



April 17, 2017

Via: EBSA.FiduciaryRuleExamination@dol.gov

Timothy D. Hauser
Deputy Assistant Secretary for Program Operations
Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW,
Washington, DC 20210

Re: RIN 1210-AB79
Fiduciary Rule Reexamination

Dear Mr. Hauser:

Over a six year period, the Department of Labor engaged in a thorough, inclusive and deliberative process resulting in the 2016 Definition Of Fiduciary Rule (2016 Rule). AARP¹ believes the rule is necessary to address a changed retirement plan landscape,

¹ AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocates for what matters most to families with a focus on health security, financial stability and personal fulfillment. As a trusted source for news and information, AARP produces the world's largest circulation publications, AARP THE MAGAZINE and AARP BULLETIN. Nearly half of our members are employed full or part-time, with many of their employers providing retirement plans. A major priority for AARP is to assist Americans in accumulating and effectively managing adequate retirement assets to supplement Social Security. The shift from defined benefit plans to defined contribution plans has transferred significant responsibility to individuals for investment decisions that will directly impact the adequacy of the assets available to fund future retirement needs. AARP has enthusiastically supported the Fiduciary Rule as a necessary protection for participants when they make investment decisions concerning their retirement monies. Without this protection, it is difficult for an individual to plan for a secure and adequate retirement.

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and to minimize investment advisers' conflicts of interest so that hard-working Americans have a better opportunity to achieve the American dream of a more secure and dignified retirement. AARP and our nearly 38 million members agree with the simple and basic tenet that retirement plan advisers should act in the best interest of retirement savers. We believe the rule achieves this important objective and should be fully implemented without further delay.

During the regulatory process, the Department made significant adjustments to its proposed Rule, including changes to address concerns raised by the financial services industry, many of which are again raised by the February 3, 2017, Presidential Memorandum on Fiduciary Duty Rule. The 2016 Rule has also now withstood challenges in three district courts. At least six court decisions (including emergency motions for injunctions) have ratified the Department's process, regulatory analysis, and compliance with the Administrative Procedure Act in finalizing the 2016 Rule.

Although AARP is extremely disappointed that any portion of 2016 Rule has been delayed, we appreciate that the Department of Labor has decided to go forward with the applicability date for the Impartial Conduct Standards starting on June 9, 2017. To delay these standards further is simply too costly to retirement investors, regardless of the method used to calculate these losses. *Compare* the Economic Policy Institute's calculation of losses of \$3.7 billion for a 60-day delay with the Department's calculation of \$147 million in the first year and \$890 million over 10 years using a three percent discount rate. While it is unclear what the impact of a longer delay or rescission of the 2016 Rule will be on the American economy in the short and long-term, it is clear that a longer delay or rescission of the 2016 Rule jeopardizes the retirement security of hard working Americans.

I. The 2016 Rule Is Consistent With The Statutory Language Of ERISA.

A. Courts have held that, unlike the old five-part test defining fiduciary, the 2016 Rule is consistent with ERISA's statutory language and purpose.

The U.S. District Court for the District of Columbia stated, ". . . it is the five-part test — and not the current rule — that is difficult to reconcile with the statutory text." *Nat'l Ass'n for Fixed Annuities v. Perez*, 2016 U.S. Dist. LEXIS 153214, 50-51 (D.D.C. Nov. 4, 2016). The U.S. District Court for the Northern District of Texas agreed, finding:

[T]he [old] five-part test is the more difficult interpretation to reconcile with who is a fiduciary under ERISA. The broad and disjunctive language of ERISA's three prong fiduciary definition suggests that significant onetime transactions, such as rollovers, would be subject to a fiduciary duty. Under the five-part test, however, such a transaction would not trigger a fiduciary duty. This outcome is seemingly at odds with the statute's text and its broad remedial purpose, especially given today's market realities and the proliferation of participant-directed 401(k) plans, investments in IRAs, and rollovers of plan assets to IRAs. An interpretation covering such transactions better comports with the text, history, and purposes of ERISA.

Chamber of Commerce of the United States v. Hugler, 2017 U.S. Dist. LEXIS 17619, 38-39 (N.D. Tex. Feb. 8, 2017). The judge went on to state that “[t]he DOL's new rules comport with Congress' expressed intent in enacting ERISA.” *Id.* at 42. Consequently, a rescission of the 2016 Rule is not a viable option because reinstatement of the five-part test under the 1975 fiduciary rule is inconsistent with ERISA itself and will subject the Department of Labor's action to challenge.

B. Most of the financial services industry agrees that the Impartial Conduct Standard is the appropriate standard for providing retirement investment advice.

The financial services industry generally agrees that investment advice should be provided in the best interests of the participant and retirement investor. A review of the 2015 public comment letters demonstrates the overwhelming consensus on the best interest standard. *E.g.*, SIFMA Comment Letter 506 (“The industry ... shares that goal” “to ensure financial services providers are looking out for their customer’s best interest”); Plan Sponsor Council of America Comment Letter 614 (“[W]e believe our retirement system will be greatly strengthened by ensuring that investment advice is provided in the recipient’s best interest consistent with those fiduciary standards and that any financial conflicts are disclosed.”); American Council of Life Insurers Comment Letter 621 (“We share the Department’s interest in seeing that plan sponsors, plan participants and IRA owners receive advice that is in their best interest.”); American Bankers Association Comment Letter 622 (“We agree with the Department that retirement service providers, when acting in their capacity as fiduciaries, should act in the best interest of customers and that such customers deserve to be protected from financial abuse.”); Insured Retirement Institute Comment Letter 626 (“Financial professionals should be held to a best interest standard when recommending

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investments to retirement investors.”); Business Roundtable Comment Letter 645 (“Financial professionals should be required to act in the best interests of employee benefit plan participants when providing investment advice to a retirement plan or its participants.”); Wells Fargo Comment Letter 647 (“[W]e remain supportive today of a “best interest” standard of care for clients.”).

There should be no surprise about this consensus since these standards have been in place since the Employee Retirement Income Security Act (ERISA) was enacted in 1974. Indeed, treating those who provide investment advice for a fee as a fiduciary is consistent with both the statute and the common law of trusts upon which ERISA was based. The public record also demonstrated that many investment advisers have provided advice in the best interests of participants and retirement investors for decades. Significantly, although there have been attempts to weaken the rule requiring those who provide investment advice for a fee to be treated as a fiduciary, Congress has never agreed to do so. ERISA § 408(b)(14), 408(g), as amended by Pension Protection Act, § 601(a)(1), (2). As the Department of Labor recognized in its delay of the applicability date for the Impartial Conduct Standard until June 9, there is absolutely no reason not to use the solely in the interest standard that Congress enacted over 40 years ago to protect and preserve employees’ hard-earned retirement savings.

C. The public has demanded the protections of this Rule and weakening the Rule’s protections will undermine the expectations of participants and plan sponsors.

AARP members and the public generally have demanded and supported the protections of this Rule. In an AARP 2013 survey of over 1,400 adults who had money saved in either a 401(k) or a 403(b) plan, more than nine in ten (93%) respondents favored requiring retirement advice to be in their sole interest, and fewer than four in ten (36%) respondents indicated they would trust the advice from an adviser who is not required by law to provide advice that is in their best interests. AARP, *Fiduciary Duty and Investment Advice: Attitudes of 401(k) and 403(b) Participants* (Sept. 2013), <http://www.aarp.org/research/topics/economics/info-2014/fiduciary-duty-and-investment-advice---attitudes-of-401-k--and-4.html>. A survey taken after the Rule was promulgated demonstrated that an overwhelming percentage of respondents were in favor of the 2016 Rule and believe it is important for financial advisors to give financial advice in a client’s best interests. S. Kathi Brown, *Attitudes Toward the Importance of Unbiased Financial Advice* 4, 6 (May 2016), http://www.aarp.org/content/dam/aarp/research/surveys_statistics/econ/2016/attitudes-unbiased-fin-advice-rpt-res-econ.pdf.

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In a companion survey of over 3,000 plan sponsors of all sizes, nearly nine in ten (89%) plan sponsors said that they would favor requiring giving advice that is in the sole interest of plan participants. AARP, *Fiduciary Duty and Investment Advice: Attitudes of Plan Sponsors* (March 2014), <http://www.aarp.org/research/topics/economics/info-2014/fiduciary-duty-and-investment-advice---attitudes-of-plan-sponsor.html>.

There have been too many horror stories about individuals being placed into “suitable” investments that are neither prudent nor in their best interests. See, e.g., Bob Egelko, *Judge orders ING to pay \$36.8 million to Fireman’s Fund employees*, SAN FRANCISCO CHRONICLE (Oct. 31, 2014), <http://www.sfgate.com/bayarea/article/Judge-orders-ING-to-pay-36-8-million-to-5861719.php> (Fireman’s Fund employees and retirees placed their pensions, 401(k) plans and other funds in investments that advisers assured them were safe, but turned out to be speculative private placements, losing significant amounts of retirement monies). A recent survey by the AARP Fraud Watch Network finds that the individuals who are the most susceptible to investment fraud typically exhibit an unusually high degree of confidence in unregulated investments and tend to trade more actively than the general investor population. Doug Shadel and Karla Pak, *AARP Investment Fraud Vulnerability Study* 5-6 (2017), http://www.aarp.org/content/dam/aarp/research/surveys_statistics/econ/2017/investment-fraud-vulnerability-study-res-econ.pdf. These anecdotes further show a need for the 2016 Rule.

Personal finance writers have touted the beneficial effects of the 2016 Rule.² They have informed their readers of the Rule’s requirements and protections. Many of them have provided their readers with questions to ask their advisers to ensure that they are fiduciaries. Further, a significant number of major players in the financial services industry have already promised that they will comply with the 2016 Rule.³

² See Attachment of Consumer Views, providing the views of finance writers and others explaining the benefits of the 2016 Rule and the consequences of rescission or weakening of the Rule.

³ See, e.g., Nick Thornton, *Even if DOL fiduciary rule is delayed, many firms preparing to serve as fiduciaries*, BENEFITSPRO (Jan 24, 2017), <http://www.benefitspro.com/2017/01/24/even-if-dol-fiduciary-rule-is-delayed-many-firms-p>; Bruce Kelly, *Despite new review of DOL fiduciary rule, firms are sticking with higher standard of care*, INVESTMENT NEWS (Feb 6, 2017), <http://www.investmentnews.com/article/20170206/FREE/170209945/despite-new-review-of-dol-fiduciary-rule-firms-are-sticking-with>; Jim Probasco, *Which Firms Are Sticking with Fiduciary Rule Changes Anyway?* INVESTOPEDIA (Feb. 28, 2017), <http://www.investopedia.com/articles/retirement/022817/which-firms-are-sticking-fiduciary-rule-changes-anyway.asp#ixzz4e8aixFHC>.

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For all of these reasons, the 2016 Rule should not be rescinded or weakened.

II. There Has Been No Adverse Effect On The Ability Of Americans To Gain Access To Retirement Information And Financial Advice.

One question that the February 3, 2017, Presidential Memorandum and the reexamination asks is whether the 2016 Rule adversely affects the ability of Americans to gain access to retirement information and financial advice. The answer to that question is a resounding no. Under the 2016 Rule, Americans for the first time will know that the investment advice that they receive will be in their best interests. Many people assumed that this has always been the rule⁴ and many advisers preyed on that ignorance. With the copious articles from personal finance writers and other media reporting on this Rule,⁵ AARP is hopeful that more Americans will use investment advisers because they will now be able to count on getting advice in their best interest.

Under the 2016 Rule, Americans will still be able to gain access to a variety of retirement savings offerings. There is no prohibition in the Rule against any type of retirement investment product. Karen Damato, *Trump Advisor Uses Terrible Food Analogy to Defend Financial Deregulation*, MONEY (Feb 03, 2017), <http://time.com/money/4659485/trump-advisor-uses-terrible-food-analogy-to-defend-financial-deregulation/>. Accordingly, the 2016 Rule does not require investment firms to abandon products, but instead allows a wide variety of investment products. The 2016 Rule permits the investment marketplace to evolve and innovate to provide investments and products that answer the needs of participants and beneficiaries who now shoulder greater responsibility for their retirement security as well as provide protection for their hard-earned retirement monies. Access to numerous products is still available to retirement investors. Because ERISA does not have an authorized or legal list of investments, the 2016 Rule is consistent with Congress's design of ERISA's broad fiduciary rule.

Investment firms will continue to make business decisions on how to structure their customer relationships and, for example, whether to make use of the Best Interest

⁴ Matthew Frankel, *The Fiduciary Rule: Pros and Cons: Here's what the fiduciary rule means and why many people are opposed to it*, MOTLEY FOOL (Feb 3, 2017), <https://www.fool.com/retirement/2017/02/03/the-fiduciary-rule-pros-and-cons.aspx>.

⁵ See n.2, *supra*.

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Contract Exemption for certain products or particular fee arrangements. The decision of each firm may be different depending on an analysis of its business model and its clientele. Greg Iacurci, *Fidelity, Empower and T. Rowe take three different approaches to the DOL fiduciary rule*, INVESTMENT NEWS (Mar. 7, 2017), <http://www.investmentnews.com/article/20170307/FREE/170309941/fidelity-empower-and-t-rowe-take-three-different-approaches-to-the> (detailing different approaches in business models).

Advisers also continue to have the option to use ERISA § 408(b)(14) — the statutory exemption — that covers transactions that arise from the provision of investment advice where advisers are ERISA fiduciaries to plan participants who direct investments in their individual accounts. This statutory exemption was available to advisers prior to the Department’s rulemaking on the 2016 Rule.

The bottom line is that investment advisers will continue to have numerous options to comply with the 2016 Rule. That choice is a business decision.

III. Any Dislocations/Disruptions Within The Retirement Services Industry Have Been Positive For Retirement Investors.

While some disruption within the retirement services industry can be expected after updating a 40-year old regulation to make it relevant to the current retirement marketplace, the disruption has overall been positive for retirement investors. See AARP’s June 21, 2015 comment letter on the proposed fiduciary rule, attached hereto, detailing the various changes to the retirement system. The disruption has resulted in lower fees, advice in the best interest of the saver or retiree, and minimized conflicts in advice provided to individuals.

Americans saving for retirement have the majority of their savings in defined contribution plans and IRAs. ICI Research & Statistics, *Retirement Assets Total \$25.3 Trillion in Fourth Quarter 2016* (Mar. 22, 2017), https://www.ici.org/research/stats/retirement/ret_16_q4. Given the trillions of dollars that continue to accumulate in the 401(k) plan and IRA market, there is no evidence — nor any reason to believe — that financial service providers will abandon this lucrative market.⁶ Thus, to

⁶ According to ICI, IRAs held approximately \$7.8 trillion in assets at the end of the third quarter of 2016, while 401(k) plans held \$4.8 trillion in assets during that same period. ICI Research Report, *Defined Contribution Plan Participants’ Activities, First Three Quarters of 2016* at 2 (Feb. 2017), <https://ici.org/>

the extent there are disruptions, retirement savers stand to benefits as the various players in the financial services industry adjust to maintain their competitive edge.

IV. Increases In Potential Litigation And Increases In The Prices That Investors And Retirees Must Pay To Gain Access To Retirement Services Are Overstated.

A. Whether there will be increases in litigation is unknown.

With every new law and regulation, there can always be the assertion that there will be increased litigation,⁷ as illustrated in this example of a faulty prediction of increased litigation in 2015. Daniel Fisher, *Employers To Face More Litigation In 2015 As Plaintiff Lawyers Swoop In*, FORBES (Jan. 6, 2015), <https://www.forbes.com/sites/danielfisher/2015/01/06/employers-face-more-lawsuits-in-2015/#584cbfd53ebe>. The author predicted:

More lawsuits over pension plans, after the U.S. Supreme Court eliminated protections against suits against defined-contribution plan fiduciaries for including company stock among investment choices.

Instead, the Supreme Court decision in *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014), was the death knell for employer stock litigation, not the great increase in litigation that was predicted. See Joe Clark, *View From Proskauer: Courts Close Their Doors to ERISA Stock-Drop Litigation*, BLOOMBERG BNA PENSION & BENEFITS REPORTER (Apr. 4, 2017), http://news.bna.com/pbln/display/story_list.adp?mode=ins&frag_id=108482030&prod=pbln. These predictions were wrong in the case of employer stock litigation and most probably will be wrong in this instance. The simple point is: no one can predetermine the level of litigation because it largely depends on the actions of the financial services industry.

Indeed, in response to the Department's request to the financial services to provide litigation cost data, the industry did not do so because "of the extreme

[pdf/ppr_16_rec_survey_q3.pdf](#).

⁷ We also note a remarkable dearth of articles on increases in litigation due to the 2016 Rule. While you may see a sporadic comment in an article, there have been few articles on this issue, probably because compliance such as training advisers is not so different from training that claims administrators are required to do to meet their fiduciary obligations.

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uncertainties surrounding litigation risk.” *Chamber of Commerce of the United States v. Hugler*, 2017 U.S. Dist. LEXIS 17619, *95 (N.D. Tex. Feb. 8, 2017). As Judge Barbara M. G. Lynn stated that, to the extent that there were concerns about the risk of litigation, the Best Interest Contract Exemption addressed those by permitting mandatory arbitration of individual claims and only permitting allegations of systemic egregious conduct to be litigated via class actions. *Id.* Moreover, the judge noted that the exemption permits waivers of the right to obtain punitive damages or rescission based on violation of the contract. *Id.* at 87. Judge Lynn also noted that these concerns are not new “as state law litigation was already available to remedy wrongs occurring in IRA transactions.” *Id.* at 88. She stated that the Best Interest Contract Exemption did not “exacerbate Plaintiffs’ liability risks and concerns over possibly conflicting or inconsistent judicial decisions” inasmuch as accountholders had contractual rights prior to the rulemaking. *Id.*

Moreover, the two district courts before which the argument was made have rejected that the BICE created a private right of action. *Chamber of Commerce of the United States v. Hugler*, 2017 U.S. Dist. LEXIS 17619, *56-62 (N.D. Tex. Feb. 8, 2017); *Nat’l Ass’n for Fixed Annuities v. Perez*, 2016 U.S. Dist. LEXIS 153214, *87-95 (D.D.C. Nov. 4, 2016). Instead, both courts found that the Department did not create a cause of action or a private litigation right.” They both found that it is state law that would govern the enforcement of the terms of the contract. This is where the law stood prior to the issuance of the 2016 Rule; it is where the law stands subsequent to the issuance of the 2016 Rule. Accordingly, both courts discounted the litigation risks.

B. The claim that retirement investors will be forced to pay more to gain access to retirement advice discounts the innovation and competitiveness of the advice market.

Many investment firms and their advisers have taken steps to meet the requirements of the regulation and already have incurred one-time, up-front compliance costs. Significantly, we have not seen prices increase for those companies that have already complied with the 2016 Rule.

We understand that there are many firms that have chosen to use a level fee structure to comply with the 2016 Rule. Some have decided to abandon their commission structure. Others have decided to offer both commission and fee options. See Michael Wursthorn, *A Complete List of Brokers and Their Approach to ‘The Fiduciary Rule’*, WALL STREET JOURNAL (Feb 6, 2017), <https://www.wsj.com/articles/a-complete-list-of-brokers-and-their-approach-to-the-fiduciary-rule-1486413491>. Individual retirement

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investors can determine which is the best option for them – no doubt the market will respond. Moreover, if a commission structure were in the best interests of the retirement investor, we would expect that the adviser would so advise the retirement investor.

The variety and complexity of investments have dramatically changed since the ERISA's enactment and the 1975 regulation was issued. For example, in 1975, Wall Street had not yet created collateralized debt obligations nor contemplated the creation and tremendous growth of target date funds. AARP has every confidence that the financial services industry and the retirement advice market will continue to develop innovative new products and systems to help hard working Americans save for retirement.

V. Many Companies In The Financial Services Industry Have Made Substantial Investments To Comply With The 2016 Rule.

AARP reminds the Department that many organizations within the financial sector have made significant financial investments to install new systems; establish revised policies and procedures; amend service provider, record keeping, and participant agreements; and change their marketing in order to meet the requirements of the 2016 Rule. These organizations and the investment advisors employed by them have generally determined that providing retirement investment advice in the best interests of their clients is the right thing to do for their clients. *See, e.g.,* Michael Wursthorn, *Wealth Adviser Daily Briefing: Trump Begins Roll Back of Fiduciary Rule*, WALL STREET JOURNAL (Feb 6, 2017), <http://blogs.wsj.com/moneybeat/2017/02/06/wealth-adviser-daily-briefing-trump-begins-roll-back-of-fiduciary-rule/> (listing Merrill Lynch, Morgan Stanley, Wells Fargo Advisors, LPL Financial Holdings, Raymond James Financial, J.P. Morgan Chase, Edward Jones as companies that would comply with the Rule); Financial Engines and Betterment Comment Letters on Proposed Rule to Delay; Attachment on Industry Compliance and Costs. Given the \$12.6 trillion in 401(k) plans and IRAs, their decision is not surprising. However, it seems unfair to penalize these companies for their good faith efforts to achieve compliance in a timely fashion, but reward those firms that have done little or nothing to meet the requirements of the 2016 Rule. We note that the bulk of costs to the financial service industry are one-time start-up costs. The bulk of the marketplace has already made these expenditures that benefit investors, and revisiting the rule will not only harm consumers, but place these firms and advisors at a disadvantage.

VI. The 2016 Rule Does Not Violate The Administrative Procedure Act, Any Other Applicable Statute or the United States Constitution.

Every court that has reviewed the Department's actions concerning the 2016 Rule has found that the Department complied with the Administrative Procedure Act, the Investment Adviser's Act, and other statutes. Where challenged, the courts have stated that the Department performed the necessary Regulatory Impact Analysis. Where violations of the United States Constitution were alleged, they have been rejected. We expect that the Department will continue to comply with all of these statutes and the Constitution in its reexamination.

VII. Conflicted Advice Will Have a Negative Effect On Both Individual Retirement Security and on the Economy.

Not only is there a potential negative impact of conflicts of interest on the retirement security of our members and other older Americans, but such conflicts lead to a negative effect on the economy. The Government Accountability Office (GAO) estimated that \$20,000 in a 401(k) account that had a one percentage point higher fee for 20 years would result in an over 17% reduction — over \$10,000 — in the account balance. U.S. Gen. Accounting Office, GAO-07-21, *Private Pensions: Changes Needed to Provide 401(k) Plan Participants and the Department of Labor Better Information on Fees* 7 (2006). We estimate that over a 30-year period, the account would be about 25 percent less. Even a difference of only half a percentage point — 50 basis points — would reduce the value of the account by 13 percent over 30 years. In short, conflicted advice resulting in higher fees and expenses can have a huge impact on retirement income security levels.

Moreover, the Department itself found that generally risks caused by conflicted investment advice are increasing as the baby boomers retire and they move their money from protected ERISA plans to IRAs. Indeed, the Department found that advice from conflicted investment advisers could cost these retirees between 12 to 24 percent of their retirement savings over thirty years. Department of Labor, *Fiduciary Investment Advice: Regulatory Impact Analysis* 3-4 (2015). The Department found that IRA investors tend to be older as they are close to or at retirement. These IRA investors are more vulnerable to the negative impact of conflicted advice because the amount of assets available for rollover are large, many older investors do not have strong financial literacy skills, and they are making significant and often one-time decisions to move their

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retirement savings from more protected employer based plans into significantly less protected IRAs. *Id.* at 59-60.

Lower and middle-income retirement investors need every penny of their retirement savings. “Among the 48 percent of households age 55 and older with some retirement savings, the median amount is approximately \$109,000 — commensurate to an inflation-protected annuity of \$405 per month at current rates for a 65- year-old.” U.S. Gen. Accountability Office, GAO-15-419, *Retirement Security: Most Households Approaching Retirement Have Low Savings* at 11 (May 2015), <http://www.gao.gov/assets/680/670153.pdf>. The Department itself stated that “small investors” (that is, those with low balances or those with modest means) are most negatively impacted by the detrimental effects of conflicted advice. Those with small accounts have fewer economic resources — any additional costs or losses diminish what little savings they have worked so hard to amass.

Accordingly, the 2016 Rule was designed to capture the estimated loss of \$17 billion to retirement accounts. Perhaps a more telling statistic is that without the 2016 Rule, retirement investors are at risk of a 1% drop in annual returns on retirement savings. The 2016 Rule could therefore have important benefits for the broader economy. If households — especially lower and middle class older individuals — have more money in their modest retirement accounts because of lower fees, they will have more money to spend in the economy on goods and services.

Most importantly, these older households tend to spend most of their money to maintain their standard of living. A report found that Social Security benefits have a positive effect on the economy. *Cf.* Gary Koenig & Al Myles, AARP Pub. Policy Inst., *Social Security’s Impact on the National Economy* 1-2, 4-7 (2013), http://www.aarp.org/contentdam/aarp/research/publicpolicy_institute/econ_sec/2013/social-security-impact-national-economy-AARP-ppi-econ-sec.pdf (establishing that every dollar of Social Security benefits generates \$2 of economic output). We would expect the economic effect of retirement income sources such as 401(k) accounts and IRAs would be similar. Second, the extent to which the rule results in lower fees/better returns, the higher the gross savings (retirement account balances) will be. Higher savings can lower interest rates, which in turn can lead to higher levels of investment by small and large businesses. This larger capital stock will lead to faster economic growth and higher wages.

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X. Additional Research

The proposed reexamination listed numerous questions for review. However, AARP submits that the list is incomplete. We have set forth below additional questions touching on economic, legal, and policy issues that we believe that the reexamination should also answer.

- Given that every court decision has upheld the 2016 Rule, what is the impact of the court decisions on this reexamination and any subsequent change to the 2016 Rule? Does the Department of Labor open itself up to another round of administrative law challenges? Will the Department be less successful in its defense?
- What will be the impact of the court decisions stating that the 1975 Rule did not comport with ERISA's statutory language?
- Given that higher fees on IRA accounts will reduce the amount that individual savers have available to supplement their Social Security income, thus forcing a greater reliance on taxpayer-financed social services, what will be the effect of delay or repeal on the fiscal outlook of both the federal government and that of the individual states?
- Which states will be most affected by the increased demand for subsistence-level support, and to what extent will that increased burden fall most heavily on states with higher populations of economically disadvantaged individuals?
- As the fiduciary rule would apply to payroll deduction IRAs that could be used by smaller businesses to provide a basic retirement savings option to their workers, how will this action affect the costs small businesses would bear in establishing such plans and how would higher fees affect the ability of their workers to accumulate sufficient retirement savings?

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- While 401(k) accounts are increasingly invested in assets defined as Qualified Default Investment Alternatives (QDIAs), this does not apply to payroll deduction IRAs and rollover IRAs. To what extent would a delay or repeal of the fiduciary rule result in these accounts being invested in inappropriate asset types that either have higher risk or lower returns or higher fee assets? What would be the effect of such actions on individual savers?
- As markets require full and free disclosure of both risk and costs to operate effectively, and given that many consumers lack necessary financial literacy skills, how would delay of the fiduciary rule affect the ability of individual consumers to evaluate both the true cost and appropriateness of investment options available in the IRA market?
- Older Americans, because of cognitive decline, may be less likely to distinguish between advice provided in their best interest and other types of advice. In addition, older Americans are more likely to roll over from an employer plan to an IRA than younger workers are. How would delay of the fiduciary rule affect Americans by age group?
- Given that lower fees and better investment choices caused by the fiduciary rule will increase retirement savings balances, what long term positive effects will the rule as currently written have on the stock of investable assets? To what extent would it reduce interest rates and enable small and large businesses to have reduced borrowing costs, higher growth rates, and increased opportunities to hire additional workers?
- Employers sponsor pension plans to enable their employees to accumulate assets for when they retire. Under ERISA, the employer as the plan sponsor always is required to act in a fiduciary capacity operating in the best interest of his/her workers. How would delay of the rule enhance or disrupt the ability of employers to understand and negotiate for prudent retirement services for their workers?

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XI. Conclusion

AARP respectfully requests a public hearing on these issues including those that impact on prohibited transaction exemptions. *Cf.* Section 408(a), 29 U.S.C. § 1108(a) (requiring a hearing on prohibited transaction exemptions if requested).

For all the above reasons, we urge you to permit the 2016 Rule to be applicable as soon as possible to enable hard-working Americans to protect their retirement savings and enhance the possibility of a secure and dignified retirement. If you have any questions, please feel free to contact me or Jasmine Vasquez of our Government Affairs office at 202-434-3711.

Sincerely,

A handwritten signature in cursive script, appearing to read "David Certner", with a long horizontal flourish extending to the right.

David Certner
Legislative Counsel and
Legislative Policy Director
Government Affairs