. 111-203, § 913(g), 124 Stat. 1376, 1828 (2010).

over a seven- to 14-year period.[5] A 2015 study found that receiving investment advice significantly increases retirement savings.[6] According to the report, among individuals with $100,000 or less in annual income, individuals who receive investment advice save at least 38% more than individuals who do not receive investment advice. For individuals of retirement age (65 and older), the disparity increases: Individuals who received advice have more than double the assets of those who did not.

Working with a financial professional has a positive influence on retirement planning behaviors including:

- Increased usage of tax-advantaged savings vehicles, improved asset allocation, greater portfolio diversification and less-speculative investing.[7]
- Financial professionals have been shown to help consumers earn 1.59 percent in additional annual returns, which over time leads to 22.8 percent more income in retirement.[8]
- Financial professionals can help their clients overcome the emotional aspects of investing, which can add one percent to two percent in annual net returns.[9]
- Workers receiving assistance in connection with workplace plans have annual returns that are more than 3 percent higher than workers without assistance. For an average 45-year-old worker, this incremental performance will lead to 79 percent more savings by retirement age.[10]
- Assistance from financial professionals when changing jobs or retiring helps prevent $20 billion to $30 billion in lost retirement savings, which would reduce individual workers' retirement savings by 20 percent to 40 percent. [11]

The help provided to employers by financial professionals regarding the selection and monitoring of funds increases the availability of small business retirement plans. Without this help, nearly 30 percent of small businesses would likely stop offering their workers such plans, and 50 percent

[5] Claude Montmarquette, Nathalie Viennot-Briot. Centre for Interuniversity Research and Analysis on Organizations (CIRANO). *Econometric Models on the Value of Advice of a Financial Advisor.*
[6] Oliver Wyman, The Role of Financial Advisors in the US Retirement Market (2015)
[7] *Ibid.*
[8] Morningstar. *Alpha, Beta, and Now...Gamma.*
[9] Vanguard Research. *Putting a Value on Your Value: Quantifying Vanguard Advisor's Alpha.* http://www.vanguard.com/pdf/ISGQVAA.pdf.
[10] Aon Hewitt and Financial Engines. "Help in Defined Contribution Plans: 2006 through 2012." https://corp.financialengines.com/employers/FinancialEngines-2014-Help-Report.pdf
[11] Quantria Strategies. "Access to Call Centers and Broker Dealers and Their Effects on Retirement Savings." http://quantria.com/DistributionStudy_Quantria_4-1-14_final_pm.pdf

would reduce contribution matches, offer fewer investment options, or increase fees paid by workers.[12]

We would also note the particular benefits of retirement planning advice for women and minorities. Women are more than twice as likely to be confident in their outlook on retirement when they work with a financial professional.[13] African Americans are nearly three times more likely to save in an IRA and four times more likely to have an annuity when working with a financial professional.[14] Similarly, nearly 90 percent of Hispanic Americans contribute to a retirement plan when working with a professional, compared to only 54 percent working on their own.[15]

For many retirement savers, commission-based brokerage accounts are the most appropriate or desirable way to pay investment advice, a fact that the Department seemingly disregarded in adopting the Fiduciary Rule. Recent research has found that 64 percent of financial advisers think the Fiduciary Rule will have a largely negative impact on retirement savers with less than $300,000 in net investable assets, 39 percent think financial advice will become too expensive for most retirement savers, and 71 percent will disengage from at least some retirement savers because of the Fiduciary Rule.[16] On average, these advisors estimate they will no longer service 25% of their mass-market clients — creating a potential advice gap for low-balance investors.[17] Another recent study concluded that 57 percent of all retirement savers will be forced to terminate their relationship with their financial adviser.[18]

5. ***The Fiduciary Rule will cause significant dislocations or disruptions within the retirement services industry due to the inappropriate expansion of the definition of fiduciary in a manner that is inconsistent with the statutory text of ERISA.***

Cetera has long supported a best interest standard for financial professionals who provide investment advice, and we believe the vast majority of financial professionals already act in the best interest of their clients. We do not believe, however, that it is necessary or appropriate to require all financial professionals to operate as ERISA fiduciaries in order to ensure that this

[12] U.S. Hispanic Chamber of Commerce and Davis & Harman. "The Impact of the Upcoming Re-Proposed Department of Labor Fiduciary Regulation on Small Business Retirement Plan Coverage and Benefits." http://ushcc.com/wp-content/uploads/2014/05/survey_0029436_embargoed_002095743.pdf

[13] Prudential Financial, Inc. *Financial Experience & Behaviors Among Women: 2014-2015 Prudential Research Study*. http://www.prudential.com/media/managed/wm/media/Pru_Women_Study_2014.pdf.

[14] Prudential Financial. *The African American Financial Experience.* http://www.prudential.com/media/managed/aa/AAStudy.pdf.

[15] Prudential Financial. *Hispanic Americans On the Road to Retirement.* http://www.prudential.com/media/managed/Hispanic_Retirement_FINAL_3-19-08.pdf.

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

[17] Id.

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

standard is being met. ERISA fiduciary status is recognized as being among the most stringent standards of conduct imposed under law, and entails much more than just acting in the client's best interest.

The Fiduciary Rule inappropriately characterizes a broad spectrum of financial marketing and sales activities as fiduciary in nature even where no reasonable expectation can exist that an advice provider will act as an unbiased and impartial source of recommendations. This problem is made even more acute under a legal standard that appears to require an adviser to disregard its own interests as a seller of investment products or provider of asset management services. Under the Regulation, fiduciary status arises virtually any time a communication is made that is in any way suggestive of an investment or investment management activity and is either individualized for or specifically directed to an advice recipient for consideration in making investment or management decisions. Financial professionals should be permitted to recommend products that they believe are in an advice recipient's best interest without triggering fiduciary status by virtue of having made such a recommendation. Requiring advice providers to completely disregard their own interest in earning compensation is inappropriate, overly burdensome, and will substantially impair Americans' access to valuable retirement products and services. In our view, a fiduciary relationship should only arise when a communication with a retirement investor is sufficiently tailored, within the context of a particular relationship, to provide a basis for the investor's reliance on that communication as an impartial and unbiased investment recommendation.

Financial advisers frequently engage in many activities that should not reasonably give rise to an expectation of a fiduciary relationship and have not traditionally been considered fiduciary in nature, but which could give rise to fiduciary status under the Regulation. A few pertinent examples include recommendations to a client that they:

- "Roll over" all or part of their retirement savings from a 401(k) plan to an IRA account, or transfer all or part of their savings from one IRA to another.
- Hire another person to provide investment advice or investment management services.
- Transition from a commission-based brokerage account to a fee-based advisory account.
- Use the proceeds of a distribution from a qualified plan account to purchase any product or service, whether it would be considered an investment asset or not.

FINRA has provided guidance on the distinction between recommendations and non-recommendations. It focuses not on the existence of a mere suggestion, but on whether there has been a communication that could be viewed as a "call to action" that might reasonably

influence an investor to make an investment transaction.[19] The FINRA guidance may be applied to distinguish an objective description of the features of an investment product or service (including performance and benchmarking information) from communications that constitute a "recommendation." The definition of recommendation in these circumstances should not require a provider to cease marketing its products and communicating with potential purchasers about them in order to avoid becoming a fiduciary.

The Fiduciary Rule fails to recognize that financial professionals may undertake to provide advice to plans, participants, beneficiaries and IRA owners that does not purport to be unbiased or impartial. For example, an advice provider that engages in the distribution of proprietary investment products may work with a prospective client to identify a particular product that fits the customer's needs. The customer, who has been informed that the advice provider offers proprietary products, is under no illusion that the advice provider is unbiased or impartial. Based on the customer's lack of any expectation of receiving unbiased or impartial advice, it would be inappropriate to impose fiduciary status on such a relationship. As a result of this overbroad definition of "fiduciary, "the Fiduciary Rule effectively bans common and long-accepted forms of compensation such as commissions, sales loads, and 12b-1 fees (charges used to pay the company or agent for ongoing support and services provided to the customer), because under ERISA and the Code, fiduciaries are prohibited from receiving compensation that varies based on the investment advice or transaction.

The Best Interest standard articulated by the Department appears to require a complete disregard of any financial interest of the fiduciary and its affiliates. In particular, the phrase "without regard to the financial or other interests of the fiduciary, any affiliate or any other party" is problematic because it appears to require that any advice provided wholly ignore the business and economic reality that financial advisers need to generate enough revenue to cover their costs and earn a reasonable profit in order to stay in business.

The Department elected not to include a "seller's exception" in the Fiduciary Rule for investment recommendations to small plans, IRA owners and plan participants and beneficiaries, asserting that, as a rule, such transactions do not fit the arm's length characteristics that the seller's carve-out was designed to preserve. This suggests that the Department, at the time, did not view retail customers as capable of looking out for their own interests by engaging in arm's length bargaining with financial service providers for favorable terms. We disagree with the premise that all consumers should be deemed incapable of looking after their own affairs and that existing regulations do not appropriately require financial professionals to act in the best interest of their clients.

This view is also inconsistent with the position taken by Congress in enacting ERISA § 404(c) and was unsupported by the rulemaking record. The resulting omission of a seller's exception for

[19] *See* NASD Notice to Members 01-23.

recommendations to small plans and retail customers will deprive them of the opportunity to shop the financial services marketplace for the investment arrangements that best fit their needs.

6. *The Regulatory Impact Analysis overstated the benefits of the Fiduciary Rule and underestimated its costs.*

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

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

In estimating that the average mutual fund sold by brokers underperformed its benchmark, the Department improperly used performance data on certain unrepresentative funds to draw conclusions about the entire mutual fund market. The Department compounded this error by relying on data for the period 1993 through 2009 (a cherry-picked sample encompassing the entire global financial crisis and nearly none of the recovery) and basing its underperformance estimate not on actual holding periods, or even over a full market cycle, but rather on the single year in which funds were purchased. This is a fundamental oversight that does not permit reliable conclusions to be drawn. The Department also ignored studies in the record that refuted its flawed estimates, in further violation of rulemaking requirements.

The outsized benefits the Department claimed for the Fiduciary Rule were principally the result of manipulating the "law of large numbers" by spreading small marginal benefits across the trillions of dollars in retirement savings. In addition, when it came to evaluating the costs of the Fiduciary Rule, the Department downplayed and outright ignored the effects its actions would have across

millions of retirement accounts, focusing only on firms' direct compliance costs to the exclusion of virtually all other direct and indirect consequences. The costs of the Fiduciary Rule include more than the expense of complying with regulations. Any disadvantage to either investors or financial advisers should be considered a cost.

The result of DOL's single-minded focus was a skewed analysis that grossly understated the Fiduciary Rule's adverse consequences in several respects:

- The Department ignored the costs of the class action lawsuits that will proliferate under the BICE, costs that will be borne by the defendants in those actions and by consumers who pay higher prices as a result. Class actions threaten potentially enormous liability and consequently exert economic pressure on defendants to settle even nonmeritorious cases. The Department has acknowledged that it was "creative" in fashioning new rights of action, and purposely relied on class actions as an enforcement mechanism. It ignored rulemaking comments about the adverse consequences, such as the inconsistent standards resulting from 50 different states' interpretation of the scope of fiduciary status, and the chilling effect that this will have on innovation and communication resulting from risking liability to large classes of investors under new and vaguely-articulated legal standards. This directly conflicts with ERISA's policy of uniform application in federal courts. In assigning no estimate to class action litigation in its cost analysis the Department improperly failed to respond to significant comments in the record, and ignored one of the most controversial aspects of the entire rulemaking. It was arbitrary and capricious to make private litigation the primary mechanism to enforce these rules while refusing to include any assessment of the adverse effects of that choice.

- The Department ignored the costs to individuals whom the Fiduciary Rule will deprive of assistance in retirement saving. That problem is real, and serious: The U.K. has determined that its move to a fee-based compensation model adversely affected retirement savers, particularly those with lower incomes. The Department dismissed concerns with this "advice gap" by, in part, suggesting that receiving financial assistance was not helpful to retirement savers. "There is little evidence," it said, "that financial advisers improve retirement savings."

  The Department's rejection of the value of advice is flatly inconsistent with its own previous projections that investment mistakes cost investors approximately $114 billion per year, that access to financial assistance reduced the cost of those mistakes by $15 billion per year, and that increased access to financial assistance would enable them to save billions more. Confronted with this contradiction in the rulemaking, the Department has stated that its earlier projections referred only to assistance provided by a fiduciary. It asserts that no such benefits could be attributed to a financial representative who has no fiduciary obligations. This claim cannot be supported. The Department's 2011 estimate

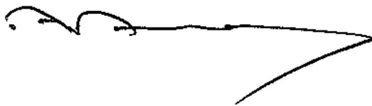
was based on a range of services that are regularly performed by brokers, and that do not involve the asserted conflicts of interest that seem to have propelled this rulemaking. For example, the Department said in 2011 that billions in savings would result from financial professionals helping savers avoid excess taxes, improper risk, failure to diversify their investments, or to simply prevent mistakes. The Department's recharacterization of these earlier statements was arbitrary and capricious.

- The Department failed to give appropriate weight to an economic analysis demonstrating that the loss of advice caused by the Fiduciary Rule could cost savers as much as $80 billion in a single major stock market correction. The Department concluded that the analysis "provides no empirical evidence," and cited studies that suggested that "investors who receive advice from a broker exhibit worse market timing than those who don't." In 2011, the Department posited the opposite thesis. Professional advice prevents investors from realizing their losses by selling off their investments during a market downturn. It was arbitrary and capricious to reject this analysis without reconciling these inconsistencies with the Department's prior position.

****

If you have questions about any of the comments herein or those in any of our previous submissions on the Fiduciary Rule, please feel free to contact me. My thanks for your consideration.

Sincerely,



Adam Antoniades
President
Cetera Financial Group