.:. MassMutual

August 7, 2017

Submitted electronically to: EBSA.FiduciaryRuleExamination@dol.gov

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

Re: Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions (RIN 1210-AB82)

Ladies and Gentlemen:

Massachusetts Mutual Life Insurance Company ("MassMutual") appreciates the opportunity to provide these comments regarding the Department of Labor's ("Department") request for information ("RFI") on changes to the final regulation defining the term "fiduciary" under the Employee Retirement Income Security Act of 1974, as amended, the Best Interest Contract Exemption ("BIC"), and the amendments to prohibited transaction exemption ("PTE") 84-24 issued by the Department on April 8, 2016 (collectively, the "Fiduciary Rule").

MassMutual is a leading mutual life insurance company and Fortune 100 Company headquartered in Springfield, Massachusetts. As a mutual company, we operate for the benefit of our members and participating policyholders, and offer a range of quality financial products and solutions, including life, disability and long-term care insurance, annuities and retirement/401(k) plan services. MassMutual has a long record of supporting the goals of protecting investors and encouraging retirement savings. Acting in the best interest of our customers is at the core of our mission to secure their future and protect the ones they love. We support a workable best interest standard of care, but believe that changes to the Fiduciary Rule are required for the reasons discussed below.

Create a Rule that Preserves Access to Advice

Clear evidence of harm to investors. As explained in our letter dated April 17, 2017, and numerous other comment letters submitted to the Department in response to the Department's March 2017 request, there is incontrovertible evidence that the Fiduciary Rule and the changes to BIC becoming applicable on January 1, 2018 have already forced changes, and will continue to cause changes, in the retirement marketplace that will increase costs and decrease investment choices and access to advice for retirement investors. For example, since the Fiduciary Rule was adopted and in anticipation of the final BIC requirements, firms have announced (i) that they intend to stop providing advice to retirement customers in commission-based accounts, which will hurt those customers, such as buy-and-hold investors, where a commission-based account was the right fit; (ii) that they will no longer offer advice on certain product types to retirement customers in commission-based accounts (including advice on existing investments); (iii) the narrowing of their product shelf, inevitably reducing the choices available to retirement investors; and (iv) the imposition of account minimums, which will obviously have a material adverse impact on working class Americans. And even without firms imposing account minimums, a significant percentage of advisors are likely to cease providing advice to at least some investors because of the Fiduciary Rule, resulting in an increase in orphaned accounts and an "advice gap" similar to what was experienced in the UK following its adoption of the Retail Distribution Review.

A mountain of evidence of the above harms was submitted to the Department in April. The industry trade associations compiled that evidence in a document that is attached to this letter (Exhibit A). It is our understanding that significantly more evidence is being compiled for submission in connection with the RFI.

Class action litigation: a major source of the harm. Firms and advisors are finding it necessary to make these and other changes to their business models directly in response to the significant costs and class action litigation risks associated with provisions of BIC scheduled to go into effect January 1, 2018. As the Department itself made clear in the preamble to BIC, exposure of firms and their advisors to class action litigation is intended to serve as the primary means of enforcing this new exemption; an approach that is deeply flawed. Class action litigation will lead to increased costs for retirement investors without commensurate benefits. The exorbitant expenses associated with defending class actions and the resulting settlements, which disproportionately benefit the lawyers involved,[1] will inevitably be borne by those the Fiduciary Rule is designed to protect. This risk is all the more problematic given the overly complex, ambiguous and subjective nature of the warranties and neutral factor requirements. Compliance with these provisions could never be assured in advance, despite a firm's best efforts to do so. Instead, compliance will be interpreted and enforced (almost certainly in a conflicting manner) by juries and arbitration panels in all 50 states. Given the significant litigation risk, including class actions, it should come as no surprise (and was, in fact, predicted in many of the comment letters received by the Department, including ours) that firms and advisors have decided to limit product offerings, cease providing advice to investors where the size of the retirement accounts do not justify taking on this risk, and/or increase the costs of their products and services to compensate for this risk. In light of the high level of excise taxes applicable to prohibited transactions, this outcome is not desirable, justifiable or necessary, as discussed further below.

Eliminating a major source of harm without undermining the best interest standard. Since June 9th, advisors and their firms have been required to meet the Impartial Conduct Standards when providing advice to retirement investors, which the Department itself has recognized results in investors generally receiving the economic gains associated with the fiduciary rulemaking. Given the Department's conclusion that investors benefit from the interim version of BIC, the requirements of the June 9th rule should be made the only conditions of the final exemption. The Impartial Conduct Standards provide a workable and balanced approach to protecting investors without fundamentally disrupting existing business models and limiting access to retirement advice.

[1] Mayer Brown LLP Study, "Do Class Actions Benefit Class Members" concludes that the vast majority of cases they studied provided no benefits to most members of the putative class.

If the Department is unwilling to make the Impartial Conduct Standards the sole conditions for the exemption, then the Department must modify BIC to eliminate certain of the other conditions of the exemption - specifically the contract, warranties, neutral factors and public website requirements - that are causing firms and advisors to make changes to their business models that harm investors.[2] Modified in this manner, the BIC would essentially require that:

- Advisors and firms provide investment advice that is in the investors' best interest;
- Advisors and firms receive no more than reasonable compensation;
- Advisors and firms make no misleading statements to investors about recommended transactions;
- Advisors and firms clearly disclose the type and scope of services provided, any material conflicts of interest and the types of compensation received by the advisor or firm or that the investor may pay as a result of the recommendation;
- Firms adopt written policies and procedures reasonably designed to ensure that its advisors adhere to the Impartial Conduct Standards; and
- Firms provide contact information for a representative of the Financial Institution that the Retirement Investor can use to contact the Financial Institution with any concerns about the advice or service they have received.

There can be no serious debate that this approach will better serve retirement investors, as it will eliminate the significant costs and harm associated with provisions of the BIC scheduled to go into effect on January 1, 2018 while at the same time building upon the Impartial Conduct Standards, which, as noted above, the Department has already acknowledged results in investors generally receiving the economic gains that the Department found would result from the fiduciary rulemaking.

It is important to note in this regard that the concession made by the government in the Fifth Circuit case permitting waivers of class actions under the BIC is not nearly enough to solve the class action issue because FINRA precludes such waivers. So the inclusion in the BIC of the contract requirement or any representation or warranty is the equivalent of preserving class actions with respect to brokers subject to FINRA rules.

The only reason suggested in the RFI why the Department should not modify the BIC in the manner we have suggested is the Department's unsubstantiated assertion that firms may not comply with the Impartial Conduct Standards without the threat of class action litigation. We think that concern is entirely unfounded. First, this suggestion is inconsistent with the Department's own conclusion noted above concerning the economic efficacy of the Impartial Conduct Standards. Moreover, in addition to their exposure to IRS-imposed excise taxes, firms and advisors have a strong self-interest in ensuring that they comply with the Impartial Conduct Standards; their business depends on their reputation.

Even if the Department remains concerned that there needs to be a third-party other than the IRS to enforce the exemption, the answer is not to keep the problematic provisions of the BIC. Instead, the Department should work together with the Securities and Exchange Commission and the National

[2] Attached to this letter is a revised Best Interest Exemption that we believe is workable (Exhibit B).

Association of Insurance Commissioners to create a harmonized best interest standard of care for sales of securities and annuities, including non-ERISA sales. Not only would such an approach greatly benefit consumers, firms and advisors (a harmonized standard would make compliance implementation more efficient and effective), it would also alleviate the Department's enforcement conundrum for IRAs, since the harmonized standard would be directly enforced by the applicable functional regulators. We do not read anything in the Department's original cost benefit analysis evidencing a concern that the SEC, FINRA or State Insurance Departments are not effective regulators.[3] Rather, the Department concluded (erroneously in our opinion) that the existing suitability requirements under the securities and insurance laws are inferior to the Department's Impartial Conduct Standards and its best interest requirement. With a harmonized best interest standard in place, the Department could, and should, adopt a streamlined exemption for insurance companies, broker-dealers, and their advisors that rely on the functional regulator to enforce the standard. This would fully achieve the Department's objective while eliminating the harm being caused by the provisions of the BIC scheduled to go into effect January 1, 2018.

Current Grandfather Rule will Create an Enormous Number of Orphaned Accounts; There is a Simple Cure to this Serious Problem

Section VII of the BIC provides a grandfathering provision intended to facilitate ongoing advice with respect to investments that predated the Fiduciary Rule, and to enable advisors to continue to receive compensation for those investments. We fully support the intent of the provision. For many clients, contributing additional assets into an existing mutual fund or variable annuity would be beneficial. Not only will clients increase the dollars set aside for retirement, but existing products often provide benefits such as breakpoints, rights of accumulation, shorter contingent deferred sales charge periods or more advantageous product features such as guaranteed income benefits, some of which may not even be currently available in the market.

Unfortunately, the existing grandfathering provision does not allow firms to advise clients with respect to non-systematic contributions and remain within the grandfathering provision. A recommendation that a client deposit additional assets into an existing account would require compliance with the full requirements of BIC. While applying only the Impartial Conduct Standards – which will ensure that the recommendation is in the client's best interest, that the compensation is reasonable and that no misleading statements were made in connection with the recommendation – is both appropriate and feasible, applying the other requirements of BIC, such as the neutral factors requirement for differential compensation, will increase disruption and limit access to advice. The compensation arrangements on existing accounts were established prior to the Fiduciary Rule and vary based on how the particular product manufacturer structured the compensation. Absent modifications to the grandfathering provision, firms are forced to build incredibly complicated and costly system enhancements to adjust compensation on the existing account once a subsequent deposit is made. Attempting to retrofit compensation arrangements on thousands of products, and hundreds of thousands of relationships, is complex, in some instances may be impossible, and certainly is not cost justified. This will result in firms forcing clients to remain within the

[3] See comment letter from SEC Commissioner Michael S. Piwowar to the Department in which he states that the Fiduciary Rule "is dismissive of the efficacy of conflict of interest disclosure, a view that runs contrary to decades of Commission experience" (publically available on July 25, 2017 at www.sec.gov/news/public-statement/piwowar-comment-dol-fiduciary-rule-prohibited-transaction-exemptions).

grandfathering provision by either prohibiting, where authorized, clients from making subsequent deposits, or prohibiting their advisors from providing advice on such deposits. Either case will result in an increase in orphaned accounts, which is a terrible outcome for investors. We recommend a simple modification to the grandfathering provision. For grandfathered accounts that receive non-systematic contributions, the BIC should be based solely on compliance with the Impartial Conduct Standards rather than the other requirements of BIC. This would ensure that clients are both protected and have access to the valuable advice they need to save for retirement.

Preserving Annuitization under a Best Interest Standard

As shown in the appendix demonstrating the harm of the Fiduciary Rule, the greatest harms have occurred with respect to the annuity products subject to the BIC. In brief, the BIC was not designed in a way that is consistent with the transactional manner in which annuities are sold. The choice here is straightforward: (1) maintain the current rules for annuities and continue to see a devastating reduction in individuals' protection against longevity risk, or (2) modify the rules to apply rules to annuities that fit the transactional manner in which they are sold.

Consistent with MassMutual's comment letter from July 21, 2015, we believe that it is appropriate to make the relief under PTE 84-24 available for recommendations of all annuities, including fixed, variable and fixed index annuities. PTE 84-24 provides client protection by requiring that recommendations comply with the Impartial Conduct Standards, while providing a workable exemption that avoids many of the problematic aspects of the BIC. MassMutual urges the Department to permanently adopt the revisions that were made applicable to PTE 84-24 as of June 9, 2017, with the change noted below.

We are unaware of any demonstrated harm to insurance consumers that would necessitate limiting PTE 84-24 for certain insurance products. PTE 84-24 (including its predecessor) has been an effective exemption for the sale of insurance products and the receipt of commissions since 1977, and the Department has failed to articulate a compelling reason to remove variable annuities from PTE 84-24. We disagree with the Department's assertion that the changes to the retirement marketplace, complexity of the products, and conflicted payment structures require these changes. The original exemption, combined with other regulatory safeguards under securities and insurance laws, are designed to protect consumers. There is a long history of using PTE 84-24 that clearly proves this point, even during the recent decades where 401(k) plans and IRAs have been the primary retirement vehicles.

Regardless, the definition of insurance commission under the exemption is too narrow. The definition should include all compensation that may be paid by an insurance company under applicable insurance law. Any Department concerns regarding payments made to advisors can be effectively mitigated with disclosure to the consumer. As long as the commission payment to the advisor is reasonable, fully disclosed, and the sale otherwise satisfies the exemption, including the application of the Impartial Conduct Standards, the source of the advisor's commission should be irrelevant. This new and narrow insurance commission definition is inconsistent with current business models and longstanding industry practice. Again, we are unaware of any demonstrated harm to insurance consumers that would necessitate a narrow definition of insurance commissions under PTE 84-24.

Close the Large Plan Gap

The BIC permits advisors, Financial Institutions, and their Affiliates and Related Entities, to receive compensation as a result of their provision of investment advice to an investor that holds or has under management or control total assets of less than $50 million ("Small Plans") but BIC does not cover advice to investors that hold, manage or control $50 million or more ("Large Plans") and no other exemption is available under the Fiduciary Rule after January 1, 2018 with respect to most investments sold to such plans. The Department simply has provided no exemptive relief for advisors who are willing to act as fiduciaries to Large Plans and no path for the continued sale of proprietary products in that market, which is contrary to the Department's stated intention and repeated assurances to the retirement plans industry.

The Department's approach appears to assume, we believe incorrectly, that the sponsors of Large Plans do not want their advisors to be held to a fiduciary standard. Limiting the BIC to Small Plans denies Large Plan fiduciaries a marketplace option that is available to Small Plans. We assume it was not the Department's intent to leave this gap in the Rule. An independent fiduciary to a Large Plan should be able to hire an advisor to assist with investment decisions just as an independent fiduciary could for a Small Plan. Although plan size is not a reliable proxy for the sophistication of the plan's fiduciary, it is reasonable to assume that Large Plan fiduciaries are at least as sophisticated as Small Plan fiduciaries and equally capable of evaluating potential conflicts and disclosures provided by their fiduciary advisors. The Department should eliminate this gap in the Rule by revising the definition of "Retirement Investor" in BIC to include Large Plans.

Clarify Applicability to Health and Welfare Plans

Under the Fiduciary Rule, a "Plan" is defined to include any employee benefit plan as defined in ERISA §3(3). This definition includes welfare benefit plans. The Department noted in the preamble to the Fiduciary Rule that it was not the Department's intent to treat as fiduciary investment advice, advice as to the purchase of health, disability, and term life insurance policies that provide benefits to plan participants or IRA owners provided the policies do not have an investment component. The Department also noted that it is not aware of any substantial concern or confusion regarding whether the 1975 regulation covered recommendations to purchase health, disability, or term life insurance policies. While we agree that there should be no confusion when applying the final Fiduciary Rule to health and welfare products, the Department's reference to products that don't have an "investment component" has in fact lead to widespread uncertainty as to the application of the Fiduciary Rule to very common health and welfare products such as universal life insurance and whole life insurance. These products are purchased primarily for the death benefit protection particularly when purchased within a welfare benefit plan; the potential for added cash value is ancillary. The Fiduciary Rule, to the extent it is intended to address investment advice, is a bad fit for these products and is discouraging firms from offering them within plans.

In addition, the Regulatory Impact Analysis conducted by the Department for the Fiduciary Rule did not include the analysis required for health and welfare plans. The Department needs to conduct a comprehensive Regulatory Impact Analysis for such products. Given the lack of analysis and its impact on welfare benefit plans, the Department should exclude these plans from the Fiduciary Rule until a full analysis is complete and there is an opportunity for the public to provide comments to the Department.

Allow for Common Sense Education on Increasing Plan Contributions

Informing a plan fiduciary, plan participant, beneficiary, or IRA owner about the benefits of increasing contributions is not a recommendation for purposes of the Fiduciary Rule if no reference is made to the appropriateness of any individual investment alternative or benefit distribution option. The investment education exception is available irrespective of who provides the information, including plan sponsor, fiduciary, or service provider and irrespective of the form in which the information and materials are presented, including on an individual or group basis, in writing or orally, or via call center, video or computer software. The Department's Conflict of Interest FAQs confirm that the Fiduciary Rule's investment education provision covers information provided to a plan participant about the benefits of increasing plan contributions. Unfortunately, the FAQs can be read to imply that education about increasing contributions may have limitations. This uncertainty jeopardizes retirement readiness by discouraging conversations about the benefits of increasing contributions.

Given the critically important public policy of increasing retirement benefits when retirement savings are woefully deficient for American workers, the Department should unambiguously confirm that encouraging plan participants to increase their contributions is not a recommendation and is covered under investment education if no reference is made to the appropriateness of any individual investment alternative or benefit distribution option.

Advising on Non-Qualified Assets following a Minimum Required Distribution Should Not be Fiduciary Advice

The Internal Revenue Code requires generally that plan participants and IRA investors start taking minimum required distributions (MRDs) from their accounts no later than April 1 of the year following the year in which the participant or investor reaches age 70.5. The Rule provides that a recommendation as to how securities or other investment property of a plan or IRA should be invested after the funds are distributed from the plan or IRA constitutes investment advice. The Department's Conflict of Interest FAQs (Part II – Rule) Q4 indicates that an advisor renders fiduciary advice within the scope of the Fiduciary Rule to the extent that the advisor recommends how funds should be used after they are distributed in the form of an MRD, even though MRDs are mandatory and the advisor made no recommendation regarding plan or IRA assets. The Department's interpretations are overly expansive and lead to illogical and impractical results. An advisor who recommends that a participant use the proceeds of an MRD for a particular purpose is a fiduciary under the Department's interpretation of the Fiduciary Rule regardless of whether the advisor making the recommendation is even aware of the source of the funds and regardless of when the recommendation is made, whether one month, one year or ten years after the distribution. Accordingly, the Department should revise the Rule to clarify that a recommendation as to the investment of the proceeds of an MRD is not fiduciary advice as long as the advisor did not recommend the timing or source of the MRD.

* * *

We very much appreciate the opportunity to comment on changes to the Fiduciary Rule which will help preserve the ability of Americans to gain access to financial advice for their retirement accounts while avoiding unnecessary disruption to the financial services marketplace.

Please do not hesitate to contact us with any comments or questions, or if further information would be helpful.

Respectfully submitted,

John E. Deitelbaum
Senior Vice President &
Deputy General Counsel

Kevin O. Finnegan
Senior Vice President &
Deputy General Counsel

Exhibit A

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]

New Information: Increased Litigation

- 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]

New Information: Compliance Costs

- 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.*

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[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).

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

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

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

[58] U.S. Department of Labor, Employee Benefits Security Administration, *Regulating Advice Markets, Definition of the Term "Fiduciary" Conflicts of Interest - Retirement Investment Advice, Regulatory Impact Analysis for Final Rule and Exemptions* (April 2016), p. 244.

[59] *See e.g.,* Insured Retirement Institute, *Boomer Expectations for Retirement 2011*; Insured Retirement Institute, *Survey of Americans Aged 51 to 67*; Insured Retirement Institute, *Tax Policy and Boomer Retirement Saving Behaviors.*

[60] *See, e.g.,* Comment Letters submitted to the Department of Labor by the Investment Company Institute on July 21, 2015, September 24, 2015, and December 1, 2015.

[61] *See* Craig M. Lewis, "An Inflated $17 Billion Talking Point from DOL," Forbes (Dec. 16, 2015).

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

[63] Comment Letter submitted by American Bankers Association (March 15, 2017).

[64] Comment Letter submitted by Americans for Annuity Protection (March 17, 2017).

[65] Comment Letter submitted by Primerica (April 17, 2017).

[66] Comment Letter submitted by Neuberger Berman Group LLC (April 17, 2017).

[67] Comment Letter submitted by Association for Advanced Life Underwriting (AALU) (April 17, 2017).

Note: Although the Impartial Conduct Standard is retained, this in no way is meant to suggest that the author agrees that the DOL has authority to issue substantive conduct standards in a PTE. This issue will be decided by the Courts. This draft is merely meant to illustrate the additional changes that need to be made to the BIC exemption in order for it to be both protective and workable.

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Section I—Best Interest Exemption

(a) In general. ERISA and the Internal Revenue Code prohibit fiduciary advisers to employee benefit plans (Plans) and individual retirement plans (IRAs) from receiving compensation that varies based on their investment advice. Similarly, fiduciary advisers are prohibited from receiving compensation from third parties in connection with their advice. This exemption permits certain persons who provide investment advice to Retirement Investors, and associated Financial Institutions, Affiliates and other Related Entities, to receive such otherwise prohibited compensation as described below.

(b) Covered transactions. This exemption permits Advisers, Financial Institutions, and their Affiliates and Related Entities, to receive compensation as a result of their provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) to a Retirement Investor.

As defined in Section VI(o) of the exemption, a Retirement Investor is: (1) A participant or beneficiary of a Plan with authority to direct the investment of assets in his or her Plan account or to take a distribution; (2) the beneficial owner of an IRA acting on behalf of the IRA; or (3) a Retail Fiduciary with respect to a Plan or IRA.

As detailed below, Financial Institutions and Advisers seeking to rely on the exemption must adhere to Impartial Conduct Standards in rendering advice regarding retirement investments. In addition, Financial Institutions must adopt policies and procedures designed to ensure that their individual Advisers adhere to the Impartial Conduct Standards; disclose important information relating to fees, compensation, and Material Conflicts of Interest; and retain records demonstrating compliance with the exemption. The exemption provides relief from the restrictions of ERISA section 406(a)(1)(D) and 406(b) and the sanctions imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(D), (E) and (F). The Adviser and Financial Institution must comply with the applicable conditions of Sections II-V to rely on this exemption. This document also contains separate exemptions in Section VI (Exemption for Purchases and Sales, including Insurance and Annuity Contracts) and Section VII (Exemption for Pre-Existing Transactions).

(c) Exclusions. This exemption does not apply if:

(1) The Plan is covered by Title I of ERISA, and (i) the Adviser, Financial Institution or any Affiliate is the employer of employees covered by the Plan, or (ii) the Adviser or Financial Institution is a named fiduciary or plan administrator (as defined in ERISA section 3(16)(A)) with respect to the Plan, or an affiliate thereof, that was selected to provide advice to the Plan by a fiduciary who is not Independent;

(2) The compensation is received as a result of a Principal Transaction;

(3) The compensation is received as a result of investment advice to a Retirement Investor generated solely by an interactive Web site in which computer software-based models or applications provide investment advice based on personal information each investor supplies through the Web site without any personal interaction or advice from an individual Adviser (*i.e.,* "robo-advice") unless

the robo-advice provider is a Level Fee Fiduciary that complies with the conditions applicable to Level Fee Fiduciaries; or

(4) The Adviser has or exercises any discretionary authority or discretionary control with respect to the recommended transaction.

Section II—Impartial Conduct and Other Requirements

(a) *Impartial Conduct Standards.* In connection with a recommendation to a Retirement Investor, the Financial Institution and its Adviser must comply with the following standards:

(1) When providing investment advice to the Retirement Investor, the Financial Institution and the Adviser(s) provide investment advice that is, at the time of the recommendation, in the Best Interest of the Retirement Investor. As further defined in Section VI(d), such advice reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the information obtained from the Retirement Investor regarding the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, placing the interest of the Retirement Investor before the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party;

(2) The recommended transaction will not cause the Financial Institution, Adviser or their Affiliates or Related Entities to receive, directly or indirectly, compensation for their services that is in excess of reasonable compensation within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2).

(3) Statements by the Financial Institution and its Advisers to the Retirement Investor about the recommended transaction, fees and compensation, Material Conflicts of Interest, and any other matters reasonably relied upon by a Retirement Investor when making an investment decisions, are not materially misleading at the time they are made

(4) The fact that a Financial Institution or Adviser only offers or recommends proprietary or a limited range of products or receives commissions or other variable compensation shall not be deemed inconsistent with the Best Interest standard set forth in Section II(a)(1).

(b)*Conditions for relief.*

(1) The Financial Institution has adopted written policies and procedures reasonably and prudently designed to ensure that its Advisers adhere to the Impartial Conduct Standards set forth in Section II(a);

(2) In formulating its policies and procedures, the Financial Institution has specifically identified and documented its Material Conflicts of Interest; adopted measures reasonably and prudently designed to prevent Material Conflicts of Interest from causing violations of the Impartial Conduct Standards set forth in Section II(a); and designated a person or persons, identified by name, title or function, responsible for addressing Material Conflicts of Interest and monitoring their Advisers' adherence to the Impartial Conduct Standards.

(c) *Disclosures.* In a single written disclosure provided to the Plan prior to or at the same time as the execution of the recommended transaction, the Financial Institution clearly and prominently:

(1) States the Best Interest standard of care owed by the Adviser and Financial Institution to the Retirement Investor; informs the Retirement Investor of the services provided by the Financial Institution and the Adviser; and describes how the Retirement Investor will pay for services, directly or through Third Party Payments. If, for example, the Retirement Investor will pay through commissions or other forms of transaction-based payments, the contract or writing must clearly disclose that fact;

(2) Describes Material Conflicts of Interest; discloses any fees or charges the Financial Institution, its Affiliates, or the Adviser imposes upon the Retirement Investor or the Retirement Investor's account; and states the types of compensation that the Financial Institution, its Affiliates, and the Adviser expect to receive from third parties in connection with investments recommended to Retirement Investors;

(3) Discloses to the Retirement Investor whether the Financial Institution offers Proprietary Products or receives Third Party Payments with respect to any recommended investments; and to the extent the Financial Institution or Adviser limits investment recommendations, in whole or part, to Proprietary Products or investments that generate Third Party Payments, notifies the Retirement Investor of the limitations placed on the universe of investments that the Adviser may offer for purchase, sale, exchange, or holding by the Retirement Investor.;

(4) Provides contact information (telephone and email) for a representative of the Financial Institution that the Retirement Investor can use to contact the Financial Institution with any concerns about the advice or service they have received; and, if applicable, a statement explaining that the Retirement Investor can research the Financial Institution and its Advisers using FINRA's BrokerCheck database or the Investment Adviser Registration Depository (IARD), or other database maintained by a governmental agency or instrumentality, or self-regulatory organization; and

(5) Describes whether or not the Adviser and Financial Institution will monitor the Retirement Investor's investments and alert the Retirement Investor to any recommended change to those investments, and, if so monitoring, the frequency with which the monitoring will occur and the reasons for which the Retirement Investor will be alerted.

(6) The Financial Institution will not fail to satisfy this Section II(c) solely because it, acting in good faith and with reasonable diligence, makes an error or omission in disclosing the required information, provided the Financial Institution discloses the correct information as soon as practicable, but not later than 30 days after the date on which it discovers or reasonably should have discovered the error or omission. To the extent compliance with this Section II(c) requires Advisers and Financial Institutions to obtain information from entities that are not closely affiliated with them, they may rely in good faith on information and assurances from the other entities, as long as they do not know that the materials are incomplete or inaccurate.

(7) The disclosure required by this section may be provided in person, electronically or by mail.

(e) *Bank Networking Arrangements.* An Adviser who is a bank employee, and a Financial Institution that is a bank or similar financial institution supervised by the United States or a state, or a savings association (as defined in section 3(b)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1)), may receive compensation pursuant to a Bank Networking Arrangement as defined in Section VIII(c), in connection with their provision of investment advice to a Retirement Investor, provided the investment advice adheres to the Impartial Conduct Standards set forth in Section II(c). The remaining conditions of the exemption do not apply.

Section III—Recordkeeping

This Section establishes record retention and disclosure conditions that a Financial Institution must satisfy for the exemption to be available for compensation received in connection with recommended transactions.

(a) *Recordkeeping.* The Financial Institution maintains for a period of six (6) years, in a manner that is reasonably accessible for examination, the records necessary to enable the persons described in paragraph (b) of this Section to determine whether the conditions of this exemption have been met with respect to a transaction, except that:
(1) If such records are lost or destroyed, due to circumstances beyond the control of the Financial Institution, then no prohibited transaction will be considered to have occurred solely on the basis of the unavailability of those records; and

(2) No party, other than the Financial Institution responsible for complying with this paragraph (b), will be subject to the civil penalty that may be assessed under ERISA section 502(i) or the taxes imposed by Code section 4975(a) and (b), if applicable, if the records are not maintained or are not available for examination as required by paragraph (b), below.

(b)(1) Except as provided in paragraph (b)(2) of this Section or precluded by 12 U.S.C. 484, and notwithstanding any provisions of ERISA section 504(a)(2) and (b), the records referred to in paragraph (a) of this Section are reasonably available at their customary location for examination during normal business hours by:

(i) Any authorized employee or representative of the Department or the Internal Revenue Service;

(ii) Any fiduciary of a Plan that engaged in an investment transaction pursuant to this exemption, or any authorized employee or representative of such fiduciary;

(iii) Any contributing employer and any employee organization whose members are covered by a Plan described in paragraph (b)(1)(ii), or any authorized employee or representative of these entities; or

(iv) Any participant or beneficiary of a Plan described in paragraph (c)(1)(ii), IRA owner, or the authorized representative of such participant, beneficiary or owner; and

(2) None of the persons described in paragraph (b)(1)(ii)-(iv) of this Section are authorized to examine records regarding a recommended transaction involving another Retirement Investor, privileged trade secrets or privileged commercial or financial information of the Financial Institution, or information identifying other individuals.

(3) Should the Financial Institution refuse to disclose information on the basis that the information is exempt from disclosure, the Financial Institution must, by the close of the thirtieth (30th) day following the request, provide a written notice advising the requestor of the reasons for the refusal and that the Department may request such information.

(4) Failure to maintain the required records necessary to determine whether the conditions of this exemption have been met will result in the loss of the exemption only for the transaction or transactions for which records are missing or have not been maintained. It does not affect the relief for other transactions.

Section IV—Exemption for Purchases and Sales, Including Insurance and Annuity Contracts

(a) *In general.* In addition to prohibiting fiduciaries from receiving compensation from third parties and compensation that varies based on their investment advice, ERISA and the Internal Revenue Code prohibit the purchase by a Plan, participant or beneficiary account, or IRA of an investment product, including insurance or annuity product from an insurance company that is a service provider to the Plan or IRA. This exemption permits a Plan, participant or beneficiary account, or IRA to engage in a purchase or sale with a Financial Institution that is a service provider or other party in interest or disqualified person to the Plan or IRA. This exemption is provided because investment transactions often involve prohibited purchases and sales involving entities that have a pre-existing party in interest relationship to the Plan or IRA.

(b) *Covered transactions.* The restrictions of ERISA section 406(a)(1)(A) and (D), and the sanctions imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(A) and (D), shall not apply to the purchase of an investment product by a Plan, participant or beneficiary account, or IRA, from a Financial Institution that is a party in interest or disqualified person.

(c) The following conditions are applicable to this exemption:

(1) The transaction is effected by the Financial Institution in the ordinary course of its business;

(2) The compensation, direct or indirect, for any services rendered by the Financial Institution and its Affiliates and Related Entities is not in excess of reasonable compensation within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2); and

(3) The terms of the transaction are at least as favorable to the Plan, participant or beneficiary account, or IRA as the terms generally available in an arm's length transaction with an unrelated party.

(d) *Exclusions,* The exemption in this Section IV does not apply if:

(1) The Plan is covered by Title I of ERISA and (i) the Adviser, Financial Institution or any Affiliate is the employer of employees covered by the Plan, or (ii) the Adviser and Financial Institution is a named fiduciary or plan administrator (as defined in ERISA section 3(16)(A)) with respect to the Plan, or an affiliate thereof, that was selected to provide advice to the plan by a fiduciary who is not Independent.

(2) The compensation is received as a result of a Principal Transaction;

(3) The compensation is received as a result of investment advice to a Retirement Investor generated solely by an interactive Web site in which computer software-based models or applications provide investment advice based on personal information each investor supplies through the Web site without any personal interaction or advice from an individual Adviser (*i.e.,* "robo-advice") unless the robo-advice provider is a Level Fee Fiduciary that complies with the conditions applicable to Level Fee Fiduciaries; or

(4) The Adviser has or exercises any discretionary authority or discretionary control with respect to the recommended transaction.

Section V—Exemption for Pre-Existing Arrangements

(a) *In general.* ERISA and the Internal Revenue Code prohibit Advisers, Financial Institutions and their Affiliates and Related Entities from receiving compensation that varies based on their investment advice. Similarly, fiduciary advisers are prohibited from receiving compensation from third parties in connection with their advice. Some Advisers and Financial Institutions did not consider themselves fiduciaries within the meaning of 29 CFR 2510-3.21 before the applicability date of the amendment to 29 CFR 2510-3.21 (the Applicability Date). Other Advisers and Financial Institutions entered into transactions involving Plans, participant or beneficiary accounts, or IRAs before the Applicability Date, in accordance with the terms of a prohibited transaction exemption that has since been amended. This exemption permits Advisers, Financial Institutions, and their Affiliates and Related

Entities, to receive compensation, such as 12b-1 fees, in connection with recommendations relating to securities or other investment property that was acquired prior to the Applicability Date, as described and limited below.

(b) *Covered transaction.* Subject to the applicable conditions described below, the restrictions of ERISA section 406(a)(1)(A), 406(a)(1)(D), and 406(b) and the sanctions imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(A), (D), (E) and (F), shall not apply to the receipt of compensation by an Adviser, Financial Institution, and any Affiliate and Related Entity, as a result of investment advice provided before, on or after the Applicability Date to a Plan, participant or beneficiary or IRA owner in connection with the purchase, holding, sale, additional deposits into or additional purchase or exchange of securities or other investment property that was acquired before the Applicability Date This Exemption for Pre-Existing Arrangements is conditioned on the following:

(1) The compensation is received pursuant to an agreement, arrangement or understanding that was entered into prior to the Applicability Date and that has not expired;

(2) The purchase, exchange, holding or sale of the securities or other investment property was not otherwise a non-exempt prohibited transaction pursuant to ERISA section 406 and Code section 4975 on the date it occurred;

(3) The amount of the compensation paid, directly or indirectly, to the Adviser, Financial Institution, or their Affiliates or Related Entities in connection with the transaction is not in excess of reasonable compensation within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2); and

() Any investment recommendations made after the Applicability Date by the Financial Institution or Adviser with respect to the securities or other investment property reflect the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, and place the interest of the Retirement Investor before the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party.

Section VI—Definitions

For purposes of these exemptions:

(a) “Adviser” means an individual who:

(1) Is a fiduciary of the Plan or IRA solely by reason of the provision of investment advice described in ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B), or both, and the applicable regulations, with respect to the assets of the Plan or IRA involved in the recommended transaction;

(2) Is an employee, independent contractor, agent, or registered representative of a Financial Institution; and

(3) Satisfies the federal and state regulatory and licensing requirements of insurance, banking, and securities laws with respect to the covered transaction, as applicable.

(b) “Affiliate” of an Adviser or Financial Institution means—

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the Adviser or Financial Institution. For this purpose, “control” means the power to exercise a controlling influence over the management or policies of a person other than an individual;

(2) Any officer, director, partner, employee, or relative (as defined in ERISA section 3(15)), of the Adviser or Financial Institution; and

(3) Any corporation or partnership of which the Adviser or Financial Institution is an officer, director, or partner.

(c) A "Bank Networking Arrangement" is an arrangement for the referral of retail non-deposit investment products that satisfies applicable federal banking, securities and insurance regulations, under which employees of a bank refer bank customers to an unaffiliated investment adviser registered under the Investment Advisers Act of 1940 or under the laws of the state in which the adviser maintains its principal office and place of business, insurance company qualified to do business under the laws of a state, or broker or dealer registered under the Securities Exchange Act of 1934, as amended. For purposes of this definition, a "bank" is a bank or similar financial institution supervised by the United States or a state, or a savings association (as defined in section 3(b)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1)),

(d) Investment advice is in the "Best Interest" of the Retirement Investor when the Adviser and Financial Institution providing the advice act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the information obtained from the Retirement Investor regarding the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, placing the interests of the Retirement Investor before the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party.

(e) "Financial Institution" means an entity that employs the Adviser or otherwise retains such individual as an independent contractor, agent or registered representative and that is:

(1) Registered as an investment adviser under the Investment Advisers Act of 1940 (15 U.S.C. 80b-1 *et seq.*) or under the laws of the state in which the adviser maintains its principal office and place of business;
(2) A bank or similar financial institution supervised by the United States or a state, or a savings association (as defined in section 3(b)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1));

(3) An insurance company qualified to do business under the laws of a state, provided that such insurance company:

(i) Has obtained a Certificate of Authority from the insurance commissioner of its domiciliary state which has neither been revoked nor suspended,

(ii) Has undergone and shall continue to undergo an examination by an Independent certified public accountant for its last completed taxable year or has undergone a financial examination (within the meaning of the law of its domiciliary state) by the state's insurance commissioner within the preceding 5 years, and

(iii) Is domiciled in a state whose law requires that actuarial review of reserves be conducted annually by an Independent firm of actuaries and reported to the appropriate regulatory authority;

(4) A broker or dealer registered under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*); or

(5) An entity that is described in the definition of Financial Institution in an individual exemption granted by the Department under ERISA section 408(a) and Code section 4975(c), after the date of this exemption, that provides relief for the receipt of compensation in connection with investment

advice provided by an investment advice fiduciary, under the same conditions as this class exemption.

(f) "Independent" means a person that:

(1) Is not the Adviser, the Financial Institution or any Affiliate relying on the exemption;

(2) Does not have a relationship to or an interest in the Adviser, the Financial Institution or Affiliate that might affect the exercise of the person's best judgment in connection with transactions described in this exemption; and

(3) Does not receive or is not projected to receive within the current federal income tax year, compensation or other consideration for his or her own account from the Adviser, Financial Institution or Affiliate in excess of 2% of the person's annual revenues based upon its prior income tax year.

(g) "Individual Retirement Account" or "IRA" means any account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code.

(h) A Financial Institution and Adviser are "Level Fee Fiduciaries" if the only fee received by the Financial Institution, the Adviser and any Start Printed Page 21084Affiliate in connection with advisory or investment management services to the Plan or IRA assets is a Level Fee that is disclosed in advance to the Retirement Investor. A "Level Fee" is a fee or compensation that is provided on the basis of a fixed percentage of the value of the assets or a set fee that does not vary with the particular investment recommended, rather than a commission or other transaction-based fee.

(i) A "Material Conflict of Interest" exists when an Adviser or Financial Institution has a financial interest that a reasonable person would conclude could affect the exercise of its best judgment as a fiduciary in rendering advice to a Retirement Investor.

(j) "Plan" means any employee benefit plan described in section 3(3) of the Act and any plan described in section 4975(e)(1)(A) of the Code.

(k) A "Principal Transaction" means a purchase or sale of an investment product if an Adviser or Financial Institution is purchasing from or selling to a Plan, participant or beneficiary account, or IRA on behalf of the Financial Institution's own account or the account of a person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with the Financial Institution. For purposes of this definition, a Principal Transaction does not include the sale of an insurance or annuity contract, a mutual fund transaction, or a Riskless Principal Transaction as defined in Section VIII(p) below.

(l) "Proprietary Product" means a product that is managed, issued or sponsored by the Financial Institution or any of its Affiliates.

(m) "Related Entity" means any entity other than an Affiliate in which the Adviser or Financial Institution has an interest which may affect the exercise of its best judgment as a fiduciary.

(n) A "Retail Fiduciary" means a fiduciary of a Plan or IRA that is not described in section (c)(1)(i)(A)-(D) of the Regulation (29 CFR 2510.3-21(c)(1)(i)(a)-(d)).

(o) "Retirement Investor" means—

(1) A participant or beneficiary of a Plan subject to Title I of ERISA or described in section 4975(e)(1)(A) of the Code, with authority to direct the investment of assets in his or her Plan account or to take a distribution,

(2) The beneficial owner of an IRA acting on behalf of the IRA, or

(3) A Retail Fiduciary with respect to a Plan subject to Title I of ERISA or described in section 4975(e)(1)(A) of the Code or IRA.

(p) A "Riskless Principal Transaction" is a transaction in which a Financial Institution, after having received an order from a Retirement Investor to buy or sell an investment product, purchases or sells the same investment product for the Financial Institution's own account to offset the contemporaneous transaction with the Retirement Investor.

(q) "Third-Party Payments" include sales charges when not paid directly by the Plan, participant or beneficiary account, or IRA; gross dealer concessions; revenue sharing payments; 12b-1 fees; distribution, solicitation or referral fees; volume-based fees; fees for seminars and educational programs; and any other compensation, consideration or financial benefit provided to the Financial Institution or an Affiliate or Related Entity by a third party as a result of a transaction involving a Plan, participant or beneficiary account, or IRA.