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Office of Exemption Determinations
Employee Benefits Security Administration
Attn: D-11933
Suite 400
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

RE: RIN 1210-AB82 – Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions

Dear Sir or Madam:

On behalf of a group of firm clients, I am writing today to provide "input that could form the basis of new exemptions or changes/revisions to the [fiduciary] rule and PTEs." This submission is made pursuant to the Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions ("RFI") published in the Federal Register on July 6, 2017.

We greatly appreciate the President's leadership in directing the review of the new definition of a fiduciary, the new prohibited transactions, and the modifications of existing prohibited transaction exemptions (collectively referred to as the "Fiduciary Rule"). As discussed below, the Fiduciary Rule is clearly in need of a review, followed by a complete rewrite of the Rule. Without such a rewrite, the Rule will have extremely adverse effects on retirement security.

SUMMARY

I. **Great harm being done by Fiduciary Rule.** In response to the issues raised in the President's memorandum, there is already massive evidence of both the harm being done by the Fiduciary Rule and the clear errors in the Department of Labor's ("DOL") 2016 economic analysis. That analysis was tainted by serious conflicts of interest and needs to be completely redone to avoid great harm to retirement savings. More such evidence will come to the DOL through responses to the RFI.

II. **Seven changes to the Fiduciary Rule needed**. The following seven changes to the Fiduciary Rule are needed to avoid that great harm to retirement savings.

- Under the Fiduciary Rule, casual suggestions give rise to fiduciary status, thus serving to stifle any type of investment assistance. This should be changed so that fiduciary status will not be triggered unless there is a mutual agreement between the advisor and the customer that there will be material reliance on the advice.
- Unlike any other commercial area, the Fiduciary Rule makes marketing illegal, which stifles normal and informative commercial discussions. This should be fixed with a real exception for selling activity, as under the original 2010 DOL proposal. ***It would be ironic if this Administration were to come out on the side of more regulation than even the 2010 Obama Administration.***
- The Fiduciary Rule creates expansive opportunities for expensive class action litigation, which will raise costs so dramatically that small accounts will be denied access to advice, and many mid-sized accounts will be priced out of the market. This should be addressed by deleting the contract and warranties in the Best Interest Contract Exemption and establishing a workable disclosure-based prohibited transaction exemption. The government concession that class action waivers are permitted does not, in fact, permit financial institutions to avoid class actions, as explained below.
- The helpful investment education rules established under President Clinton and preserved under the 2010 DOL proposal should be reinstated so as not to stifle needed education of investors. ***Again, it would be ironic if this Administration were to favor more regulatory restrictions than either President Clinton or the 2010 DOL.***
- The current grandfather rule is so restrictive that investors are being told that old accounts are completely frozen. A meaningful grandfather rule needs to permit continued advice regarding assets and investment strategies put in place prior to the January 1, 2018 (as delayed) applicability date, as well as advice regarding additional investments in grandfathered assets.
- Where ERISA section 404(c) applies, the statute provides very clearly that no fiduciary shall have liability with respect to investment decisions made by the participant. The Fiduciary Rule conflicts with the statute in this regard and should be modified accordingly.
- Real coordination with the SEC is needed to avoid inconsistent rules, which is causing confusion and could shift much savings from retirement to nonqualified savings, thus undermining retirement security.

DISCUSSION

I. ISSUES RAISED BY THE PRESIDENT'S MEMORANDUM

Issue #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.*"

<u>Two questions raised</u>. This issue breaks down into two distinct questions. First, will the Fiduciary Rule cause a reduction in access to retirement savings help? Second, will that reduction cause harm?

Attached to this letter is an Appendix, which was compiled by the financial trade associations, of the great harm being done by the by the Fiduciary Rule. The evidence of harm continues to pour in. Brief examples of that harm are set forth below.

Two independent studies of the final Fiduciary Rule conclude that the Fiduciary Rule will very significantly deprive small retirement accounts of access to personal investment advice. Because the Rule has only recently gone into partial effect, there is not a large amount of post-June 9 data on the effects of the Rule, but there is a great deal of data that indicates very powerfully that the Rule will cause small accounts to lose access to investment assistance.

Two major studies of the effects of the final regulation demonstrate the extent to which small retirement accounts will lose access to advice. One study was conducted by CoreData Research UK, which is the London unit of a global financial services research and strategy consultancy. CoreData Research UK issued a ***non-commissioned report*** based on an October 2016 survey of 552 U.S. financial advisors. Here is a key conclusion of the study:

- **<u>71% of advisors will cut off advice to many small retirement clients</u>**. "The fiduciary rule could result in mass market investors being left out in the cold, creating the prospect of an advice gap. ***Seven in ten (71%) financial advisors will disengage with at least some mass-market investors because of the DOL's rule.*** These advisors estimate they will disengage with an average of 25% of their mass market clients." (emphasis added)
    - For purposes of the report, mass-market investors are defined as investors with less than $300,000 in net investable assets. In our view, this underscores the depth of the problem with the Fiduciary Rule. For the truly small accounts, like those under $25,000, the result may be that almost none of the 71% will provide services.

In October of 2016, A.T. Kearney, a global management consultant, published a study of the effects of the Fiduciary Rule, in connection with a discussion of how Kearney can help financial institutions adjust to the Rule. The study was not structured to influence rulemaking in any way, but rather was structured to identify the effects of the Rule and to offer financial institutions strategies to deal with those effects. Here is a key excerpt from the Kearney study:

> "The rule will usher in several key shifts that industry players must understand to position themselves effectively for the future. . . . As firms move toward fee-based advisory, many low-balance accounts will no longer be served, shifting many assets to formats such as robo-advice and self-directed."

The study recommends that broker/dealers should: **"Accelerate the transition to fee-based services and advisory, and evaluate account thresholds to continue to serving (for example, accounts greater than $200,000)."** Thus, we have a management consultant recommending that broker/dealers consider ceasing to provide personalized advice to retirement accounts under, for example, $200,000, due to the Fiduciary Rule.

Will investors' lack of access to investment assistance cause harm? The DOL already has clear evidence, almost completely ignored by the prior Administration, that the lack of access to an advisor can have very adverse effects on retirement savings.

In "The role of financial advisors in the US retirement market" (July 10, 2015) (part of the record as a comment submitted with respect to DOL's 2015 proposal), the consulting firm Oliver Wyman finds that:

- Small businesses that work with a financial adviser are 50% more likely to set up a retirement plan (and micro businesses with 1-9 employees are almost twice as likely).
- Advised individuals, segmented by age and income, have a minimum of 25% more assets than non-advised individuals.
- In the case of individuals aged 65 and older with $100,000 or less in annual income, advised individuals have an average of 113% more assets than non-advised investors.
- Advised investors have more diversified portfolios – they own twice as many asset classes, have more balanced portfolio asset allocations, and use more packaged products for equity exposure compared with non-advised investors.
- Advised investors stay more invested in the market – advised individuals hold less cash in their investment accounts (36%-57% less than non-advised individuals for similar age and wealth cohorts).
- Advised investors re-balance more frequently, and are 42% more likely to re-balance their portfolios at least every two years.

Conclusion. In response to the question raised in the President's memorandum as to possible lack of access to investment advice, the DOL already has clear evidence that the Fiduciary Rule will cause small retirement accounts across the country to lose access to an advisor. Moreover, there is clear evidence that the effects of this loss will be devastating for low and middle-income individuals with small retirement accounts who are in need of financial advice.

Issue #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."*

The data noted above provides a complete basis for concluding that investors and retirees will be adversely affected by the changes in the retirement services industry caused by the Fiduciary Rule. But there are even more adverse effects documented by the two studies cited above.

The CoreData study found that because of the Fiduciary Rule:

- **"Most" investors will find advice too expensive**. "Meanwhile, the cost of advice is expected to increase and be passed on to investors. ***Nearly four in ten (39%) advisors believe the cost of personal financial advice will become too expensive for most investors***." (emphasis added)
- **Annuity sales will be very adversely affected.** "About a third (32%) believe shifting away from certain products, such as annuities and non-traded REITs, is one of the biggest challenges posed by the fiduciary rule."

  Similarly, the Kearney report states:

  > "Certain high-cost investment products (such as variable annuities) will be phased out as the business model is no longer viable under the new rule. . . ."

- **Adverse effects on annuities have already occurred.** A March 28 article in Investment News has documented the devastating effect that the Fiduciary Rule has already had on the sale of variable annuities:

  > The variable annuity industry took a beating in 2016, with several of the top sellers inking losses upwards of 25% on the year and some exceeding 40%. The Department of Labor's fiduciary rule, issued in its final form last spring, played a big role in the industry's bruising, observers said. . . . The DOL fiduciary rule "brought some tentativeness from advisers" in terms of using variable annuities with clients, said Todd Geising, assistant research director at the Limra Secure Retirement Institute. "It's not a particular product or company's strategic decision moving the industry itself," he added. "It truly is the forces specifically with the DOL rule.". . . If the rule is delayed, Limra is forecasting VA sales to dip another 10-15% this year, Mr. Geising said. If it goes into effect on schedule, that estimate swells to 20-25%.

Conclusion. In short, retirement investors and retirees of modest means will find themselves adversely affected in numerous ways. Such investors and retirees will:

- Find personal advice unavailable;
- Be hurt by such unavailability, as evidenced by the Oliver Wyman study noted above;
- Even where advice is available, likely find it too expensive to afford;
- Be much less able to protect themselves from outliving their retirement savings due to the adverse effects of the Fiduciary Rule on the annuity market, a view strongly held by the advisors in the CoreData survey and by Kearney, and borne out by the variable annuity sales numbers cited above.

Issue #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."*

As noted above, almost 40% of the advisors surveyed by CoreData believe that most retirement investors will be priced out of the investment advice market by reason of the Fiduciary Rule, a very disturbing prospect. Moreover, the threat of litigation is very real. Many advisors are fearful of litigation, as the CoreData survey found:

- "A majority (57%) believe increased paperwork stemming from reporting and disclosure requirements will be one of the top three challenges of the fiduciary rule. . . . Advisors are also in a heightened state of readiness for a potential rise in lawsuits related to the fiduciary rule. Nearly two in 10 advisors (18%) believe preparing for potential litigation will be one of the biggest challenges they must overcome."

Conclusion. The findings by CoreData and Kearney evidence the clear need to revisit the Fiduciary Rule to ensure that great harm is not done to retirement investors. Otherwise, they will lose access to personal investment advice, pay far more for advice, lose access to protection against outliving their retirement savings, and pay for increased paperwork and litigation.

II. CLEARLY ERRONEOUS ECONOMIC ANALYSIS PROVIDED BY THE PRIOR ADMINISTRATION: NEED TO START OVER

In brief, we found the economic analysis performed by the prior Administration to be constructed like a legal brief prepared by an advocate retained to defend the DOL rule rather than a foundation for a new rule. Moreover, DOL's analysis was, as demonstrated below, deeply flawed and has already been proven wrong in key respects. In this context, we strongly urge this new Administration to start over with a clean slate, and not rely on an economic analysis aimed to support a political objective.

DOL: job loss dismissed as a "transitional friction" that need not be studied. Before turning to the clear evidence that DOL's prior economic analysis was wrong, one observation is important regarding DOL's utter disregard for the possible job losses attributable to its proposal. On page 244 of its economic analysis, DOL states:

> transitional frictions may introduce some social costs; for example, if the resource being saved is worker labor, then there would be search and training costs associated with finding new employment within or outside of the financial industry. These related costs have not been quantified due to a lack of data, literature, or other evidence . . .

In other words, some unknown number of financial services workers may lose their jobs, but this is just a "transitional friction" and not worthy of additional study. In other words, job loss should not stand in the way of over-regulation, which is exactly the opposite of the view of this new Administration.

Clear examples where DOL's economic analysis has been proven wrong even before the applicability date. Normally, it can take years before predictions regarding the effects of a regulation can be determined, but here the Fiduciary Rule was so egregiously constructed that its adverse effects have already surfaced. They directly contradict central themes of the DOL's economic analysis. Here are two clear and important examples:

- **DOL economic analysis (page 312):** "the Department believes that quality, affordable advisory services will be amply available to small plans and investors under the final rule and exemptions."
  - **Actual results:** As noted, an independent study has found that over 70% of advisors will cease providing services to many small investors. Also, in light of the new Rule, a business consultant recommended consideration be given to ceasing providing services to retirement accounts under $200,000.
- **DOL economic analysis (page 313):** "revisions to the 2015 Proposal reflected in the Best Interest Contract Exemption will reduce compliance costs and thereby help make advice affordable to small investors."
  - **Actual results:** As noted, an independent study has found that almost 40% of advisors believe that ***most*** investors will be priced out of the retirement advice market because of the Fiduciary Rule.

The prior Administration's well-documented political conflict of interest tainted DOL's economic analysis. It is ironic that a very profound conflict of interest underlies the prior Administration's economic analysis. In other words, instead of striving for accuracy, the prior Administration let its political perspective completely control the analysis. This established a clear conflict between the prior Administration's political objectives and its duty to create a sound rule. The following excerpt from a report issued by Senator Ron Johnson (R-WI) includes very disturbing quotes from DOL regarding the biased nature of DOL's economic analysis:

> The Administration was predetermined to regulate the industry and sought evidence to justify its preferred action. In emails to senior White House advisors, a Labor Department official wrote of the **'challenges in completing the [regulatory impact analysis]'** and of the need to find literature and data that **'can be woven together to demonstrate that there is a market failure and to monetize the potential benefits of fixing it.'** In another email, a Labor Department official discussed **'building the case for why the rule is necessary.'** (emphasis added)"

In a rule that is aimed at conflicts of interest (and even known as the Conflict of Interest Rule), the prior Administration's own conflicts of interest were never disclosed, acknowledged, or mitigated.

DOL's conflict of interest was most evident in DOL's consistent refusal to discuss the value of financial advice. DOL's economic analysis is very lengthy, but a great deal of it can be boiled down to one key point: fees paid to advisors reduce returns, so that, if everything else is equal (an unrealistic and unsupported assumption), advised investors have lower returns than non-advised investors who do not pay those fees. That is the core point made repeatedly in one form or another over hundreds of pages.

The overriding problem with DOL's economic analysis is that it does not take into account the benefits of advice. In very isolated places, DOL made brief references to this issue, but generally this critical issue gets very little attention in DOL's economic analysis. For example, the landmark study on the benefits of advice cited above, prepared over years by Oliver Wyman and submitted to DOL as a comment, is ***never*** discussed by DOL and is only cited perfunctorily in a footnote on page 314. How can DOL decide whether investors benefit from advice without examining a study of the benefits of that advice?

DOL dismisses overwhelming evidence that advised investors have greater savings than non-advised investors. As noted, DOL refused to even discuss the landmark study done by Oliver Wyman on this topic. DOL's basis for dismissing such evidence is that there is no showing that the advice "caused" the greater savings, relying heavily on the notion that the type of investors who seek advice may be better savers than non-advised investors. See page 316. But even DOL knows that this explanation is incorrect. On page 156, DOL admits that advised and non-advised investors "appear not to be very different across observable characteristics."

It is especially odd that in some places DOL actually admits that there is a huge hole in its economic analysis attributable to the failure to take into account the value of advice.

- DOL measures the harm of conflicted advice by comparing mutual funds distributed directly to consumers versus mutual funds distributed by full-service brokers. But then DOL admits on page 299 that this comparison does not take into account "the value of the advisory services."
- Also on page 299, DOL admits that some harm "caused" by full-service brokers may reflect "unobserved, indirect, fair compensation for advice. . . . . However, . . . retail investors are unaware of such indirect compensation (and of 12b-1 fees), so it is implausible that they reflect efficient market pricing of advisory services." DOL's statement is a non-sequitur: the evidence that brokers do not deliver value is that investors do not fully understand how brokers get paid. There is simply no logic here.

Other nominal attempts by DOL at analyzing the benefits of advice are at best half-hearted:

- Examples of DOL's extremely weak attempts to analyze benefit of advice ***(italicized material below is provided to demonstrate the weakness of DOL's analysis):***
    - "Both the industry-generated investor survey results and Foerster et al.'s finding of savings impacts suggest that at least some of advised investors' excess fees (and associated underperformance) can be interpreted as fair payment for financial services that yield consumer benefits other than improved investment performance. ***[DOL admits that fees reflect payment for valuable services.]*** Neither of these, however, challenges the more extensive and robust evidence, presented above, that investors often cannot understand the cost of their advisers' services and generally cannot determine whether the value of those services justify their cost. As such, both of these findings are consistent with the

proposition that advised investors' higher fees and underperformance are excessive relative to the services their advisers provide." (Page 157) ***[DOL's best rebuttal again is a non-sequitur. DOL says that investors may not understand the cost of services; this is no rebuttal at all regarding whether advisors provide services that justify their fees. The weakness of DOL's rebuttal is very telling regarding the fact that DOL could not effectively rebut the notion that fees are justified by the benefits of advice.]***

- "[A]dvisers incur substantial costs pursuing IRA customers, and IRA investors ultimately bear such costs." (Page 127) ***[This criticism demonstrates the weakness of DOL's position. If advisors are being condemned for passing on marketing costs, that is a condemnation of our entire economy. By definition, every retail business has to market and has to pass on marketing costs to stay in business.]***
- "Stoughton, Wu, and Zechner (2011) . . . find that, "*kickbacks are always associated with higher portfolio management fees and negatively impact fund performance*" [italics added]. Some in the industry have made the claim that although fees are hidden and advice is conflicted, consumers are still better off in these advice arrangements than getting no advice at all. Results like those from Stoughton, Wu, and Zechner (2011) cast doubt on that assertion. (Page 133) ***[Again, DOL could not do better than simply say that fees reduce returns, which is a mathematical fact and does not address whether advised investors do better than non-advised investors. And DOL's same point could be made against non-conflicted advice, which also reduces returns. DOL could not disprove the value of advice so it simply repeated over and over the tired point that fees reduce returns.]***
- "There is evidence that advisers often recommend investments that they should know are not the best alternative for their customer. Numerous academic studies have found that, as a group, passively managed mutual funds (i.e. index funds) consistently outperform actively managed funds, largely due to their low fees, (Gruber 1996; French 2008; Fama and French 2010). Therefore it is likely that IRA advisers who honor their customers' best interests would widely recommend index funds with low fees." (Page 145) ***[Again, no effort is made to evaluate the benefits of advice. DOL instead bases its analysis on the same tired point: fees reduce returns, so all actively managed funds are bad, a condemnation of a multi-trillion dollar industry. But if that is the basis for condemning actively managed funds, the same criticism would apply to the fees charged for non-conflicted advice, which also reduce returns. What DOL seems to be suggesting is that it would be better for retirement investors if advisors did not charge for advice. That is certainly the case, but that point is silly to say the least.***]
- "Hackethal, Haliassos, and Jappelli (2012) . . . show that brokerage clients who receive investment advice have inferior portfolio returns relative to those who do not receive advice, in the amount of 5.0 percent per year after fees have been factored in." (Page 154) ***[Actually, the article comes to no definitive conclusion regarding whether the value of advice justifies its cost. DOL picked certain***

parts of the article to reference, but left out the authors' extensive discussion of uncertainty regarding how to analyze the data.]

- "To the extent that 12b-1 fees are fair compensation to a BD in exchange for advice, it may be appropriate to back out these fees when estimating underperformance. However, where 12b-1 fees are charged on retail investor assets for any other purpose, this charge is appropriately reflected in the performance of the assets." (Page 163) ***[DOL starts by making a completely unsupported observation that the only fee that may be treated as fair compensation for advice is a 12b-1 fee. DOL never justifies that statement. DOL then goes on to repeat the same obvious point – fees reduce returns – without ever even acknowledging the question of the value of the advice given.]***

A large advice gap arose in the United Kingdom due to a very similar rule; DOL failed to even acknowledge that gap, much less take it into account. Again, one has to wonder about the role of DOL's conflict of interest noted above. Effective as of January 1, 2013, the United Kingdom adopted a rule that had an effect very similar to the effect the DOL's prohibited transaction rules would have under the proposal – making payments from mutual funds to advisers illegal. (Under the DOL rule, such payments are illegal unless the very risky and burdensome BICE is used, which many firms are not using.) As a result, and as predicted by the industry, U.K. advisers ceased servicing small accounts in droves, as shown below by a description of the January 1, 2013 results of the U.K.'s new rules. Some of these practices were implemented before the U.K. rule went into effect but were clearly done in anticipation of the rule, as recognized by a study commissioned by the U.K. regulator itself.

- **U.K.'s "big four" banks (an important source of investment advice in the U.K.)**
  - **HSBC:** provided investment advice only for customers with at least $80,000[1] in total assets or $160,000 of annual income.
  - **Lloyds:** provided face-to-face investment advice only for customers with at least $160,000 in assets.
  - **Royal Bank of Scotland:** charged $800 to set up a financial plan, and made changes to gear investment advice services to high net-worth clients.
  - **Barclays:** provides investment advice only for customers with at least $800,000 in assets.

  These banks previously had entire business arms or strategies providing investment advice to investors with less assets, but just prior to the U.K.'s implementation of its new rule, HSBC, Lloyds, and Barclays completely pulled out of offering investment advice to such investors, and, as noted, Royal Bank of Scotland overhauled its offerings to target high net-worth clients. For example, Barclays closed Barclays Financial Planning, leaving only Barclays Wealth to offer financial advice to individuals with at least $800,000 in assets.
- **Examples of other actions taken in the U.K.**
  - **Aviva:** ceased offering face-to-face investment advice.
  - **AXA:** ceased offering face-to-face investment advice.

[1] The dollar references are approximate, based on 2013 pound to dollar conversion rates.

- **Adviser firm AWD Chase de Vere:** stopped accepting clients with $80,000 or less in assets.
- **Adviser firm Towry:** stopped accepting clients with less than $160,000 in assets.

DOL had the opportunity to learn from the U.K. experience but chose to ignore it with incorrect statements such as the following:

- **DOL statements in its RIA.**
  - **DOL:** "[The U.K. rule] hasn't resulted in the sizable advice gap that the advisers feared." (Page 77.) **Facts:** ***No citation is provided by DOL, nor has DOL ever responded to the above data, which contradicts DOL's statement and which has been submitted to DOL.***
  - **DOL:** "Any advice gaps are questionable, not attributable to the [new rule], or small and will be resolved by the market." (Page 80.) **Facts:** ***This statement is directly contradicted by the U.K. regulator itself in a later report cited below.***
  - **DOL:** There is "evidence that advisers are available to serve even small investors." (Page 84.) **Facts:** ***One of DOL's cites is to a study by Towers Watson that itself directly contradicts DOL, as noted below.***
  - **DOL:** "Some commenters point to reports that . . . minimum account balance requirements have increased in the U.K. But this evidence appears to be mostly anecdotal." (Page 86.) **Facts:** ***As noted below, the U.K.'s own regulator has acknowledged the advice gap that DOL denies. Again, DOL has never responded to the facts of the new minimums cited above.***
  - **DOL:** "A Towers Watson report indicated demand for around 25,000 individual advisers, compared with estimates of around 30,000 financial advisers currently active in the market, although supply and demand may not be perfectly aligned across the market." (Page 86.) **Facts:** ***It is shocking that DOL failed to mention the key aspect of that report, which was Towers Watson's statement that*** *"A different picture is likely to emerge in considering individual consumer markets, as opposed to the total market. . . .it has not been possible to analyse supply by segment. . . However, anecdotal evidence . . . suggests that advice capacity serving less affluent segments is likely to have reduced."*
  - **DOL:** "Concerns also were expressed regarding an 'advice gap' within the UK when the RDR became effective. However six months after the effective date the FCA commissioned research showing that investment advisers continue to serve clients with savings and investments between £20,000 and £75,000 and that a third of advisers continue to serve clients with less than £20,000." (Page 179) **Facts:** ***DOL's own statement reveals that roughly two thirds of advisers refuse to provide services to individuals with less than $31,200 (the then-equivalent of 20,000 pounds). Why didn't DOL find this extremely troubling? Why didn't DOL follow up on this point and find out how many advisers serve individuals with less than $10,000?***

- **Additional facts:**
  - **Minimums cited above.** Please see above the account minimums adopted in connection with the new U.K. rule, a point never refuted by DOL.
  - **Study by U.K. government concedes existence of advice gap caused by new rule**. On March 14, 2016, the United Kingdom government published a study confirming that investment advice for holders of accounts with small balances has been diminished following the 2013 rule change. The report was primarily a review of the U.K. *regulator by* the U.K. *regulator*, so not surprisingly much in the report simply defends the appropriateness of the regulator's own regulation. ***But even the U.K. regulator admits that there is a serious problem, squarely contradicting DOL's characterization of the U.K. experience.***
  - **U.K. regulator admits that the new regulation only helps the wealthy:** "We believe that the [new regulation] has brought about a positive step change in the quality of advice available to those with larger amounts to invest. However, steps need to be taken to make the provision of advice and guidance to the mass market more cost-effective." And "at present, this high standard of advice is primarily accessible and affordable only for the more affluent in society." ***In other words: the wealthy are getting the help they need, but lower income individuals cannot get advice.***
    - **Minimum required assets of $142,000 becoming common:** "a survey of advice firms suggested that, over the last two years, the proportion of firms who ask for a minimum portfolio of more than £100,000 [approximately $142,000] has more than doubled, from around 13% in 2013 to 32% in 2015." ***In other words, since the new regulation took effect in 2013, minimum asset thresholds for advice have soared, just as predicted by the industry in the U.K. and by the industry here.*** DOL acknowledged this fact, but inexplicably seemed to dismiss its importance.
    - **Large majority of advisors not interested in small accounts:** "In a 2016 survey . . . 69% of advisers said they had turned away potential clients over the last 12 months." ***In other words, almost 70% of advisors have turned away low income customers.***
    - **Almost 50% of firms rarely help customers with less than $42,600.** The U.K. regulator's own survey revealed that "45% of firms very rarely advise customers on retirement income options, if those customers have small funds (i.e. less than £30,000 to invest) [approximately $42,600]." ***In other words, entire firms will not work with small accounts.***

DOL's own conflict of interest: all supporting studies are sound; all opposing studies are flawed. It is remarkable to read the economic analysis prepared by the prior Administration's DOL. Every supporting study is sound; every opposing study is flawed. For example, in 3.2.4 of the economic analysis alone, DOL cites with approval 14 studies or submissions that support the DOL position. DOL only discusses one opposing view, the ICI comment letter. DOL makes the following comments regarding ICI's position: DOL "rejects" ICI's argument; ICI's argument "obscures meaningful differences;" ICI's estimates are "far less reliable;" and ICI "makes several comparisons that provide no relevant information."

Another egregious example of bias relates to a SIFMA report. DOL quoted an anonymous commenter as saying without any support whatsoever: "The [SIFMA] report has no credibility, particularly in light of the gross misrepresentations of the rule included in SIFMA's comment letters." Well-reasoned and documented reports from the industry have "no credibility" while unsupported attacks by Rule supporters are accepted as gospel. This is sad.

One could pick any section of DOL's analysis that addresses submissions from critics of the rule, and the pattern is exactly the same. What are the chances that every study supporting DOL is correct and every study criticizing the Rule is flawed? Mathematically, the chances are almost nil, a clear indication that DOL's economic analysis was constructed to reach a political result, exactly as noted in DOL's e-mails to the White House.

DOL disregarded the advice of other agencies in preparing its economic analysis. On page 260 of its economic analysis, DOL states that the "Department consulted closely with the IRS/Treasury, SEC staff, and FINRA in developing the proposal." In fact, based on documents that the Administration agreed to turn over, Senator Johnson (R-WI) prepared a report, which very powerfully shows that DOL rejected comments from the SEC, Treasury, and OMB. ***Moreover, the report shows very clearly that the SEC raised some of the key concerns that the industry has raised – such as concerns that the Rule will cut off access to advice.***

The report documents the following disturbing points:

- **DOL has refused to turn over what must be extremely damaging material.** As shown below, DOL consistently rejected much input from the SEC, Treasury, and OMB. And this is only based on the material that was turned over to Senator Johnson. ***DOL steadfastly refused to turn over what must be damaging communications among the agencies, without any claim of privilege.***
- **Urging SEC not to cooperate.** ***DOL urged the SEC not to cooperate with Congressional requests for information about the SEC's comments on the fiduciary project.***
- **Inaccurate statement regarding DOL/White House communications.** ***DOL told Senator Johnson's office that there were no documented communications between the White House and DOL on the Fiduciary Rule, yet Senator Johnson's office obtained such documents from the SEC.***
- **More than half of SEC's 26 concerns unheeded.** Career, non-partisan SEC staff identified at least 26 items of concern related to the substantive content of the proposed rule. As discussed in the report, DOL rejected or failed to implement 14 of those concerns, more than half.
- **SEC's concerns about DOL cutting off access to advice unheeded.** SEC e-mail to DOL: "[W]e continue to believe that commenters are likely to raise concerns that the proposal may result in reduced pricing options, ***rising costs and limited access to investment advice, particularly for retail investors***. Commenters also may express concerns that broker-dealers, as a practical matter, may be unlikely to use the exemptions provided and ***may stop providing services*** because of the number of conditions imposed, likely compliance costs, and lack of clarity around several provisions." (emphasis added)

- **More SEC concerns about cutting off access rejected.** ***DOL did not follow SEC's recommendation "that the Labor Department analyze the costs and risks associated with the possibility that the rule could decrease the availability of investment advice and could drive firms to switch to registered investment advisor models from broker-dealer models."***
- **DOL expressly rejected SEC's request to examine the costs and benefits of alternative approaches.** Such an examination is required by Executive Order. Specifically, Executive Order 12866 provides as follows:

> In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.

- **Treasury's concern about regulating IRAs was rejected.** As stated in the report, "Treasury officials voiced concerns that the Labor Department's proposal, by attempting to regulate IRAs through the proposed rule, 'fl[ies] in the face of logic' and was contrary to Congressional intent."
- **E-mails from DOL employee harshly rejecting input from the SEC.** DOL employee: "***Well, I hate to break it to you, but you're wrong . . . . We have now gone far beyond the point where your input was helpful to me. . . . If you have nothing new to bring up, please stop emailing me.***" The SEC staffer responded: "***I am now also utterly confused as to what the purpose of the proposed DOL rule is*** . . . ." (emphasis added)
- **SEC: DOL Rule's required disclosures "have very little economic meaning and thus no value to consumers."**

The Johnson report draws a very clear picture of an agency determined to complete a regulation without regard to whether the regulation reflected the input of experts and could have adverse effects. This is even further evidence of the need to start over with the economic analysis.

III. SEVEN FIXES TO THE PROBLEMS OF THE FIDUCIARY RULE

Casual "suggestions" can give rise to fiduciary status, thus cutting off retirement investors from almost any helpful information. Under the Fiduciary Rule, casual "suggestions" about investments or distributions that are clearly not intended to be relied upon as advice would give rise to fiduciary status. This is not appropriate and is a core problem with the Rule. When an employee or IRA owner calls a call center for informal assistance, no such assistance will be available because any casual suggestion is a fiduciary act. When an employee asks a human resources employees for help, no help will be provided because that would give rise to fiduciary status. (There is an illusory exception for human resources employees that only applies to human resources employees who violate company policy by answering questions.)

Fixing this problem is simple. Investment or distribution advice should not give rise to fiduciary status unless there is a mutual agreement, arrangement, or understanding that the advice is individualized and that there will be material reliance on the advice. Why should casual suggestions that were never intended to be relied on give rise to fiduciary status?

A seller's exception is needed, as in the 2010 DOL proposal: otherwise, in one and only one industry – the retirement industry -- marketing, promoting, and selling are now being regulated as fiduciary acts and are thus illegal. In every industry in the country, promoting and selling are part of doing business. Under DOL's shocking new definition of a fiduciary, persons openly acting as salespersons must assume fiduciary status and be subject to severe liabilities simply by reason of promoting their own products. This is such an amazing result that even DOL did not dare propose this in 2010, expressly treating selling as selling in 2010. But in the radicalization of the Rule in 2016, this common sense provision was eliminated.

A real seller's exception, similar to the one proposed by the DOL itself in 2010, is clearly needed.

The Fiduciary Rule is a plaintiffs' lawyer dream come true in terms of litigation opportunities. This needs to be addressed through the other changes described in this letter, plus reform of the exemption requirements. Under the Fiduciary Rule (which includes the Best Interest Contract Exemption ("BICE")), there is no such thing as safe advice. A financial institution can easily be sued over any advice. For example:

- A financial institution can be sued if its compensation is not "reasonable". But DOL has not given guidance on what that means, so financial institutions always run a risk of being sued for receiving "unreasonable" compensation.
- The Fiduciary Rule requires financial institutions to adopt procedures to oversee their advisors, but there is no guidance on how to design these procedures. So regardless of what financial institutions do, they can be sued for having insufficient procedures.
- Financial institutions can also be sued if advisors receive normal commissions for selling annuities, and, as DOL concedes, those commissions are materially different from the commissions for, for example, mutual funds. The law technically permits this difference but only if the commissions can be justified based on "neutral factors" that are impossible to quantify and for which DOL provides no meaningful guidance.
- Financial institutions can be sued for promoting their own products, because under the rule selling is fiduciary advice.
- A financial institution can be sued if a trial lawyer later disagrees that its advice was in the client's best interest, because again there is no guidance on what that means.

The anticipated explosion in litigation will send costs skyrocketing, which will in turn cause small accounts and small businesses to lose access to assistance and will price mid-sized accounts out of the market.

In order to avoid this huge expansion of litigation, the contract and all required warranties and representations need to be deleted from the exemptions. This is what gives rise to the class action opportunities with respect to IRA advice. In this regard, please note that the ability under the BICE to waive class actions in favor of arbitration does not help nearly as much as it might seem. Even if such waivers are permitted under the BICE, class actions under the BICE will still be permitted if contract and representation requirements are retained. This is true because lawsuits can be based on such contracts or representations, and these lawsuits can be class actions because FINRA rules preclude waivers of the right to pursue class actions.

Thus, in all cases in which the FINRA rules apply, there is no ability to require waivers of class actions. This means that if the BICE requires a contract and/or representations, then plaintiffs' lawyers will be able to bring class actions based on an alleged failure to comply with the terms of the contract or representations. There is no policy need for such class actions, which simply add costs and potential liabilities to the system, thereby making it uneconomical to serve small accounts. Congress has established a very rigorous excise tax regime to address prohibited transactions. Adding class actions is just a gift to the trial bar, a gift given at the expense of the small accounts who will lose access to investment advice.

Additionally, the BICE needs to be modified to provide far more clarity on how it works. Specifically:

- The determination of whether compensation is reasonable should be made based on whether a similar amount of compensation is charged to others and thus the amount charged is a market-based amount. If it is, the compensation is by definition reasonable. There is no way to determine reasonableness of compensation other than by reference to the existing market of buyers and sellers.
- The rule regarding level fees at the advisor level, subject to exceptions based on neutral factors, should be repealed. The requirement cannot be administered, as illustrated by DOL's failure to provide any helpful guidance on how to apply it.

New definition devastating to investment education. One of DOL's great achievements in the last 25 years was the issuance of Interpretive Bulletin 1996-1, which opened the door to massive increases in investment education for millions of Americans. The 2010 DOL proposal very appropriately preserved 1996-1. In the radicalization of the 2016 Rule, investment education was cut way back.

Under 1996-1, education includes (1) guidance on the extent to which an individual should invest in different asset classes (such as large and small cap equity funds, and long and short-term bond funds) based on her age and other factors, and (2) examples of investments that fit within such asset classes. This definition of education has worked very well for more than 20 years. Under the Fiduciary Rule, however, providing examples of investments that fit within asset classes would be fiduciary advice, not education, in the case of IRAs. Thus, education would be limited to conversations about investment theory that will be of little use to most retirement savers. As a result, we will have less informed retirement investors who will be less able to put investment education to practical use and will be much less able to make informed decisions about investing their IRA assets.

Interpretive Bulletin 96-1 needs to be reinstated in full. And, as under the Fiduciary Rule, 96-1 needs to be made explicitly applicable to IRA owners, plan fiduciaries, withdrawals, and rollovers.

Need for a real grandfather rule. The Fiduciary Rule is causing great harm already, even before it is fully in effect. Advisors are hesitant to make recommendations for fear that such recommendations will later trigger prohibited transaction problems. This is depriving many investors of needed help, especially with respect to variable annuities, which, as noted in the CoreData and Kearney studies and in the Investment News article, are particularly hurt by the Fiduciary Rule.

While the public policy discussion goes on, we ask DOL to include, in the preamble to the delay of the January 1, 2018 applicability date, a strong signal that it is considering a broader grandfather rule that would fully exempt from the January 1, 2018 portion of the Best Interest Contract Exemption: (1) all transactions entered into, or advice given, prior to the January 1, 2018 applicability date, as delayed, and (2) advice provided after such applicability date regarding (a) any assets acquired prior to that date, or (b) investment of additional assets into grandfathered investments. It does not make sense to preclude advice on assets previously acquired, regardless of whether it is advice to sell such assets or invest further in such assets.

In the absence of the above changes, the adverse impacts of the Rule will continue to harm investors while the Rule's effects on the goals of the Administration are under review. Advisors will be hesitant to provide advice now if they cannot provide further advice on the same assets. Moreover, in those cases where grandfathered advice is given, without these changes, investors' grandfathered assets could be effectively isolated in a largely frozen account without access to assistance and separate from the investor's ongoing account.

Modify the Fiduciary Rule to conform to ERISA section 404(c). Where applicable, ERISA section 404(c) provides that:

- A participant or beneficiary exercising control over the assets in his account "shall not be deemed to be a fiduciary by reason of such exercise," and
- "no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from [a] participant's or beneficiary's exercise of control."

The statute is very clear. Where section 404(c) applies, advice to a participant cannot trigger fiduciary liability. The Fiduciary Rule needs to be modified to conform to the statute in this regard. This would help facilitate coordination with the SEC, as discussed below, with the securities laws appropriately regulating advice to participants.

Real coordination with the SEC needed. It is clearly not workable to have different fiduciary standards for retirement and non-retirement assets. Investors typically talk to their broker about both IRA and non-retirement accounts. With the onerous DOL Fiduciary Rule, brokers are left with two choices. First, the broker could refuse to provide assistance to small non-retirement accounts, just as is happening with respect to retirement accounts. This would extend the adverse effects of the Fiduciary Rule to non-retirement assets.

Second, the broker could apply different standards to the two different accounts, which is both confusing and risky. For example, the broker might provide advice on the non-retirement assets, but refuse to provide advice on the IRA because the account is too small to justify the potential liability. In that case, the broker would have to get the customer to agree not to use the non-retirement advice in making investment decisions regarding the IRA. The customer would understandably be completely confused. Is the non-retirement advice bad for the IRA? If so, why? And if so, why is it good for the non-retirement assets? How should the IRA assets be invested? Do the general investment principles that the broker explained apply to the IRA? Or are those inapplicable too?

This confusion will be rampant. So the taint of the Fiduciary Rule will carry over and affect non-retirement assets unless there can be a uniform fiduciary rule that applies a workable best interest standard. In addition, even where the confusion can be overcome, the availability of advice only on the non-retirement side for small accounts will mean that there will be far less retirement savings and more non-retirement savings, severely undermining retirement security.

Thank you for your consideration of the views expressed in this letter.

Sincerely,

Kent A. Mason

NEW DATA SHOWS DOL FIDUCIARY RULE HARMING SMALL RETIREMENT SAVERS

Executive Summary

As ordered by the President, the Department of Labor requested new information about the economic effects of the Fiduciary Rule. This new data, based on actual experience rather than academic guesswork, shows that the Department's original predictions were wrong. The facts show that the Department significantly underestimated the negative effects of the rule, particularly in reducing access to advice for small retirement savers and small businesses. Specifically:

- A survey of advisors finds 71% will stop providing advice to at least some of their current small accounts due to the risk and increased costs of the rule.
- Other surveys found that 35% of advisors will stop serving accounts under $25,000, and 25% will raise their client minimum account thresholds.
- A major mutual fund provider reported that the number of orphaned accounts on its books (accounts no longer serviced by an advisor, leaving investors on their own) tripled in the first quarter of 2017 due to the fiduciary rule. These small accounts averaged $21,000. It further estimated that roughly 15% of its accounts would be orphaned following full implementation of the rule.
- A survey of insurance service providers shows 70% already have or are considering exiting the market for small balance IRAs and small plans, and half are preparing to raise minimum account requirements for IRAs.
- Lack of access to advice hurts retirement savers—a study shows that investors starting with $25,000 who receive advice save nearly three times more than their non-advised peers. This is due not only to investment recommendations, but to personal assistance in developing better saving rates and other financial behaviors.
- Many comments explained that a wide array of financial service providers are responding to the Rule's new litigation risks by limiting the investment types and products they will recommend.

The information also highlighted critical flaws in the Department's original analysis, including its reliance on old data, inadequate consideration of alternatives, not taking into account the benefits advisors provide while focusing on aspect of costs, and underestimating the impact on small businesses.

As this data shows, the Trump Administration should further delay the applicability date of the rule while it completes its full review in order to avoid harming the very people the rule is intended to help.

New Information: Loss of Consumer Access to Retirement Advice

- According to a 2016 study, Americans who work with a financial professional save more than Americans who do not, including saving twice as much over a seven- to 14-year period.[1] (IRI, Davis & Harman, FSR and Chamber)
- A 2016 study by CoreData found that 71 percent of financial professionals will disengage from at least some retirement savers because of the Fiduciary Rule, and 64 percent think the Fiduciary Rule will have a large negative impact on their mass-market clients (i.e., investors with less than $300,000 in net investable assets). On average, these financial professionals estimate they will no longer work with 25 percent of their mass-market clients, creating an advice gap for low-balance investors.[2] (IRI, Davis & Harman, ABA, Market Synergy, SIFMA, ACLI)
- A 2016 study by A.T. Kearney found that by 2020, broker-dealer firms (including wirehouses, independents, and dually-registered broker-dealer/registered investment advisers) will collectively stop serving the majority of the $400 billion currently held in low-balance retirement accounts. [3] (IRI, Davis & Harman, FSI)
- In a 2017 survey of IRI member firms, 70 percent of respondents either already have or are considering exiting smaller markets such as lower balance IRAs and small employer based plans, and nearly half already have or are considering raising IRA account minimums. [4] (IRI)
- A 2017 survey by the National Association of Insurance and Financial Advisors ("NAIFA") found that nearly 90 percent of financial professionals believe consumers will pay more for professional advice services, 75 percent have seen or expect to see increases in minimum account balances for the clients they serve, and 91 percent have already experienced or expect to experience restrictions of product offerings to their clients. [5] (IRI, NAIFA)
- One report notes that 35 percent of advisers surveyed "will move away from low-balance accounts" (*i.e.*, less than $25,000 in assets).[6] And "nearly one in four advisers said that they will likely increase their current client minimums as a result of the fiduciary rule, focusing their attention on higher-net worth clients and more profitable relationships."[7] (FSR)
- One large mutual fund provider reports that its number of orphaned accounts nearly doubled in the first three months of 2017, and that the average account balance in these orphan accounts is just $21,000. Further, it projects that ultimately 16% of the accounts it services will be orphaned this year because of the Fiduciary Rule. Extrapolating this prediction suggests that at least 1.6 million small retirement savers have already lost access to investment assistance since January 2017, and an additional 1.6 million are likely to lose access after the Rule becomes applicable. (Chamber, ICI)

- The National Conference of Insurance Legislators ("NCOIL") adopted a resolution stating that "the Rule will prevent consumer access to crucial retirement education and services, ultimately harming the very people it seeks to aid." (Market Synergy)
- According to a February 2017 survey of more than 1,000 investors conducted by J.D. Power, more than half (59 percent) who pay commissions now say they either "probably will not" (40 percent) or "definitely will not" (19 percent) be willing to stay with their current firm if it meant being forced to move to fee-based retirement accounts. (Market Synergy)
- A 2017 report indicates that the Rule will result in additional charges to retirement investors of approximately $800 per account or over $46 billion in aggregate.[8] (FSR, FSI, NAIFA)
- Many advisors plan to exit the business entirely. In a blind online poll of 459 advisors conducted by Fidelity Clearing & Custody Solutions from August 18-26, 2016, 10% of advisors reported they are planning to leave or retire from the field earlier than expected because of the rule, and another 18% said they are "reconsidering their careers as advisors.[9]
- "For example, effective April 10, 2017, specific distribution partners of Pacific Life will scale back the retirement products they offer, limiting competition and choice. Advisors plan to be more selective of the new investors they choose to service which will limit access to retirement information and personalized advice for many. In addition, distributors continue to identify and eliminate clients with small to modest account balances in anticipation of the added compliance costs and heightened litigation risks generated by compliance with the new rule. As a result a significant number of existing investors could lose access to an advisor to talk to, answer questions, and who can help encourage them to save more and remain invested over time."[10]
- "According the 2016 Global Survey of Financial Advisors published by Natixis Global Asset Management, more than three-quarters of advisors surveyed believe increased regulations could lead to higher costs for their clients. The Rule is specifically mentioned as being one of the primary drivers of increased regulatory costs. More alarming to small businesses, 38 percent of respondents said they were likely to "disengage from smaller clients." Because retirement plans sponsored by small businesses often pale in comparison to larger corporate retirement plans in terms of assets invested, small businesses face a greater likelihood of being dropped by their financial advisors."[11]
- "It is estimated the rule could disqualify up to 7 million IRA holders from investment advice and reduce the number of IRAs opened annually by between 300,000 and 400,000."[12]
- "According to Cerulli, two-thirds (66%) of advisors believe that small investors will have less access to professional financial advice as a result of the rule. And, according to a recent report by CoreData Research, 71% of surveyed U.S. advisors plan to disengage from "mass market" investors because of the DOL rule and these advisors estimate they will no longer

service 25% of their current clients – creating a potential “advice gap” for low balance investors.”[13]

- Due to the requirements of BICE “Landenburg will be forced to preclude some lower cost investment options that may be appropriate for some clients and reduce available product offerings to only those that pay the same level compensation (even if that compensation is higher) to the Financial Institution. This will likely cause a broad reduction across multiple product categories and, in some categories, may reduce available products from over 100 to less than 10.”[14]

New Information: Loss of Consumer Access to Retirement Products

- Some distribution firms and financial professionals have already significantly scaled back their use of commission-based products such as variable annuities because of concerns about the potential implications of the Fiduciary Rule on recommendations of such products. In fact, despite the existence of a rising stock market, which has always led to increased sales of variable annuities, sales declined by 21.6 percent from 2015 to 2016. [15] (IRI)
- Adverse effects on annuities have already occurred. “The variable annuity industry took a beating in 2016, with several of the top sellers inking losses upwards of 25% on the year and some exceeding 40%. The Department of Labor's fiduciary rule, issued in its final form last spring, played a big role in the industry's bruising, observers said.”[16] (Davis & Harman, IRI)
- In 2015, variable annuities represented 56% of IRA annuity sales and 46% of 2016 IRA annuity sales. LIMRA projects that variable annuity purchases will decrease another 20-25% in 2017 if the Rule goes into effect.[17] (SIFMA)
- For IRA purchases, sales declined 22% in 2016 compared to the prior year.[18] The ambiguous regulatory structure of the Rule is expected to result in additional decreases in purchases of variable annuities, which represents a significant amount of IRA annuity purchases. (SIFMA)
- More than 80 percent of respondents to the 2017 IRI survey have already introduced, plan to introduce, or are considering introducing fee-based variable annuities. However, those products are unlikely to be widely available in the near-term and may not be appropriate for all retirement savers, including some for whom a traditional commission-based variable annuity would be more economical, less costly, and likely in their best interest. [19] (IRI)
- Several large intermediaries have already announced a variety of changes to service offerings, including firms no longer offering mutual funds in IRA brokerage accounts; others offering no IRA brokerage accounts at all; firms reducing web-based educational tools; and firms raising account minimums for advisory fees.[20] (ICI)

- Recent media reports have highlighted the decisions being made by some firms to change their service models and product availability, including (a) moving clients to fee-based accounts, (b) eliminating commission-based IRAs; (c) raising investment minimums for commission-based IRAs; (d) eliminating variable annuity products; and (e) excluding certain products from commission-based IRAs (*e.g.*, annuities, mutual funds, and exchange-traded funds).[21] (FSR)
- Many firms have already determined the BIC Exemption is unworkable for certain products, and the substantial threat of unwarranted litigation cannot be justified for certain accounts.[22] (ICI)
- Many companies will be inclined to reduce the universe of available investments in order to effectively mitigate potential conflicts of interest arising from different compensation amounts and cost structures, which the company does not control. Likewise, investment choice will be limited in order to ensure that financial institutions can comply with the numerous initial and ongoing disclosure requirements applicable to BICE. The technology and operational capabilities necessary to meet these disclosure obligations inevitably will cause us and others to offer fewer products in order to control the costs of these efforts.[23]
- "Firms have restricted product offerings to certain clients, thereby limiting consumer choice, and have abandoned traditional, lower-cost compensation arrangements for advisors (e.g., commissions, rather than high upfront management fees that small and first-time savers cannot afford) in order to avoid the cost of complying with the BIC Exemption and mitigate the threat of costly class action lawsuits." [24]
- "AAF found that three major companies have already left part of the brokerage business, and an additional six are drawing down their business or switching to a fee-based arrangement, depriving more consumers of investment advice."[25]
- "Over the 12-month period ending on September 30, 2016, industrywide sales of variable annuities with guarantees declined 24%."[26]
- "The National Economic Research Association estimates more than 57 percent of current retirement savings account holders will be forced out of their current plan by this rule. Economists from the Brookings Institution estimated the consumer loss could be $80 billion – twice as much as was projected by the Department of Labor – and a report from economic consulting firm Oliver Wyman concluded the rule could raise the price of financial advice by nearly 200 percent."[27]
- "According to the Insured Retirement Institute, 2016 sales of all annuities declined 7.6% from 2015, and 2016 sales of variable annuities, which under the Rule will fall under the complicated BICE regulations, fell 21.65% from 2015. Fourth quarter 2016 fixed indexed annuity sales declined 7% from third quarter 2016 sales. For 2017, the LIMRA Secure

Retirement Institute projects that total sales of US individual annuity sales will drop 10% to 15%, while sales of variable and indexed annuities will drop as much as 20% to 25%."[28]

- "Most notably, 91% of respondents [to a recent survey of NAIFA members] have already experienced or expect to experience restrictions on product offerings to their clients, nearly 90% believe consumers will pay more for professional advice services, and 75% have seen or expect to see increases in minimum account balances for the clients they serve."[29]
- "In fact, nearly half of NAIFA's members (46%) already have experienced a restriction of product offerings to their clients, and another 45% anticipate that such restrictions are forthcoming. More specifically, 68% of our members have been told that they cannot recommend certain mutual fund classes to clients, and over 70% say they cannot recommend certain annuities."[30]
- Due to BICE's requirements "KMS will be forced to preclude some lower cost investment options that may be appropriate for some clients and reduce available product offerings to only those that pay the same level compensation (even if that compensation is higher) to the Financial Institution. This will likely cause a broad reduction across multiple product categories and, in some categories, may reduce available products from over 100 to less than 10."[31]
- The Oxford Economics report warned that the DOL has "dramatically underestimated" the cost to comply with the new rule and that smaller firms would find it difficult to stay in business. The Oxford Economics study estimates the Fiduciary Rule will result in startup costs ranging from $1.1 million to $16.3 million per firm, depending on firm size. The study also found that because of the cost burdens, firms will shift their business model towards fee-based advising and create a minimum balance for client accounts. These account minimums will effectively force smaller investors into self-advised or robo-advice accounts. As compliance costs rise, fees for investors and account minimums rise, causing middle and lower class investors to be priced out of professional investment advice. The impact of being priced out of professional investment advice will have a permanent, long-term impact on investor's retirement savings."[32]

<u>New Information: Value of Advice</u>

- Reuter updates previous analyses based on data from 1994-2004 with newer data from 2004 – 2012. He finds a statistically significant decline in the apparent underperformance in earnings of commission broker sold, actively-managed mutual funds compared to actively-managed direct-sold funds. Instead of the 110 basis point disparity reported by Del Guericio and Reuter in their 2014 paper on which the Department relied for its regulatory impact analysis, Reuter reports that over the 2004-2014 period the disparity declined to 64 basis points. This decline suggests that the putative benefits estimated by the Department for the

Fiduciary Rule and the predicted costs of delaying its implementation are grossly overvalued.[33] (Chamber, ABA, SIFMA)

- Studies show that unadvised households tend to hold fewer equities than advised households. The likelihood of owning any stocks or stock-based mutual funds increases by 67% with the use of an advisor and the proportion dedicated to stock positions increases by 39%. Academic work clearly shows that asset allocation, not mutual fund selection, explains, on average, 100% of performance. If the Rule results in a reduction of equity allocations by only 15%, the ICI estimated that would result in a performance decline of 50-100 bps per year, on average, or $95 billion and $189 billion over the next 10 years and between $202 billion and $404 billion over the next 20 years. (ICI, SIFMA)
- New economic studies estimate that investors could lose $109 billion over 10 years because of the Rule's implementation. This would amount to $780 million per month in losses to investors. A 60-day delay would thus save investors $402 million in lost returns over 60 days. A 180-day delay would save more than $1.2 billion. Even a 60-day delay would amount to $414 million in lost returns saved for investors over the first year if the Rule ultimately goes forward as now structured and $542 million over a 10-year period (at a three percent discount rate). These lost returns far exceed the Department's estimated $104 million losses in the form of foregone gains— gains that, as shown above, are widely overstated. (SIFMA, ICI)
- Kinniry, et al., found that having a financial professional can make up to a 300 basis point difference in annual compound returns. They found that the greatest contributing factor of assistance, amounting to 150 basis points in annual compound rate of return, was the "behavioural coaching" element of the interactions between a customer and a financial professional.[34] (Chamber, FSR)
- A paper casts doubt on the social benefits of the Department's promotion of passive index fund investing. The paper shows that despite the apparent advantages to some individual investors, widespread and growing adoption of the strategy could distort capital markets in ways that could slow overall economic growth. The author shows how inclusion of a stock in an index fund may artificially raise its internal cost of capital calculations and discourage otherwise profitable investment decisions. He also illustrates how an index fund investor may be exposed to unforeseen risk of loss.[35] (Chamber)
- A report finds that many retirement savers are adverse to assistance from call centers or robots. The personal connection with a financial professional is important for educating and motivating savings behavior.[36] (Chamber)
- "Studies indicate that households that have worked with a financial advisor over a 15-year period "have about 290% more financial assets than non-advised households," even though half of these households had less than $25,000 in savings when they initially began to work

with an advisor. "The discipline imposed by a financial advisor on households' financial behavior and increased savings of advised households are key to improving asset values of households relative to comparable households *without* an advisor." Indeed, some studies find that "behavioral coaching can add 1% to 2% in net return."[37]

<u>New Information: Increased Litigation</u>

- The increased litigation stemming from the inappropriate use of the private right of action in enforcing the BIC Exemption will result in $70 and $150 million in costs to the industry each year.[38] (IRI and Chamber)
- Data shows that class action lawsuits like the type that would flow from the Rule provide almost no benefit to the class members of the action, but rather just help their lawyers.[39] (Chamber, ICI, FSR, Market Synergy)
- Companies interviewed by the Chamber suggest insurance costs could exceed two to three times the cost estimated by the Department. Some respondents to Chamber interviews cited numbers as high as $10,000 per professional per year for Errors and Omissions coverage. (Chamber, NAIFA)
- Expanded incentive for class action litigation results in defendant's settling with an extremely litigious plaintiff's bar instead of spending years tied up in discovery. A survey of lawsuits filed against fiduciaries in recent years demonstrates how plaintiff's use these settlements to fund future lawsuits.[40] (ARA, ICI)
- In 2016, nearly 4,000 FINRA arbitration cases were filed by consumers alleging broker-dealer wrongdoing (only 158 of those cases were decided in favor of the consumer)-meaning that broker-dealers spent a lot of time and money defending these cases.[41]
- A SIFMA survey indicated "… more than 60% of the responding firms stated that they anticipate that some or all of the costs resulting from the potential increase in litigation and liability insurance may be passed on to clients."
- "An equity analyst from Morningstar stated that annual litigation costs will be $70MM-$150MM per year."[42]
- "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."[43]
- "Participants are not the primary beneficiaries of these awards, as a Fiduciary Benchmarks survey conducted in 2016 concluded that out of $698 million awarded, attorneys received $204 million and the average participant award was $116."[44]

<u>New Information: Compliance Costs</u>

- The Securities Industry and Financial Markets Association estimates that annual compliance costs will range from $240 million to $570 million over the next ten years.[45] (SIFMA)
- Small broker-dealers face the greatest financial risk under the Rule, forcing potential consolidation of broker-dealers.[46] (SIFMA, FSI, FSR)
- One recent study by the American Action Forum found reported compliance costs of at least $106 million in 2016, representing up-front costs from just four companies. (Market Synergy)
- The DOL's RIA grossly underestimated the cost of the rule.[47] (FSI)
- "The costs that will be incurred to comply will most likely force smaller firms to consolidate or close their doors. In other words, lost jobs. A Morningstar quote for their technology solution which would assist with compliance procedures was $1,014,540 annually. We don't have $1,000,000 of net income annually. How would we pay for this? Other solutions quoted in the several hundred thousand dollar range, again annually. We have already spent over $300,000 in legal costs and staff hours trying to develop our compliance procedures. We won't survive."[48]
- "The proposed rule has already substantially increased our compliance costs. We estimate compliance costs have increased 450% as a result of this rule."[49]
- "Our research has found that almost all retail investors will see their costs increased by 73 to 196 percent due to a mass shift toward fee-based accounts. Further, firms providing investment advice will see an average of $21.5 million in initial compliance costs and $5.1 million in annual maintenance costs. Even worse, up to 7 million Individual Retirement Accounts (IRAs) would fail to qualify for an advisory account due to the balance too low to be sustainable for the advisor. In the shorter term, we found that the fiduciary rule, as written, will result in over $1500 of duplicative fees charged per household retirement account."[50]
- "AAF also found reported compliance costs of more than $106 million in 2016, representing up-front compliance costs of just four companies."[51]
- "Goldman Sachs estimated that initial compliance with the Fiduciary Rule would cost the financial services industry $14 billion and on-going annual compliance would cost it $7 billion."[52]
- "Industry estimates show that the rule will cost $5 billion to implement and $1 billion annually to maintain."[53]
- "Implementing the DOL's new fiduciary rule for retirement accounts will cost the brokerage industry $11 billion in revenue over the next four years, according to a recent study from A.T. Kearney, a consultant."[54]

- "The Oxford Report estimated that the Rule would result in startup costs ranging from $1.1 million to $16.3 million per [Individual broker dealer] firm, depending on firm size."[55]
- "To date, Advisors Excel has spent in excess of $1 million in preparation for the Rule. Across the financial industry, compliance estimates range from Ameriprise spending in excess of $11 million in the first part of 2016, to an estimate by the Securities Industry and Financial Markets Association ("SIFMA") indicating start-up costs for large and medium broker-dealers would total $4.7 billion with on-going costs of $1.1 billion."[56]

Procedural Flaws

- An inquiry initiated by Senator Ron Johnson (R-Wisconsin) in 2015 found the Department "was predetermined to regulate the industry and sought evidence to justify its preferred action." In other words, the Department first concluded that it wanted to change the rules governing investment advice fiduciaries, and then sought to justify that conclusion. (IRI, Davis & Harman)
- The Department failed to consider how the Rule would likely create an "advice gap" for low- to middle-income families. The Department dismissed concerns of loss of access, and instead found "little evidence" that "financial advisers improve retirement savings." However, this conclusion is contradicted by the Department's own assessment in a prior rulemaking that investment mistakes cost investors approximately $114 billion per year, that access to financial assistance reduced the cost of those mistakes by $15 billion per year, and that increased access to financial assistance would enable them to save billions more. (IRI)
- The Department chose to ignore evidence regarding the impact of similar rules established in other jurisdictions. Most notably, following the United Kingdom's 2013 move to a fee-based compensation model, the U.K. regulator determined that retirement savers – particularly those with lower incomes – were adversely affected and acknowledged that its "high standard of advice is primarily accessible and affordable only for the more affluent in society." Rather than taking advantage of the opportunity to learn from mistakes made by other countries, the Department simply denied the existence of an "advice gap" in the U.K. and dismissed the possibility that a similar "advice gap" would develop in the U.S. under the Fiduciary Rule. (IRI, Chamber, ICI and Davis & Harman)
- Under Executive Order 12866[1] and related guidance issued by OMB,[2] consideration of viable alternatives is a fundamental element of federal agency rulemaking. However, the lack of consideration given to all relevant costs of the Fiduciary Rule prevented the

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

Department from properly evaluating less burdensome alternatives that would have greatly reduced the costs of the Fiduciary Rule, harmonized the Department's regulatory regime with that of the SEC and, because they would have applied only to relationships in which the client has no reasonable expectation of fiduciary status, would not have caused any meaningful consumer harm. However, as a result of the Department's flawed process, it arbitrarily rejected these and other alternatives. (IRI)

- According to the Johnson Report discussed above, the Department failed to adequately consider comments from expert regulators and professionals staffers from the SEC, OIRA and the Treasury Department expressing concerns and offering recommendations regarding the Rule. (IRI, Davis & Harman)
- "Further, the Department of Labor underestimated the impact of the Rule on small and independent businesses by insufficiently fulfilling its obligations under the Regulatory Flexibility Act (RFA). The RFA requires agencies to consider the impact of their regulatory proposals on small entities, to analyze effective alternatives that minimize small entity impacts, and to make their analyses available for public comment. It is the role of the U.S. Small business Administration's Office of Advocacy to advance the views, concerns, and interests of small business before Congress, the White House, federal agencies, federal courts, and state policy makers. The Office of Advocacy is the government's expert on the RFA. In this role, the Office of Advocacy comments to federal agencies regarding the impact of proposed regulations on small business and provides feedback on agency analyses of the regulatory impact. Under the RFA, an agency is required to examine whether its proposed rule will have a significant economic impact on a substantial number of small entities. If the agency determines that its proposed rule will have such an impact, it is required to prepare an initial regulatory flexibility analysis (IRFA). The IRFA must meet several requirements spelled out by section 603 of the RFA, including what small businesses are expected to be directly impacted, the major cost factors, and consideration of all significant regulatory alternatives. The RFA requires agencies to publish the IRFA, or a summary, in the Federal Register at the same time it publishes the proposed rulemaking. In its public comment letter to the Department of labor of July 17, 2015, the Office of Advocacy wrote that it had found the IRFA for the Rule deficient."[57]

Analytical Flaws

- According to a February 2017 analysis by the American Action Forum, it is unclear how CEA found that $1.7 trillion of IRA assets involved conflicts of interest. Total affected IRA assets are significantly less. Retirement account assets were $7.3 trillion in 2013, 86.2 percent of which, by the CEA's own definition, were not "conflicted." That leaves less than $1 trillion in so-called "conflicted" assets. And even that amount is too large because it represents total "conflicted" assets across all retirement accounts, while the CEA's analysis was limited to

IRA assets only. Total "conflicted" IRA assets are some amount less than $1 trillion. Also, as the CEA stated, the $1.7 trillion figure is some combination of front-load funds and variable annuity in IRAs. By including the annuity market, the CEA increased total affected assets by approximately $600 billion, or about 50 percent. (Market Synergy, ACLI, SIFMA)

- The Final RIA is deficient because the Regulation is built on two false premises: all commission-based sales are conflicted, and all fee-only advice is always unconflicted and serves retirement savers' best interest. Neither premise is correct, and neither is supported by the final RIA. (ACLI)
- The Department's Regulatory Impact Analysis only briefly addressed the impact the Rule would have on jobs, noting the Rule could have "some social costs." [58] (IRI, Davis & Harman)
- In projecting the costs of the Rule, the Department did not give due consideration to the costs of the Rule specifically applied to annuity manufacturers and distributors, despite several studies made available to the Department demonstrating the costs.[59] (IRI)
- The Regulatory Impact Analysis overstated the benefits of the Fiduciary Rule, underestimated the Fiduciary Rule's direct and indirect costs to the financial services industry and retirement savers, and, as described above, failed to give meaningful consideration to the costs to retirement savers from lost access to retirement assistance (including assistance with guaranteed lifetime income products such as annuities) and the transaction-based fee model as well as the costs of class action lawsuits arising from the BIC Exemption. The record shows those costs total tens of billions of dollars. (IRI, ICI)
- The Department relied on flawed and problematic factors and data in their Regulatory Impact Analysis projections. Specifically, the Department admitted to basing savers' projected financial gains on research regarding "only one" issue: the purported "conflict that arises from variation in the share of front-end-loads that advisers receive when selling different mutual funds that charge such loads to IRA investors." This research provides no basis for regulating products—such as annuities—that may not invest in mutual funds at all, and was not even a proper assessment of mutual fund performance. (IRI, ICI, FSR)
- Additionally, 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. A series of comment letters from the Investment Company refuted this data, finding the Rule could cost investors $109 billion in additional fees.[60] (IRI, ICI, ACLI, SIFMA, NAIFA)

- Vanderbilt Professor and former SEC Chief Economist Dr. Craig Lewis noted the research relied on by the Department did not analyze the performance of mutual funds held in annuities, relied on old data not reflecting the current marketplace, and the author of one of the key studies later revised his work to show the "cost" of conflicts was about 1/6th of the amount originally estimated.[61] (Chamber, ABA, SIFMA)
- The Department was far too optimistic in relying on "robo advisers" to alleviate the potential loss of access to retirement advice for small savers. The Chamber of Commerce is currently unaware of any "robo advisor" that recommends annuity products to generate retirement income, despite the clear need for those products. (Chamber, ICI)
- The Department seemingly concludes that "robo advisors" and low-expense passive investment options are the best course of action for retirement investors, while ignoring the reality that there is no "one size fits all" investment strategy and even if some investors would benefit from this development, others would be harmed. The Department failed to address this potential impact in their Regulatory Impact Analysis. (Chamber)
- DOL failed to acknowledge that annuities are governed by a distinct, customized, and comprehensive regulatory framework that was enhanced in 2010 to account for annuities' unique features. The dated mutual fund studies relied upon by the Department, which focus primarily on investment performance in the historical period 1991 to 2005, do not measure the efficacy of targeted and more rigorous annuity-specific rules. (ACLI)
- "DOL's cost analysis is flawed on two accounts. First, DOL states that the fiduciary rule will save retirement savers $17 billion a year. It came to this conclusion by taking a uniform 1 percent off of the total amount of assets in IRAs in the United States. From a statistical standpoint, DOL failed to take into account the asset-weighted performance of funds. Craig Lewis of Vanderbilt's Owen School of Business provides an example of how this skews an analysis: "[A] non-asset weighted study examining nine funds each with $1 million invested yielding a 1 percent return and one fund with $10 million invested yielding a 10 percent return would show an average return of 1.8 percent. But an asset-weighted study looking at the same 10 funds would show an average return of 5.7 percent. By ignoring which funds investors actually invest in, the report fails to achieve its stated objective of measuring the market-wide impact of conflicted advice in retirement accounts." Second, DOL vastly underestimated the costs of compliance with the fiduciary rule. DOL estimated total startup compliance costs at $5 billion and ongoing costs of $1.5 billion. Even if true, these would make the fiduciary rule one of the most expensive regulations in history, but the costs are much higher than DOL's original estimates. AAF found that the fiduciary rule would cost $31.5 billion in total costs and $2 billion in annual burdens, making it the most expensive rule of 2016 and the second most expensive non-EPA rule since 2005."[62]

- "Among other things, the updated analysis should account for the following: (1) the Department should acknowledge that the data comprising most of the studies relied on by CEA are from the late 1990s and early 2000s, when there was scant overlap in the marketing and sale of broker-sold funds versus no-load funds. The competitive landscape now is markedly different, with 90% of front-load mutual funds also having no-load shares. (2) The author of one of the academic studies cited by CEA, Jonathan Reuter, issued an updated analysis that looked at more recent mutual fund performance (from 2003 to 2012) and concluded that broker-sold funds underperform no-load funds by an average of 18 basis points, significantly narrower than the 100-basis point difference cited by CEA. This means that CEA greatly overestimates with its projected $17 billion figure. (3) A survey of financial advisors by CoreData Research that was conducted after the Fiduciary Rule was finalized (October 2016) found that 71% plan to disengage from some mass-market investors due to the Fiduciary Rule. On average, these advisors further estimate that they will no longer service 25% of their mass-market clients, creating a significant likely advice gap for low-balance investors."[63]
- "The Department commented in its original release of the proposed Rule that the "research has shown that disclaimers are ineffective in alerting retail investors to the potential costs imposed by conflicts of interest," yet the Department has constructed a Rule that does just that. The Rule as written adds dozens of pages of disclaimers and disclosures for consumers to review in addition to the ones imposed by state insurance regulation."[64]
- "First, the Department's premise that investors will gain from the Rule is incorrect. Instead, investors will incur substantial quantitative and qualitative losses. The Rule has the potential to increase consumer costs by $46.6 billion, or $813 annually per account, in addition to the $1,500 in duplicative fees for retirement savers that have already paid a fee on their commission-based accounts. The RIA's assessment of the "Small Saver Market" is woefully inadequate. For example, the RIA spends a mere 14 pages of 376 assessing the very market segment the Rule purports to protect."[65]
- "Separately, the Investment Company Institute has pointed out that new economic studies estimate that investors could in fact lose $109 billion over 10 years because of the rule's implementation."[66]
- "For example, a Vanguard study from last September shows that having a financial professional's assistance can increase compound annual returns by 300 basis points, fully half of which is due not to investment selection, but to teaching better saving habits and other behavioral changes. Another paper discusses factors the Department did not consider in its analysis, showing the effects a financial professional has in encouraging increased savings and financial discipline. These studies show that the Department underestimated the costs and overestimated the gains of the rule for individual retirement investors—when

these investors lose access to financial professionals, regardless of how they are paid, they lose valuable financial assistance causing real harm."[67]

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[4] *Id.*

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

[6] Investment News, *The Economics of Change: How the DOL Fiduciary Rule Will Set Money in Motion and Alter Business Models Across the Advice Industry* at 11.

[7] *Id*. at 13.

[8] Milloy, *The Consequences of the Fiduciary Rule for Consumers*, American Action Forum at 11 (Apr. 10, 2017), available at https://www.americanactionforum.org/research/consequences-fiduciary-rule-consumers/.

[9] Comment Letter submitted by the National Association of Insurance and Financial Advisors (March 10, 2017), quoting ThinkAdvisor *DOL Fiduciary Has Many Advisors Mulling Career Change: Fidelity Survey,* (Nov. 3, 2016)

[10] Comment Letter submitted by Pacific Life (March 16, 2017).

[11] Comment Letter submitted by The National Federation of Independent Business (march 16, 2017).

[12] Comment Letter submitted by Americans for Tax Reform (March 17, 2017).

[13] Comment Letter submitted by Lincoln Financial Group, citing various sources (March 17, 2017).

[14] Comment Letter submitted by Landenburg Thalmann Financial Services Inc. (March 17, 2017).

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

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[18] Id. See also LIMRA Secure Retirement Institute, Fourth Quarter 2016.

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

[20] *See* "A Complete List of Brokers and Their Approach to 'The Fiduciary Rule'," Wall Street Journal, Feb/ 6, 2017, available at https://www.wsj.com/articles/a-complete-list-of-brokers-and-their-approach-to-the-fiduciary-rule-1486413491 .

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[22] *See* "Edward Jones Shakes Up Retirement Offerings Ahead of Fiduciary Rule," Wall Street Journal, Aug. 17, 2016, available at https://www.wsj.com/articles/edward-jones-shakes-up-retirement-offerings-ahead-of-fiduciary-rule-1471469692 ; "Fiduciary Ready: Edward Jones Unveils Compliance Plans," On Wall Street, Aug. 19, 2016, available at https://www.onwallstreet.com/news/fiduciary-ready-edward-jones-unveils-compliance-plans ; "JPMorgan Chase to Drop Commissions-Paying Retirement Accounts," Reuters, Nov. 10, 2016, available at http://www.reuters.com/article/us-jpmorgan-wealth-compliance-idUSKBN1343LK .

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charge commissions); Crain's, *Why State Farm agents are getting out of the investment game* (Sep. 3, 2016) (State Farm directs 12,000 securities-licensed agents to no longer provide their clients with mutual funds, variable annuities and other investment products); Maxey, Daisy, Wall Street Journal, *New Rule Helps No-Loan Funds—But Investors Still Need to Watch for Other Fees* (Nov. 7, 2016) (Charles Schwab stops selling fund share classes with frond-end sales loads in May 2016). *See, e.g.,* Benjamin, Jeff, Fiduciary Focus, *DOL Fiduciary Rule Class-Actions Costs could Top $150M a Year* (Feb. 9, 2017) ("Some firms, including Merrill Lynch, Capital One, and Commonwealth Financial Network, have already announced plans to use a streamlined [BIC Exemption] that does not include a contract or variable commission rate, making them exempt from class-action lawsuits. Other firms will be rolling the dice."); AdvisorHUB, *Merill to End Commission-Based Retirement Business on Retail Accounts* (Oct. 6, 2016) available at https://advisorhub.com/exclusive-merrill-end-commission-based-retirement-businessretail-accounts/ (Merrill Lynch announces, in response to the fiduciary rule, that its 14,000 brokers cannot receive commissions for advice on retirement accounts and will have to shift clients who remain with the firm to fee-based advisory accounts).

[25] Comment Letter submitted by American Action Forum (March 16, 2017).

[26] Comment Letter submitted by Lincoln Financial Group, citing LIMRA Secure Retirement Institute Variable Annuity Guaranteed Living Benefit Election Tracking Survey, 3rd Quarter 2016 (March 17, 2017).

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[28] Comment Letter submitted by The Standard (April 14, 2017).

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[51] Comment Letter submitted by American Action Forum (March 16, 2017).

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