DAVIS & HARMAN LLP

ATTORNEYS AT LAW

THE WILLARD
1455 PENNSYLVANIA AVENUE, NW, SUITE 1200
WASHINGTON, DC 20004

TEL 202-347-2230
FAX 202-393-3310 WWW.DAVIS-HARMAN.COM

December 18, 2023

Delivered electronically

Office of Regulations and Interpretations, and
Office of Exemption Determinations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20219

RE: RIN: 1210-AC02, Definition of Fiduciary
Application No. D-12057, PTE 2020-02, ZRIN 1210-ZA32
Application No. D-12060, PTE 84-24, ZRIN 1210-ZA33
Application No. D-12094, PTEs 75-1, 77-4, 80-83, 83-1, and 86-128, ZRIN 1210-ZA34

Dear Sir or Madam:

On behalf of a group of firm clients, including brokerage firms, mutual funds, insurance companies, asset managers, and banks, w***e are writing to strongly urge the Department of Labor ("DOL") to withdraw all the proposals*** published on November 3, 2023 modifying the definition of an investment advice fiduciary and amending certain related prohibited transaction exemptions.

Briefly, there is an extremely high likelihood that the proposals will be invalidated in court because the proposals are in clear and direct conflict with the Fifth Circuit's decision in 2018 to invalidate the very similar 2016 final fiduciary rules.[1] It is inappropriate to force retirement investors across the country to pay for the enormous compliance and litigation costs for a rule that will barely last a year. Moreover, as well documented, in addition to those costs, the proposal will lead to millions of retirement savers losing access to investment assistance. It is time for DOL to stop this harmful 13-year project and move forward with rules that help rather than hurt retirement savings.

[1] *Chamber of Com. of U.S. of Am. v. U.S. Dept. of Lab.*, 885 F. 3d 360 (5th Cir. 2018) (*Chamber*).

SUMMARY OF COMMENTS

Below is an outline of the issues addressed in this letter.

- **Brief overview of the failure and harm of this 13-year project to invalidly expand the definition of a fiduciary.**
- **Fifth Circuit decision regarding the definition of a fiduciary.** The Fifth Circuit held that (1) salespeople are not fiduciaries, (2) one-time advice is not fiduciary advice, and (3) the five part-test for fiduciary status is the right test.
- **DOL's 2023 proposed definition of a fiduciary is virtually identical to the invalidated 2016 final rule and directly conflicts with the Fifth Circuit decision**. The 2023 proposed definition conflicts with the Fifth Circuit decision by (1) turning salespeople into fiduciaries, (2) turning one-time advice into fiduciary advice, and (3) eliminating the same three elements of the five-part test that DOL eliminated in 2016.
- **DOL's 2023 proposed modifications to specified Prohibited Transaction Exemptions ("PTEs"), including 2020-02 and 84-24, directly conflict with the Fifth Circuit decision.** The 2023 proposals are another invalid attempt to regulate IRAs, for which DOL has no jurisdiction.
    - The required acknowledgment of fiduciary status in PTEs 2020-02 and 84-24 is a prime example of DOL regulating IRAs far beyond its authority. Those exemptions effectively force firms to accept fiduciary status – along with fiduciary duties of loyalty and prudence -- with respect to countless IRA client interactions that do not satisfy the Fifth Circuit definition of fiduciary advice.
    - Forcing advisors to accept fiduciary status opens the door to private lawsuits under state fiduciary law, also in conflict with the Fifth Circuit.
    - DOL's proposed prohibitions on forms of advisor incentive compensation are completely arbitrary and a clear example of the proposal's impermissible regulation of IRAs.
- **Entire proposal, including the definition of a fiduciary and the modifications of the PTEs, should be invalidated**. Under the Fifth Circuit's decision, if material parts of the rule are invalid, the entire rule must be invalidated; bits and pieces of valid components cannot be saved by "severing" them from the invalid parts. In invalidating the entire 2016 rule, the Fifth Circuit said this very clearly: "this comprehensive regulatory package is plainly not amenable to severance."[2]
- **As discussed above, the 2023 proposal is virtually identical to the 2016 rule.** The 2016 rule had devastating effects on low and middle-income individuals, so we know that this rule will have the same effects.
    - The national accounting firm Deloitte studied 21 financial institutions that represented 43% of U.S. financial advisors and 27% of the retirement savings assets in the market. The study found that as of the DOL rule's first applicability date on June 9th, ***53% of study participants reported limiting or eliminating access to brokerage advice for retirement accounts, which the firms estimated as impacting 10.2 million accounts and $900 billion AUM.***[3]

---

[2] *Id.*

[3] https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00599.pdf

- In 2021, the Hispanic Leadership Fund released a study[4] showing the devastating effects of reviving the 2016 fiduciary rule, as would be done by the current proposal. The current proposal would have the most adverse effects on Blacks and Hispanics – reducing their projected accumulated IRA savings by approximately 20 percent over 10 years – contributing to ***an approximately 20 percent increase in the wealth gap attributable to IRAs for these individuals.***

- **Through its actions and its words, this Administration has made it clear that the comment period is generally a check-the-box formality, thus violating the Administrative Procedure Act under case law directly on point.** ***For example, the President said formally that "If this rule is finalized as proposed, it's going to protect workers and it's going to save for —that are saving for their retirements."***
- **Julie Su's indefinite status as Acting DOL Secretary without the consent of the Senate violates the Constitution, rendering this proposal and any final rule void.**
- **11 pages of data on the devastating harm done by the 2016 final rule, which was essentially identical to the current proposal.**

DISCUSSION

Brief overview of the failure and harm of this 13-year project to invalidly expand the definition of a fiduciary.

For over 13 years, DOL has attempted in different ways to convert almost all financial professionals working with ERISA plans and IRAs, including salespeople, into fiduciaries. ***These attempts have all failed to change the law, but have caused billions of dollars of harm.***

- **2010 proposal: so unsupportable that that DOL was forced to withdraw it**. On October 22, 2010, DOL published a proposed fiduciary rule that was so lacking in basis that DOL had to publicly announce in September 2011 that it would not be finalized.[5]
- **2016 rule: completely invalidated.** On April 8, 2016, DOL published a final fiduciary rule that (1) was, as noted, invalidated by the Fifth Circuit Court of Appeals in 2018[6] as flatly inconsistent with the law because it treated salespeople as fiduciaries, and (2) had well-documented devastating effects on low and middle-income individuals.
- **2020 preamble: core element invalidated.** On December 18, 2020, DOL completely rewrote the definition of a fiduciary in a preamble to a new prohibited transaction exemption,[7] and the core of that new definition has been invalidated by one court,[8] rejected by another court,[9] and expected to be invalidated by a third court.[10]

---

[4] https://hispanicleadershipfund.org/wp-content/uploads/2021/11/FINAL_HLF-Quantria_FiduciaryRule_08Nov21.pdf
[5] https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32
[6] *Chamber.*
[7] https://www.govinfo.gov/content/pkg/FR-2020-12-18/pdf/2020-27825.pdf
[8] *American Securities Association v. US Dept of Labor,* 8:22-cv-330-VMC-CPT (M.D. Fla. Feb. 13, 2023).
[9] *Carfora et al v. Teachers Insurance Annuity Association of America et al*, No. 1:2021cv08384 - Document 63 (S.D.N.Y. 2023).
[10] *Federation of Americans for Consumer Choice, Inc. v. United States Department of Labor,* No. 22 Civ. 243 (K) (BT) (N.D. Tex. June 30, 2023) (recommendations of Magistrate).

- **<u>2023 proposal: flatly inconsistent with Fifth Circuit decision invalidating 2016 rule</u>**. As noted, the Fifth Circuit rejected the 2016 rule on the grounds that it turned salespeople into fiduciaries. The 2023 proposal openly and expressly turns salespeople into fiduciaries again. DOL states: "the Department rejects the purported dichotomy between a mere ''sales'' recommendation to a counterparty, on the one hand, and advice, on the other, in the context of the retail market for investment products. . . .[S]ales and advice typically go hand in hand in the retail market."[11] ***It could not be clearer that this proposal, if finalized, will be invalidated once again.***

These attempts have cost retirement savers billions of dollars, because it is ultimately the savers that bear the cost of the wasted costs of compliance with invalid rules. And the 2016 rule resulted in millions of low and middle-income individuals losing access to much needed investment assistance. ***It is time to stop hurting the American retirement system; otherwise, the legacy of this DOL will be more enormous damage to retirement security.***

<u>Fifth Circuit decision regarding the definition of a fiduciary: salespeople are not fiduciaries, one-time advice is not fiduciary advice, and the five part-test is the right test</u>.

The Fifth Circuit could not have been clearer that the 2016 fiduciary rule impermissibly turned salespeople into fiduciaries:

> "Had Congress intended to abrogate both the cornerstone of fiduciary status–the relationship of trust and confidence–and the widely shared understanding that financial salespeople are not fiduciaries absent that special relationship, one would reasonably expect Congress to say so. This is particularly true where such abrogation portends consequences that "are undeniably significant." Accordingly, the Fiduciary Rule's interpretation of "investment advice fiduciary" fatally conflicts with the statutory text and contemporary understandings. . . . The Rule expressly includes one-time IRA rollover or annuity transactions where it is ordinarily inconceivable that financial salespeople or insurance agents will have an intimate relationship of trust and confidence with prospective purchasers. . . . Transforming sales pitches into the recommendations of a trusted adviser mixes apples and oranges."

In short, the Fifth Circuit held that in order to be a fiduciary, an advisor must have a relationship of trust and confidence with the clients, which salespeople do not have.

The Fifth Circuit was also clear about the status of one-time advice:

> The [DOL Fiduciary] Rule expressly includes one-time IRA rollover or annuity transactions where it is ordinarily inconceivable that financial salespeople or insurance agents will have [the required] intimate relationship of trust and confidence with prospective purchasers [to qualify as fiduciaries].[12]

---

[11] Federal Register / Vol. 88, No. 212 / Friday, November 3, 2023 / Proposed Rules, at 75907.
[12] *Chamber.*

Finally, the Fifth Circuit approved the current-law five-part test as the right test for fiduciary status. Briefly, that test for fiduciary status requires that (1) there be an investment-related recommendation, (2) the person providing the advice provides investment advice on a regular basis (3) pursuant to a mutual understanding that (4) the advice will serve as a primary basis for decision-making and that (5) the advice will be individualized.[13] The Fifth Circuit stated:

> ***The 1975 regulation [that established the five-part test] captured the essence of a fiduciary relationship*** known to the common law as a special relationship of trust and confidence between the fiduciary and his client. . . .
>
> [T]he phrase "investment advice for a fee" and similar phrases generally referenced a fiduciary relationship of trust and confidence between the adviser and client. To begin with, DOL itself reflected this understanding in its 1975 definition of an "investment advice fiduciary [which set forth the five-part test]." There, DOL there explained that a "fee or other compensation" for the rendering of investment advice under ERISA "should be deemed to include all fees or other compensation incident to the transaction in which the investment advice to the plan has been rendered or will be rendered." . . . DOL went on to say that this "may include" brokerage commissions, but only if the broker-dealer who earned the commission otherwise satisfied the regulation's requirements that the broker-dealer provide individualized advice ***on a regular basis pursuant to a mutual agreement*** with his client. . . . "[I]f, under the particular facts and circumstances, the services provided by the broker-dealer include the provision of 'investment advice'" as defined by the regulation—i.e. ***on a regular basis pursuant to a mutual agreement*** to provide individualized advice—only then "may [it] be reasonably expected that, even in the absence of a distinct and identifiable fee for such advice, a portion of the commissions paid to the broker-dealer would represent compensation for the provision of such investment advice."
>
> ***DOL's 1975 regulation [containing the five-part test] flowed directly from contemporary understanding of "investment advice for a fee," which contemplated an intimate relationship between adviser and client beyond ordinary buyer-seller interactions. The [2016 DOL] Fiduciary Rule is at odds with that understanding.*** [emphasis added]

<u>DOL's 2023 proposal directly conflicts with the Fifth Circuit decision by turning salespeople into fiduciaries, turning one-time advice into fiduciary advice, and eliminating the same three elements of the five-part test that DOL eliminated in 2016.</u>

DOL's 2023 proposal could not have been clearer that DOL is determined to turn salespeople into fiduciaries:

> "***[T]he Department rejects the purported dichotomy between a mere ''sales'' recommendation to a counterparty, on the one hand, and advice, on the other, in the context of the retail market for investment products***. As reflected in recent regulatory

[13] Labor Reg. sec. 2510.3-21(c).

> developments from both the SEC and NAIC, financial service industry marketing materials, and the industry's comment letters reciting the guidance they provide to investors, ***sales and advice typically go hand in hand in the retail market***."[14]

And the proposal itself is very clear that salespeople are treated as fiduciaries. This is well illustrated by the following example.

Assume that Advisor A, who regularly advises IRA owners and regularly solicits rollovers, makes a cold call soliciting a rollover from Participant P. Advisor A describes the quality of her services, and gives Participant P the names of many happy customers that Advisor A has and that are in situations like Participant P's. And Advisor A talks about the quality of her firm's research. Advisor A also says that her objective, consistent with the law, is to serve her clients' best interest. Obviously, that is a typical sales pitch. And just as obviously, that sales pitch is fiduciary advice under the proposal, as explained below.

Under the proposal, let's review this one-time cold call, with obviously no relationship of trust and confidence. Here is the key part of the proposal defining an investment advice fiduciary:

> The person either directly or indirectly (e.g., through or together with any affiliate) makes investment recommendations to investors on a regular basis as part of their business and the recommendation is provided under circumstances indicating that the recommendation is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest;[15]

The above sales pitch fits squarely within this proposed rule

- The rollover sales pitch is an individualized investment recommendation:
- Advisor A regularly makes rollover sales pitches to investors;
- Like any good sales pitch, it is at least "a" basis for any later decision.
- Like any good sales pitch, it conveys that accepting the sales pitch is in the investor's best interest based on Participant P's situation.

DOL's proposal could not have been clearer that contrary to the above quotes from the Fifth Circuit, there is no need for the regular basis test:

> [T]he proposal's regular basis requirement [regarding regular provision of advice to other investors] would not defeat legitimate investor expectations by automatically excluding one-time advice from treatment as fiduciary investment advice. For example, the proposed rule would treat an insurance agent's recommendation to invest a retiree's retirement savings in an annuity as fiduciary advice if the agent regularly makes investment recommendations to investors, and the circumstances indicate that the recommendation is based on the retiree's particular needs and circumstances and may be relied upon for making an investment decision that is in the investor's best interest. . . .

---

[14] Federal Register / Vol. 88, No. 212 / Friday, November 3, 2023 / Proposed Rules at 75907

[15] Proposed Labor Reg. sec. 2510.3-21(c)(1)(ii).

> Over time, the Department has become concerned that 1975 regulation's regular basis test served to defeat objective understandings of the nature of the professional relationship and the reliability of the advice as based on the investor's best interest.

In 2016, DOL eliminated the regular basis, mutual understanding, and primary basis parts of the five-part test; in 2023, is proposing to eliminate the regular basis, mutual understanding, and primary basis parts of the five-part test. In 2016, DOL did not replace those three parts with any other requirements. In 2023, the proposal would replace those three parts with additional tests that any good sales pitch would satisfy. The case for invalidation could not be stronger.

<u>Under the *Chamber* case, the proposed modifications to specified Prohibited Transaction Exemptions, including 2020-02 and 84-24, are an invalid attempt to regulate IRAs, for which DOL has no jurisdiction</u>.

In invalidating the Prohibited Transaction Exemptions in 2016, the Fifth Circuit made repeated statements that apply equally to the 2023 proposals. Only a small portion of the applicable statements are quoted below. The full text of the Fifth Circuit opinion reads very much like an invalidation in advance of the 2023 proposals:

> [T]he [2016] Rule ignores that ERISA Titles I and II distinguish between DOL's authority over ERISA employer-sponsored plans and individual IRA accounts. By statute, ERISA plan fiduciaries must adhere to the traditional common law duties of loyalty and prudence in fulfilling their functions, and it is up to DOL to craft regulations enforcing that provision. IRA plan "fiduciaries," though defined statutorily in the same way as ERISA plan fiduciaries, are not saddled with these duties, and DOL is given no direct statutory authority to regulate them. As to IRA plans, DOL is limited to defining technical and accounting terms, and it may grant exemptions from the prohibited transactions provisions. . . . It follows that these ERISA provisions must have different ranges; they cannot mean that DOL may comparably regulate fiduciaries to ERISA plans and IRAs. Despite the differences between ERISA Title I and II, DOL is treating IRA financial services providers in tandem with ERISA employer-sponsored plan fiduciaries. The Fiduciary Rule impermissibly conflates the basic division drawn by ERISA. [citations omitted] . . . .
>
> To begin with, DOL knew, and continues to concede, its new definition encompassed actors and transactions that the Department "does not believe Congress intended to cover as fiduciary." *[Although DOL did not repeat this quote in 2023, the 2023 proposal is actually broader than the 2026 rule.]* DOL had to create exemptions not exclusively for the statutory purposes, but to blunt the overinclusiveness of the new definition. Were it not for DOL's ahistorical and strained interpretation of "fiduciary," there would be no rationale for the BICE exemptions. Thus, when DOL argues that any exemptions would be more lenient on IRA financial services providers than deeming their ordinary activities to fall within the ERISA Title II prohibited transactions provision, DOL proves too much. . . .
>
> Additionally, the "exemptions" actually subject most of these newly regulated actors and transactions to a raft of affirmative obligations. ***Among the new requirements, brokers***

> ***and insurance salespeople assume obligations of loyalty and prudence only statutorily required of ERISA plan fiduciaries.*** [emphasis added]

Here is an example of a requirement in the proposed amendments to PTE 2020-02 clearly applying the duties of loyalty and prudence to IRA fiduciaries, directly contrary to the above-quoted words of the Fifth Circuit:

> (1) Investment advice is, at the time it is provided, in the Best Interest of the Retirement Investor. As defined in Section V(b), such advice: (A) 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 investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor; and (B) ***does not place the financial or other interests of the Investment Professional, Financial Institution or any Affiliate, Related Entity, or other party ahead of the interests of the Retirement Investor, or subordinate the Retirement Investor's interests to their own***.[16] [emphasis added]

<u>The required acknowledgment of fiduciary status in PTEs 2020-02 and 84-24 is a prime example of DOL regulating IRAs far beyond its authority, since it effectively forces firms to accept fiduciary status with respect to as many as tens of millions of IRA client interactions.</u>

DOL states in the preamble to PTE 2020-02:

> Before engaging in a transaction pursuant to this exemption, PTE 2020– 02 Section II(b)(1) currently requires the Financial Institution to provide a written acknowledgment that the Financial Institution and its Investment Professionals are fiduciaries under Title I of ERISA or the Code, or both, as applicable, with respect to any investment recommendations provided by the Financial Institution or Investment Professional to the Retirement Investor. The Department has become concerned that some parties misinterpret this condition and claim to satisfy it through artful phrasing that does not, in fact, tell the Retirement Investor if the recommendation is made by a fiduciary (for example, by saying they ''may'' be fiduciaries or that they are fiduciaries to the extent they meet the definition of fiduciary investment advice under the ERISA or the Code). . . . [I]f the Financial Institution and Investment Professional are to comply with the law and meet the exemption's conditions, they should decide if they are acting as a fiduciary, inasmuch as their legal obligations and exemption conditions turn on fiduciary status under ERISA, the Code, or both.

At first glance, this seems reasonable enough. But let's apply it. Brokerage Firm B has 10,000 representatives. Assume that each representative has 10 client interactions per business day (probably a low estimate). If the representative works 49 weeks in a year, and excluding holidays, let's assume that each representative works 230 days in a year, with 2,300 client

---

[16] Proposed Labor PTE 2020-02, section II(a)(1).

interactions. If 2,300 is multiplied by 10,000, Brokerage Firm B has 23 million client interactions per year. With on-line trading, it is impossible to know which of those interactions resulted in a transaction. And it is impossible for Brokerage Firm B to try to identify which interactions are fiduciary and which are not, leaving B with little choice but to accept fiduciary status in writing with respect to every client and prospective client interaction. This is literally a complete overhaul of the IRA regulatory system by making all interactions with clients a fiduciary act. And to make things even worse, DOL demonstrates no awareness of this issue in its proposals.

Forcing advisors to accept fiduciary status opens the door to private lawsuits under state fiduciary law, also in conflict with the Fifth Circuit. DOL states in the preamble that the amendments to PTE 2020-02 (or 84-24) do not create a new private right of action. But this statement has no authority or effect with respect to state law. ***The relevant question is whether the required written acknowledgment of fiduciary status under PTE 2020-02 (and 84-24) could make an IRA advisor a fiduciary under state law, thus triggering vulnerability to private rights of action against the advisor for breach of fiduciary duty under state law. The answer is unclear, but this proposal would be an invitation to plaintiffs' lawyers in all 50 states to try to bring such suits. Exposing advisors to private rights of action under state law constitutes further grounds for invalidation by the Fifth Circuit:***

> [T]he BICE provisions [predecessor to PTE 2020-02] regarding lawsuits also violate the separation of powers . . . Only Congress may create privately enforceable rights, and agencies are empowered only to enforce the rights Congress creates. . . . In ERISA, Congress authorized private rights of action for participants and beneficiaries of employer sponsored plans, 29 U.S.C. § 1132(a), but it did not so privilege IRA owners under Title II. DOL may not create vehicles for private lawsuits indirectly through BICE contract provisions where it could not do so directly.

DOL's proposed prohibitions on forms of advisor incentives is completely arbitrary and a clear example of the proposal's impermissible regulation of IRAs.

Proposed PTE 2020-02 and 84-24 include the following rule:

> Financial Institutions may not use quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, or other similar actions or incentives that are intended, or that a reasonable person would conclude are likely, to result in recommendations that are not in Retirement Investors' Best Interest.

What is stunning is how DOL interprets that rule in the preamble to both proposals very similarly. Here is the preamble language in PTE 2020-02.

> A Financial Institution should not offer incentive vacations, or even paid trips to educational conferences, if the desirability of the destination is based on sales volume and satisfaction of sales quotas.

This is saying that paid trips to, for example, Miami, for a vacation or an educational conference are per se illegal under both exemptions. This is completely arbitrary. What is the value of a

short educational conference in nice location? Maybe $5,000 or $10,000? What basis does DOL have to say that that amount – being paid, for example, to a very successful advisor – is reasonably interpreted as always enough to entice an advisor to act against her clients' best interest? No factual basis. This is a textbook example of arbitrary and capricious. And it is another glaring example of DOL attempting to regulate the IRA market by (1) making virtually all advisors fiduciaries, and (2) deciding what type of compensation that advisors can receive.

The arbitrariness of the paid trip prohibition is underscored by contrasting the treatment of a $5,000 paid educational conference with incentive pay, such as bonuses, of $50,000 or $100,000 or more. If the $5,000 conference is impermissible under the general standard described above and the $100,000 bonus is permissible, that is almost the definition of arbitrary. On the other, if all incentive pay of $5,000 or more is all illegal, then the proposal is prohibiting the compensation systems of virtually all financial institutions in the country, without a word of discussion of this fact in the preamble nor any economic analysis of this prohibition, again rendering the proposal arbitrary and capricious.

The Fifth Circuit squarely held that the 2016 rule, which included a very similar combination of changes to the fiduciary definition and to the PTEs, was wholly invalid and not severable. That holding applies equally to the 2023 proposal.

In the preamble to the proposed definition, DOL seems to recognize the very distinct possibility that it has gone beyond its authority and argues that invalid parts of the proposal should not affect the validity of the other parts:

> The Department generally intends discrete aspects of this regulatory package to be severable. For example, in the event that this regulatory package is finalized with both an updated regulatory definition of a fiduciary and amendments to the PTEs, the Department intends that the updated regulatory definition of a fiduciary would survive even if a court vacated any of the amendments to the PTEs leaving in place the previously granted versions of those PTEs.

As with other parts of DOL's proposal, the above statement is directly contrary to the holding of the Fifth Circuit, which said:

> [This comprehensive regulatory package is plainly not amenable to severance. Based on the foregoing discussion, we REVERSE the judgment of the district court and VACATE the Fiduciary Rule in toto.

As discussed above, the proposed fiduciary definition is invalid, as are numerous aspects of the proposed exemptions. Under the Fifth Circuit decision, this "comprehensive regulatory package" is not severable, rendering all of it invalid.

As discussed above, the 2023 proposal is virtually identical to the 2016 rule. The 2016 rule had devastating effects on low and middle-income individuals, so we know that this rule will have the same effects.

During the short period that the 2016 fiduciary rule was in effect, it had well-documented devastating effects on low and middle-income individuals. ***Please see the Appendices to this letter for more complete data on this harm***. But below, we provide some key examples:

- **10.2 million accounts harmed.** In 2017, the national accounting firm Deloitte studied 21 financial institutions that represented 43% of U.S. financial advisors and 27% of the retirement savings assets in the market. The study found that as of the DOL rule's first applicability date on June 9, 2017, ***53% of study participants reported limiting or eliminating access to brokerage advice for retirement accounts, which the firms estimated as impacting 10.2 million accounts and $900 billion AUM. The study makes it clear that smaller accounts were most severely affected.***
    - **DOL's failed in its attempts to respond to this Deloitte study.**
        - DOL mistakenly characterized the Deloitte study as a study done before finalization in 2016 that predicted a loss of investment assistance. That is obviously not correct. Here is what DOL said:

            > The preliminary market reaction to the 2016 Rule, however, differed from those expected by the studies discussed above [referring to the Deloitte study among others] and are inconsistent with more rigorous academic research.

        - One of the more "rigorous" studies relied on by DOL was Egan, Ge, and Tang (2022), which "found that while variable annuity sales had decreased, there is no evidence that the change affected investors with less wealth more than others."[17] The stunning thing about this 2022 study is that it only cites one authority for the conclusion that the less affluent were not disproportionately affected -- ***the Deloitte study.*** In other words, the Egan, Ge, and Tang study relied on by DOL could not find any authority to support its obviously wrong statement. So, ***it simply cited the Deloitte study, which came to the opposite conclusion.***

- **68% report harm to small accounts.** In a Harper Polling survey of 600 financial professionals, 68% reported that they or their institutions would take on fewer small accounts.
- **75% report taking on fewer small clients.** A NAIFA survey of 1,093 members found that nearly 75% of financial professionals experienced or expected to experience an increase in the minimum account balances for the clients they serve.
- **Small employers and small accounts harmed.** A survey of Insured Retirement Institute ("IRI") members found that "more than 60 percent of the distribution firms that participated in the Survey have, are planning to, or are considering exiting or de-emphasizing target markets such as small IRA holders and small retirement plan sponsors."

---

[17] Egan, Mark, Shan Ge, & Johnny Tang, Conflicting Interests and the Effect of Fiduciary Duty—Evidence from Variable Annuities, 35(12) The Review of Financial Studies 5334–5486. (December 2022).

On November 8, 2021, the Hispanic Leadership Fund ("HLF") released a study[18] showing the devastating effects of reviving even a portion of the 2016 fiduciary rule, as would be done by the current proposal. The study stated:

> Based on a rigorous analysis and actual experience, our conservative estimate is that reinstatement of the 2016 rule would:
>
> > (1) ***reduce the projected accumulated retirement savings of 2.7 million individuals with incomes below $100,000 by approximately $140 billion over 10 years, and***
> > ***(2) have the most adverse effects on Blacks and Hispanics – reducing their projected accumulated IRA savings by approximately 20 percent over 10 years – contributing to an approximately 20 percent increase in the wealth gap attributable to IRAs for these individuals.***

Again, DOL tried but failed to refute this study. DOL's refutation was based on a study performed in March of 2016 – before the final 2016 rule was even published. In other words, the HLF study was done in 2021 based on the actual effects of the 2016 rule. DOL responded to the HLF study by citing a March 2016 study that wrongly predicted that the rule the study authors had not seen would not adversely affect access to investment assistance.

Through its actions and its words, this Administration has made it clear that the comment period is generally a check-the-box formality, thus violating the Administrative Procedure Act under case law directly on point. ***For example, the President said formally that "If this rule is finalized as proposed, it's going to protect workers and it's going to save for —that are saving for their retirements."***

In his formal remarks[19] announcing the fiduciary proposal on October 31, 2023, the President made it very clear that he wanted the proposal adopted as proposed:

> With this new rule that we're proposing, they would close these loopholes. It finalizes any financial — it penalizes any financial advisor or insurance broker who — giving advice about retirement or selling retirement products — and it suggests if they don't give their client the best — act in the best interests of that client in the first place.
>
> If they don't, if they breach their fiduciary duty, they could face serious penalties, including having to pay restitution and additional financial penalties.

---

[18] https://hispanicleadershipfund.org/wp-content/uploads/2021/11/FINAL_HLF-Quantria_FiduciaryRule_08Nov21.pdf

[19] https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/10/31/remarks-by-president-biden-on-protecting-americans-retirement-security/

> The action we're taking today is, I believe, long overdue. ***If this rule is finalized as proposed, it's going to protect workers and it's going to save for — that are saving for their retirements.***
>
> It will protect seniors from being exploited. It will protect many trustworthy financial advisors out there who are doing the right thing from unfair competition. Now they won't be undercut by competitors willing to use deception or underhanded tactics to make a profit. [emphasis added]

The President's position in favor of adopting the proposal substantially as proposed has had clear effects on this process so far, as discussed below, and this is clearly impermissible under the Administrative Procedure Act.[20]

Many people have asked us why DOL is using such an artificially compressed comment period. The answer is very easy. DOL knows that in order to avoid the possibility of a Congressional Review Act challenge in 2025, the final rule needs to be finalized by early May. A recent Bloomberg article summarized the issue:

> Rules finalized as early as next May could be at risk of being undone under the Congressional Review Act, scholars say, potentially threatening several high-profile US Labor Department regulations currently being wrapped up by the Biden administration.
>
> Because the congressional calendar for next year hasn't been finalized, it's hard to pinpoint exactly when the law—which requires agencies to submit final rules to Congress and gives lawmakers a 60-day period to pass a resolution to nullify rules they oppose—will come into play. Sarah Hay and Steve Balla of the George Washington University Regulatory Studies Center estimate that rules published between May and September next year could potentially fall victim to the CRA.[21]

---

[20] *Nehemiah Corp. of America v. Jackson*, 546 F. Supp. 2d 830 (E.D. Cal. 2008) (holding that Department of Housing and Urban Development ("HUD") rule prohibiting seller-funded down payment assistance for certain federally-insured mortgages violated the APA and disqualifying HUD Secretary from further proceedings on the rule because he "prejudged" merits of the final rule by making public comments that he was against the assistance program). The court noted, for example:

> "Allowing the public to submit comments to an agency that has already made its decision is no different from prohibiting comments altogether. Indeed, if the public perceives that the agency will disregard its comments, there may be a chilling effect that causes the public to refrain from submitting comments as an initial matter."
>
> "If the Bloomberg News article [where the HUD Secretary made comments that he was "very much against" the program that was banned by the rule] falls short of this admittedly exacting standard [to allow extra-record evidence to be admissible], it is hard to imagine what evidence could possibly satisfy the standard, at least in the context of a prejudgment claim where the comments at issue were made outside the administrative record. Accordingly, the court finds that the article is appropriately before it."

[21] Bloomberg, Punching In: Congressional Review Act Threat Looms for DOL Rules, By Rebecca Rainey and Diego Areas Munhoz | November 20, 2023 5:05AM ET.

In this context, it was common knowledge before the proposal was issued that the comment period would be very short. Finalizing by early May clearly took precedence over any interest in comments. In order to finalize by early May, the comment period clearly needed to end in early to mid-January.

To finalize by early May, the proposal will likely need to be sent to OIRA for review by mid-March, leaving a scant 2 ½ months from an early January comment period deadline for DOL to read through the mountain of comments and prepare responses to the comments in the preamble to the final rule. That leaves no time for any major changes to the proposals, only time for a few details to be modified in this massive set of proposals.

True to expectation, DOL provided a 60-day comment period covering the longest holiday seasons of the year, with a stunning end of the comment period on January 2nd, following a week that is probably the least worked week of the year. Abbreviated comment periods have been grounds for APA violations in the past, when combined with clear evidence of a predetermined political agenda, as is the case here with the President's remarks.[22]

And to top that off, in an unprecedented move (in my experience), the hearing on the proposal was scheduled for the middle of the comment period, leaving many hearing witnesses without knowing what their final comments will say.

And finally, in denying a request for an extension of the comment period from several trade associations, EBSA Assistant Secretary Lisa Gomez justified the denial in large part based on the view that they already have most of the input they need:

> EBSA believes that its current proposal reflects significant input it has received from public engagement with this project since 2010, and looks forward to another robust comment period, public hearing, vigorous public debate, and stakeholder meetings. In addition, since the beginning of this Administration, EBSA has engaged informally with numerous stakeholders representing multiple viewpoints on issues related to the proposed rulemaking package. Therefore, at this point, EBSA does not intend to extend the comment period or delay the hearing.

Translation: we generally have all the information we need and are comfortable with our proposal, we don't need a normal comment period. Chairwoman Virginia Foxx of the House

---

[22] *Int'l Snowmobile Mfrs. Ass'n v. Norton*, 340 F.Supp. 2d 1249 (D. Wyo. 2004) (setting aside National Park Service ("NPS") final rule banning snowmobiles in national parks for violating both the APA and a federal environmental law in part because evidence showed that the agency had already made a prejudged decision with respect to the rule; in addition, finding that the NPS failed to adequately provide for public participation because it provided abbreviated comment timelines and "did not seriously consider public comments. . . . Based on the agency's failure to provide for public participation in the rule, including an abbreviated comment period of 30 days, the court concluded that "The NPS and/or the Clinton administration higher-ups had made a predetermined political decision, did not seriously consider public comments and performed mere pro forma compliance with [the National Environmental Policy Act ("NEPA")]. During this entire time the NPS ignored the purposes and procedures of NEPA and the APA in order to get this legislation approved before the end of the Clinton Administration."

Education and the Workforce Committee powerfully commented on this same point regarding Gomez's dismissal of the need to extend the comment period, saying that "this statement seems to confirm that the public is being served a regurgitation of the same old rule and that EBSA has predetermined the outcome in violation of the APA."[23]

In brief, DOL has made it clear that the comment period is a check-the-box exercise. When the proposal is finalized by early May with no major changes, we will have confirmation of this point. Just in time for the lawsuit challenging the final rule on both substantive grounds and procedural grounds – a complete lack of interest in input from the public on a proposal required by law to be subject to notice and comment.

Julie Su's indefinite status as Acting DOL Secretary without the consent of the Senate violates the Constitution, rendering this proposal and any final rule void.

On March 11, 2023, Marty Walsh resigned from his position as the 29th Secretary of Labor, and on that same day, Deputy Secretary of Labor Julie Su became the Acting Secretary. Three days later, the Senate formally received President Biden's nomination of Ms. Su to serve as the next Labor Secretary.

Ms. Su's service as Acting Secretary is contemplated by two federal statutes: (1) the Federal Vacancies Reform Act; and (2) the Labor Code.[24] Both statutes apparently permit Ms. Su to serve as Acting Secretary for as long as her nomination remains pending in the Senate. Put differently, under the statutes, Ms. Su can serve as Acting Secretary, certainly as long as there is no Senate vote.

Since Ms. Su's formal nomination, the full Senate has yet to schedule a vote for her nomination and no vote is expected for the foreseeable future because, according to informal reports, Senate Democrats do not have the votes to confirm her nomination. And yet, notwithstanding this effective rejection of Ms. Su's nomination by the Senate, according to informal reports, the White House intends to leave Ms. Su in her role as Acting Secretary indefinitely.

This strategy for Ms. Su's stalled nomination reflects an attempt to sidestep the Constitution's requirement for the Senate to provide its "advice and consent" for the appointment of officers of the United States. Consequently, future actions taken by Ms. Su as the purported head of the Labor Department would be invalid.

The Appointments Clause. Article II, Section 2 of the Constitution ("the Appointments Clause") directs the President to nominate and appoint officers of the United States "by and with the Advice and Consent of the Senate." Additionally, Article II, Section 2 authorizes the Congress to

---

[23] https://edworkforce.house.gov/uploadedfiles/11.17.23_final_fiduciary_rule_comment_period_letter_to_dol.pdf

[24] The Federal Vacancies Reform Act authorizes the President to appoint certain individuals to serve as an officer of an Executive agency whose appointment is required to be made by the President, by and with the advice and consent of the Senate. Once nominated, individuals serving under the Federal Vacancies Reform Act may serve "for the period that the nomination is pending in the Senate." 5 U.S.C. § 3341-3349e. The Labor Code states that the Deputy Secretary of Labor shall, in the case of the death, resignation, or removal from office of the Secretary of Labor, perform the duties of the Secretary "until a successor is appointed." 29 U.S.C. § 552.

vest the appointment of "inferior" officers in the President alone, in the courts, or the heads of departments.

Thus, as interpreted by the courts, the Appointments Clause creates two procedures for appointing Executive officials. First, "principal" officers may only be appointed with the advice and consent of the Senate. Second, and only if authorized by Congress, inferior officers may be appointed without the advice and consent of the Senate. The heads of Executive departments, such as the Labor Secretary, are principal officers that may only be appointed with the advice and consent of the Senate.

Stalled Labor Nomination. ***There are generally two views on whether the President can appoint someone, on an "acting" basis, to fulfill the duties of a principal officer, such as the Labor Secretary, without Senate confirmation. Under both of these views, however, the Appointments Clause prohibits an individual from indefinitely serving as the Acting Secretary.***

- **Strict Interpretation of Appointments Clause: Acting Department Heads Violate the Appointments Clause.** Under a strict interpretation of the Appointments Clause, anyone fulfilling the duties of a principal officer, such as the Labor Secretary, is a principal officer whose appointment must first be confirmed by the Senate. Thus, under this strict interpretation, Ms. Su's current service as Acting Secretary violates the Constitution's Appointments Clause because her nomination to serve as Labor Secretary has not been confirmed by the Senate. While this interpretation could create inefficiencies when there are vacancies in the Executive branch, it has nevertheless been endorsed by federal case law, including the endorsement of Supreme Court Justice Clarence Thomas.[25]

  This approach would certainly be a somewhat radical departure from current and past practices, but the key point here is that, although we acknowledge this position, we do not rely on it, due to the second approach described below.

- **More Flexible Interpretation of Appointments Clause: Indefinite Service Violates the Appointments Clause.** Under a more flexible interpretation of the Appointments Clause, courts have been willing to treat "acting" officials as inferior officers, who may be exempt from Senate confirmation, even when the duties that they perform are otherwise the duties of a principal officer. According to this view, acting federal officials are inferior officers, rather than principal officers, because they only perform their duties for a limited time under special and temporary conditions.[26] The logic being that if they

[25] *N.L.R.B. v. SW Gen., Inc.*, 580 U.S. 288 (2017) (Thomas, concurring) (explaining that the Vacancies Reform Act "raises grave constitutional concerns" and is "likely" unconstitutional with respect to principal officers of the United States); *Patrick v. Whitaker*, 426 F. Supp. 3d 182, 186 (E.D.N.C. 2019) (stating that the court was inclined to agree that the temporary appointment of an Acting Attorney General, without the advice and consent of the Senate "raises grave constitutional concerns because the Appointments Clause forbids the President to appoint principal officers without the advice and consent of the Senate.").

[26] *United States v. Eaton,* 169 U.S. 331, 343 (1898) (holding that an inferior officer may perform the duties of a principal officer for a limited time and under special and temporary conditions without transforming his office into one for which Senate confirmation is required); *Guedes v. ATF*, 356 F. Supp. 3d 109, 153 (D.D.C. 2019)

are only inferior officers, Senate confirmation is not needed before they can serve as an acting official.

Even assuming for the sake of argument that this view is correct, it does not permit any, individual to serve indefinitely as the acting secretary of an Executive branch. Thus, Ms. Su's service as Acting Secretary, at some point, violates the Constitution's Appointments Clause because she is, in effect, permanently serving in the Secretary's role, notwithstanding the Senate's clear failure to confirm her nomination. To conclude otherwise would, in violation of the Appointments Clause, permit the President to permanently install department heads, without Senate confirmation. For example, in the present situation, it is not difficult to envision Ms. Su serving as the Acting Secretary until at least the end of this presidential term – which is almost two years from the date on which she was elevated from Deputy Secretary.

Any conclusion that indefinite service as a principal officer without Senate confirmation is particularly concerning when the President and Senate share the same party, and the Senate simply chooses not to vote on the President's nominee. If department heads were permitted to serve in an acting capacity indefinitely, once a nomination of an existing official for a higher position is delivered to the Senate, there would be no incentive, or need, for the Senate to confirm the official's nomination. This result cannot be reconciled with the Senate's obligation to advise and consent under the Constitution's Appointments Clause.

Prior Confirmation Is No Cure. It has been argued by some that Ms. Su's previous appointment as Deputy Secretary of Labor, with Senate confirmation, somehow cures the constitutional defect created by the absence of Senate confirmation for her current nomination. There is case law precedent for this argument to be accepted for far lesser government positions, so that a second Senate confirmation is not needed at all. But even this precedent draws a sharp line, making the argument completely inapplicable to senior positions, which would clearly include Cabinet Secretaries.[27]

Those who make this argument contend that, when the Senate confirmed Ms. Su to serve as Deputy Secretary of Labor, it was also providing de facto consent for her to serve as the Secretary pursuant to federal succession statutes that apply in the event of a vacancy. We agree with this argument, but only up to a point. We agree that a Deputy Secretary may act temporarily as Acting Secretary without Senate confirmation. But it is a wholly different argument to say that a Deputy Secretary may act as Acting Secretary for almost two years (or more) simply by avoiding a Senate vote on her nomination.

As noted above, the constitutional basis for temporarily bypassing Senate confirmation for an Acting Secretary is that non-Secretaries may act as Acting Secretaries for a temporary period to bridge a practical gap when an agency head is needed. But the fact that a non-Secretary qualifies

---

(holding that the Acting Attorney General's service of 100 days did not cause the Acting Attorney General to become a principal officer).

[27] See *Weiss v. US,* 510 U.S. 163 (1994).

to act as an Acting Secretary temporarily does not permit the Administration to permanently bypass Senate confirmation. This is so because the Constitution, through the Appointments Clause, prevents Congress from creating any succession statutes that would otherwise permit an individual to serve as the head of an Executive department indefinitely without the Senate confirming the nomination. That is, the Constitution does not permit the Senate to waive its constitutional obligation to provide advice and consent prior to the appointment of a principal officer of the United States, such as the Secretary of Labor. If this were not the rule, a number of Senate-approved nominees could step into an Acting Secretary's position indefinitely without the need for Senate confirmation. That obviously would be unconstitutional. In short, any prior confirmation of Ms. Su for a separate and lower office is no cure for the indefinite failure to obtain Senate confirmation for her current nomination to serve as Secretary of Labor.

We thank you for your consideration of our views.

Sincerely,

Kent A. Mason

APPENDIX A: GENERAL HARM CREATED BY THE FIDUCIARY RULE

1. **Deloitte & Touche Study (August 9, 2017), as described in SIFMA's August 9, 2017 comment letter**
   a. *Description: a study of a cross-section of SIFMA's members, consisting of 21 financial institutions that represent 43% of U.S. financial advisors and 27% of the retirement savings assets in the market.*
   b. "[A]s of the Rule's first applicability date on June 9th, 53% of study participants reported limiting or eliminating access to brokerage advice for retirement accounts, which the firms estimate impact 10.2 million accounts and $900 billion AUM."
   c. "Roughly 95% of study participants indicated that they have reduced access to or choices within the products offered to retirement savers because of efforts to comply with the Rule. Products affected include mutual funds, annuities, structured products, fixed income, private offerings, and more, impacting an estimated 28.1 million accounts. Examples of the reduction in mutual fund availability include: 1) the elimination of no-load funds from brokerage platforms; 2) the elimination of mutual funds held directly at the mutual fund company; 3) reduced product offerings; and 4) elimination of other share classes."
   d. "Across the industry, broker-dealers will have spent more than $4.7 billion in start-up costs relating to the Rule, much of which has already been spent."
   e. "The ongoing costs to comply are estimated at over $700 million annually…."

2. **Harper Polling (July 2017), as described in the Financial Services Roundtable's August 10, 2017 comment letter (report and survey slides attached to letter)**
   a. *Description: a national survey of 600 financial professionals conducted by phone and through online interviews from July 7-12, 2017 (July 17, 2017).*
   b. A majority of respondents reported the Rule is restricting them from serving their clients' best interests.
   c. "Only 12% of respondents report the Rule is helping them to serve their clients best interest and 33% report there has been no impact, yet those respondents still report more complicated paperwork and fewer small accounts." "For those who reported the Rule is helping or has had no impact on their ability to serve their clients best interests, many reported negative changes to client services by (i) servicing fewer small accounts, (ii) offering fewer investment options, (iii) including fewer mutual fund options, and (iv) higher compliance costs, including additional fees for Retirement Investors."
   d. "Only 10% of Certified Financial Planners (CFP) report that the Rule is helping them to serve their clients best interests, and 55% report the Rule is restricting them from serving their clients best interests. This runs counter to the claim by the CFP Board of Standards that the Rule is workable for their members."
   e. 75% of respondents whose "typical clients have starting assets under $25,000 report that they will take on fewer small accounts due to increased compliance costs and legal risks."
   f. 63% reported that "the fiduciary standard will definitely/probably/or has already limited investment options/products they can provide to clients."
   g. 56% said "their firms would offer fewer mutual fund products to consumers."

h. "…68% reported that they or their institutions will take on fewer small accounts."

3. **American Action Forum (AAF) (March 16, 2017 comment letter)**
   a. *Description: AAF's comments are based on: (1) an AAF staff survey of the available literature in 2015 on the likely impact of the DOL rule, as discussed in an August 4, 2015 article; (2) a September 17, 2015 AAF article; and (3) AAF research as discussed in a February 22, 2017 article.*
   b. Found reported compliance costs of at least $106 million in 2016, representing up-front costs from just four companies.
   c. "[A]lmost all retail investors will see their costs increased by 73 to 196 percent due to a mass shift toward fee-based accounts."
   d. "[F]irms providing investment advice will see an average of $21.5 million in initial compliance costs and $5.1 million in annual maintenance costs."
   e. "[U]p 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."
   f. "…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."

4. **Meghan Milloy / American Action Forum (AAF) Research (April 2017), as stated on AAF's website**
   a. *Description: a research article by Meghan Milloy, Director of Financial Services Policy.*
   b. The Rule will result in additional charges to retirement investors of approximately $816 annually per account or over $46 billion in aggregate.
   c. "Although the rule has not yet become effective, AAF research has found that three major companies have left part of the brokerage business, and six more are drawing down their business or switching to a fee-based arrangement. From these companies alone, reported compliance costs have already topped $100 million, affecting 92,000 investment advisors, $190 billion in assets, and at least 2.3 million consumers."

5. **Chamber of Commerce's Monitoring of Rule's Impact, as described in the Chamber's August 16, 2017 comment letter**
   a. *Description: outreach conducted by the Chamber to 14 firms that collectively manage $10 trillion in assets.*
   b. "[N]early all of the institutions reported excluding some investment products from retirement investors in response to the rule, largely due to concerns about the pending 'level' fee requirements of the 'full' BIC Exemption."
   c. "Most of the institutions also reported using the 'grandfathering' provisions included in the final rule, meaning that a substantial number of investors would be prevented from receiving new investment advice going forward, unless they decide to change the type of account they have (e.g. change from a transaction-based account to a fee-based account)."

6. **<u>NAIFA Survey of 1,093 Members (April 2017)</u>**
    a. Nearly 75% of financial professionals have experienced or expect to experience an increase in the minimum account balances for the clients they serve.
    b. Nearly 90% of advisors believe consumers will need to pay more for their financial advice services.
    c. More than 90% of financial professionals have already experienced or expect to experience restrictions of product offerings to their clients.
    d. 68% of NAIFA's members have been told that they cannot recommend certain mutual fund classes or types to clients, and almost 70% say they cannot recommend certain annuities.

7. **<u>LIMRA Secure Retirement Institute's *Second Quarter 2017 U.S. Retail Annuity Sales Survey*</u>, as described in an August 23, 2017 LIMRA press release**
    a. Total annuity sales for the first half of 2017 decreased 10% over the first half of 2016, the lowest first half sales since 2001.
    b. Q2 2017 is the:
        i. 5th consecutive quarter of decline in overall annuity sales.
        ii. 6th consecutive quarter in which fixed annuity sales have been greater than variable annuity sales, which "hasn't happened in almost 25 years."
    c. "A closer look at what's driving the drop in VA sales reveals qualified VA sales have experienced a more significant decline than non-qualified VAs…. VA qualified sales were down 16 percent in the second quarter, while nonqualified sales were actually up 5 percent. This could be in reaction to the DOL fiduciary rule," according to the director of annuity research.
    d. Variable annuity sales are forecast to drop 10-15% in 2017, returning to levels not seen since 1998.

8. **<u>LIMRA Secure Retirement Institute's *First Quarter 2017 U.S. Retail Annuity Sales Survey*</u>, as described in a May 18, 2017 LIMRA press release**
    a. Indexed annuity sales are forecast to decline 5-10% in 2017 and "another 15-20 percent in 2018 when the BICE goes into effect."

9. **<u>LIMRA Secure Retirement Institute Study (2017), as described in NAIFA's August 4, 2017</u> comment letter**
    a. <u>"LIMRA estimates that access to guaranteed income products will decline 29% under the Rule/PTEs."</u>

10. **<u>Morningstar Report (2017)</u>, as described in the Insured Retirement Institute's April 17, 2017 comment letter**
    a. Variable annuity sales declined nearly 22% from 2015 to 2016 despite a rising stock market.

11. **<u>Survey of Insured Retirement Institute (IRI) Member Firms (July 2017)</u>, as described in IRI's August 7, 2017 comment letter**

a. *Description: IRI surveyed a representative sampling of its insurance company and distributor members from July 18-31, 2017.*
b. "More than 60 percent of the distribution firms that participated in the Survey have, are planning to, or are considering exiting or de-emphasizing target markets such as small IRA holders and small retirement plan sponsors."
c. A number of distributors reported that "approximately 155,000 of their clients have already been 'orphaned,' and a number of our insurer members told us that both the adviser and the firm have dissociated from the accounts of hundreds of their annuity contract owners. Far more accounts are expected to be impacted as implementation of the Rule proceeds."

12. <u>CoreData Report, CoreData Research UK (2016)</u>, as described in comment letter and attachment submitted by Kent Mason (August 3, 2017)

a. *Description: a non-commissioned report based on an October 2016 survey of 552 U.S. financial advisors.*
b. 71% of financial professionals will disengage from at least some retirement savers because of the Fiduciary Rule.
c. 64% of financial professionals 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).
d. On average, financial professionals estimate they will no longer work with 25% of their mass-market clients, creating an advice gap for low-balance investors.
e. 39% of advisors believe the cost of personal financial advice will become too expensive for most investors.
f. 32% of advisors believe that shifting away from certain products, such as annuities and non-traded REITs, is one of the biggest challenges posed by the fiduciary rule.
g. 57% of advisors "believe increased paperwork stemming from reporting and disclosure requirements will be one of the top three challenges of the fiduciary rule**."**
h. 18% of advisors "believe preparing for potential litigation will be one of the biggest challenges they must overcome."

13. <u>A.T. Kearney Study (October 2016)</u>, as described in comment letter and attachment submitted by Kent Mason (August 3, 2017)

a. *Description: a study of the effects of the Fiduciary Rule published in connection with a discussion of how the global management consultant can help financial institutions adjust to the rule.*
b. Concludes that "[a]s firms move toward fee-based advisory, many low-balance accounts will no longer be served, shifting many assets to formats such as robo-advice and self-directed."
c. Recommends that broker/dealers should "[a]ccelerate the transition to fee-based services and advisory, and evaluate account thresholds to continue serving (for example, accounts greater than $200,000)."

d. States that "[c]ertain high-cost investment products (such as variable annuities) will be phased out as the business model is no longer viable under the new rule…."
e. By 2020, broker-dealer firms will collectively stop serving the majority of the $400 billion currently held in low-balance retirement accounts.
f. Implementing the DOL's new fiduciary rule for retirement accounts will cost the brokerage industry $11 billion over the next four years.

14. <u>Large Mutual Fund (2017 data)</u>, as described in the Chamber of Commerce's April 17, 2017 comment letter

a. *Description: an interview the Chamber conducted with a large mutual fund provider.*
b. One mutual fund's number of orphaned accounts (i.e., accounts without an advisor) nearly doubled in the first three months of 2017, and the average account balance in these orphan accounts is just $21,000. The fund 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."

15. <u>Fidelity Clearing & Custody Solutions Poll (August 2016)</u>, as described in September 28, 2016 ThinkAdvisor article

a. *Description: A blind online poll of 459 advisors conducted from August 18-26, 2016. Respondents consisted of 30% independent broker-dealer reps, 21% RIAs, 19% regional BD reps, 15% from wirehouse firms, 11% insurance BD reps, and 3% from banks.*
b. 10% of advisors responding to the survey 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."

16. <u>2016 Global Survey of Financial Advisors commissioned by Natixis Global Asset Management</u>, as described on Natixis website and in survey whitepaper

a. *Description: a survey of 2,550 advisors (including 300 in the U.S.) in 15 countries in Asia, Europe, the United Kingdom, and the Americas conducted in July 2016. The online quantitative survey was developed and hosted by CoreData Research.*
b. 38% of respondents said they will likely "disengage with smaller clients" as a result of new regulations.
c. Almost 80% of respondents are "concerned that more stringent regulations could limit access to financial advice for lower balance and mid-tier clients."
d. More than 75% of advisors surveyed "believe increased regulations could even lead to higher costs for clients."

17. **The Cerulli Report – U.S. Broker/Dealer Marketplace 2016, as described in Lincoln Financial Group's March 17, 2017 comment letter**
    a. *Description: an "in-depth analysis of broker/dealers (B/Ds) with financial advisors serving retail investors." Available for purchase.*
    b. 66% of advisors believe that small investors will have less access to professional financial advice as a result of the rule.

18. **NERA Economic Consulting's comment on the Department of Labor Proposal and Regulatory Impact Analysis (July 17, 2015)**
    a. *Description: SIFMA retained NERA Economic Consulting to review and comment on the proposed fiduciary rule. To conduct its cost study of the proposal, NERA gathered account-level data from several financial institutions, representing tens of thousands of IRA accounts that were observed from 2012 through Q1 2015.*
    b. "Using [a] conservative minimum account balance of $25,000, over 40% of commission-based accounts in our dataset would not be able to open fee-based accounts. Using a $50,000 threshold, over 57% of accounts would not meet minimum balance requirements for a fee-based account. If the effective threshold is $75,000, two-thirds of account holders would be left without any professional investment advice."

19. **Chamber of Commerce company interviews, as described in the Chamber's April 17, 2017 comment letter**
    a. *Description: In-depth, structured interviews of two to five persons with about 10 investment-advisory companies, broker-dealers, insurance companies, and others affected directly or indirectly by the Fiduciary Rule.*
    b. Interviewed companies "uniformly report that they have already restricted the choices of investment products available to retirement savers through their fee-based advisory channels, or they intend to do so when the Fiduciary Rule becomes applicable. The majority of companies interviewed have also either already raised the minimum account amounts to qualify for advisory services or have plans to do so upon applicability of the rule. Some firms have raised the minimum for advisory accounts to $100,000 or more, clearly excluding from their services small beginning savers."
    c. "[E]ven when the financial institution itself has not increased account minimums, individual brokers may implicitly discourage enrollment of smaller accounts and ration their time to larger accounts to earn better pay and to reduce time spent on compliance associated with smaller, transaction-based accounts."
    d. Insurance costs could exceed two to three times the cost estimated by the Department. Some respondents cited numbers as high as $10,000 per professional per year for Errors and Omissions coverage.
    e. The Chamber is unaware of any "robo-advisor" that recommends annuity products to generate retirement income, despite the clear need for these products and the Department's reliance on robo-advisors to alleviate the potential loss of access to retirement advice for small savers.

20. **SIFMA survey, as described in document "New Data Shows DOL Fiduciary Rule Harming Small Retirement Savers"**
    a. *Description: a survey of 25 member financial firms impacted by the Fiduciary Rule.*
    b. "More than half the firms are considering moving IRA brokerage clients to call center services only."
    c. "44% of the respondents anticipate that more than half of their clients could see a change in services (e.g., limitation of product choice, shift to fee-based account, or shift to online only, etc.). More than 50% of responding firms anticipate offering only advisory services to a subset of their current IRA brokerage customers."
    d. "… 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."

21. **Wall Street Journal Reports (February and April 2017), as described in the Financial Services Roundtable's April 17, 2017 comment letter**
    a. Firms have responded to the Rule by taking actions that include: (1) moving clients to fee-based accounts; (2) eliminating commission-based IRAs; (3) raising investment minimums for commission-based IRAs; (4) eliminating variable annuity products; and (5) excluding certain products from commission-based IRAs (e.g., annuities, mutual funds, and exchange-traded funds).

22. **Jonathan Reuter updated analysis, as described in the American Bankers Association's (ABA) March 15, 2017 comment letter**
    a. *Description: ABA recommendations of key developments that an updated DOL analysis of the Fiduciary Rule should account for.*
    b. The author of one of the academic studies cited by the Council of Economic Advisers (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."

APPENDIX B: HARM TO THE ANNUITY MARKET FROM THE FIDUCIARY RULE

1. **LIMRA Secure Retirement Institute's *Second Quarter 2017 U.S. Retail Annuity Sales Survey*, as described in an August 23, 2017 LIMRA press release**
    a. Total annuity sales for the first half of 2017 decreased 10% over the first half of 2016, *the lowest first half sales since 2001*.
    b. Q2 2017 is the:
        i. 5th consecutive quarter of decline in overall annuity sales.
        ii. 6th consecutive quarter in which fixed annuity sales have been greater than variable annuity sales, which "hasn't happened in almost 25 years."
    c. "A closer look at what's driving the drop in VA sales reveals qualified VA sales have experienced a more significant decline than non-qualified VAs…. *VA qualified sales were down 16 percent in the second quarter, while nonqualified sales were actually up 5 percent. This could be in reaction to the DOL fiduciary rule*," (emphasis added) according to the director of annuity research.
    d. *Variable annuity sales are forecast to drop 10-15% in 2017, returning to levels not seen since 1998.*

2. **LIMRA Secure Retirement Institute's *First Quarter 2017 U.S. Retail Annuity Sales Survey*, as described in May 18, 2017 LIMRA press release**
    a. Indexed annuity sales are forecast to decline 5-10% in 2017 and "another 15-20 percent in 2018 when the BICE goes into effect," referring to the "Best Interest Contract Exemption" under the DOL fiduciary rule.

3. **LIMRA Secure Retirement Institute Study (2017), as described in NAIFA's August 4, 2017 comment letter**
    a. "LIMRA estimates that access to guaranteed income products will decline 29% under the [DOL Fiduciary] Rule/PTEs." (The reference to "PTEs" is to the exemptions from the application of the Fiduciary Rule, which substantially all qualified annuities must use.)

4. **Morningstar Report (2017), as described in the Insured Retirement Institute's April 17, 2017 comment letter**
    a. Variable annuity sales declined nearly 22% from 2015 to 2016 despite a rising stock market, which "has traditionally led to increased sales" of VAs.

5. **Insured Retirement Institute (IRI) member survey (July 2017), as described in IRI's August 7, 2017 comment letter**
    a. "Half of the participating insurance companies reported that some of their distribution partners have already dropped the insurer's products from their shelf as part of their efforts to implement the [Fiduciary] Rule."
    b. "Nearly 60 percent of the participating insurance companies expect that fee-based annuities manufactured in response to the [Fiduciary] Rule will result in higher overall fees to the consumer."
    c. "[A] number of our distributor members reported that approximately 155,000 of their clients have already been 'orphaned,' and a number of our insurer members told us that both the adviser and the firm have dissociated from the accounts of

hundreds of their annuity contract owners. Far more accounts are expected to be impacted as implementation of the Rule proceeds."

6. **Independent Insurance Agents & Brokers of America, Inc. (IIABA) Member Survey (July 2017), as described in IIABA's August 3, 2017 comment letter**
    a. "38%, or 315 respondents, answered that they personally and/or the insurance agency they work for had stopped selling or giving advice related to products impacted by the fiduciary rule, or planned to do so on or before January 1, 2018 when the [fiduciary] rule takes full effect."
    b. "[M]ore than one third of independent insurance agents who responded to the survey will exit the market on or before January 1, 2018; and for those that remain some will offer more limited services to clients."

7. **ACLI (August 7, 2017 comment letter)**
    a. "One ACLI member informed us that it has reduced its proprietary insurance product offerings by 54 percent and its non-proprietary variable annuity offerings available through its broker-dealers by 76 percent."
    b. Consequences of the Fiduciary Rule as reported by ACLI members:
        i. "Some banks are no longer offering access to fixed and indexed annuities, even when they are used outside the context of an employee benefit plan or IRA."
        ii. "Some broker-dealers are no longer offering variable annuities even to savers and retirees with non-qualified assets not subject to the Regulation."
        iii. "Some broker dealers are reducing the number of insurers and annuity products available on their platforms."
        iv. "Some firms are inquiring how quickly they can be removed as the broker dealer of record from existing annuity business."
    c. "[T]he Regulation has already resulted in a dramatic increase of 'orphaned' accounts. Several ACLI member companies have already been notified by distribution partners that they will resign as agent of record to IRA and ERISA plan annuity holders. For example, one ACLI member has informed us that, since the Regulation's June 9, 2017 applicability date, it has received 'disassociation' requests for 84 annuity contracts, and the reason provided for each action was the Regulation. By comparison, this member received only 3 disassociation notices during 2016, none of which included the Regulation as the basis for the disassociation."
    d. One member reported that it has "identified over 250 small retirement plans that have lost access to guidance and advice as a result of the Regulation."

8. **NAIFA Survey of 1,093 Members (April 2017)**
    a. 70% of NAIFA's members say they cannot recommend certain annuities.

9. **CoreData Report, CoreData Research UK (2016), as described in comment letter and attachment submitted by Kent Mason (August 3, 2017)**

a. *Description: a non-commissioned report based on an October 2016 survey of 552 U.S. financial advisors.*
b. 32% of advisors believe that shifting away from certain products, such as annuities and non-traded REITs, is one of the biggest challenges posed by the fiduciary rule.

10. <u>A.T. Kearney Study (October 2016)</u>, as described in comment letter and attachment submitted by Kent Mason (August 3, 2017)

a. *Description: a study of the effects of the Fiduciary Rule published in connection with a discussion of how the global management consultant can help financial institutions adjust to the rule.*
b. States that "[c]ertain high-cost investment products (such as variable annuities) will be phased out as the business model is no longer viable under the new rule…."

11. <u>Chamber of Commerce</u> (April 17, 2017 comment letter)

a. The Chamber is unaware of any "robo-advisor" that recommends annuity products to generate retirement income, despite the clear need for these products and the Department's reliance on robo-advisors to alleviate the potential loss of access to retirement advice for small savers.

12. <u>Wall Street Journal Reports (February and April 2017)</u>, as described in the Financial Services Roundtable's April 17, 2017 comment letter

a. Firms have responded to the Rule by taking actions that include: (1) moving clients to fee-based accounts; (2) eliminating commission-based IRAs; (3) raising investment minimums for commission-based IRAs; (4) eliminating variable annuity products; and (5) excluding certain products from commission-based IRAs (e.g., annuities, mutual funds, and exchange-traded funds).

13. <u>Cerulli Associates Research</u>, as reported in December 15, 2016 ThinkAdvisor article

a. "U.S. variable annuity and fixed indexed annuity sales are expected to decline by at least 10% through 2018 as the industry struggles to adapt to upcoming regulations put forth by the Department of Labor."
b. Cerulli views insurers' "biggest challenge for the foreseeable future" as being the Fiduciary Rule.

14. <u>Insured Retirement Institute (IRI) First-Quarter 2017 Annuity Sales Report</u>, as described in June 6, 2017 press release

a. *Description: sales results based on data reported by Beacon Research and Morningstar, Inc.*
b. Industry-wide annuity sales declined 18% in the first quarter of 2017 as compared to the first quarter of 2016.
c. Fixed annuity sales during the first quarter of 2017 declined 13.9% as compared to the first quarter of 2016, and variable annuity sales declined 10.2% for the same period.

15. **Insured Retirement Institute (IRI), as reported in December 15, 2016 ThinkAdvisor article**
    a. IRI "found that industrywide annuity sales in the third quarter totaled $51.3 billion, an 8.2% drop from sales of $55.9 billion during the second quarter of 2016, and a 12.3% decline from $58.5 billion in the third quarter of 2015."