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Submitted Electronically to EBSA.FiduciaryRuleExamination@dol.gov.

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

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

To Whom it May Concern:

The Insured Retirement Institute ("IRI")[1] appreciates the opportunity to provide these comments to the Department of Labor (the "Department") in response to the Department's request for information ("RFI") regarding the final regulation defining the term "fiduciary" (the "Fiduciary Definition Regulation") under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), the Best Interest Contract Exemption (the "BIC Exemption"), and the amendments to prohibited transaction exemption 84-24 (the "Amended PTE 84-24") issued by the Department on April 8, 2016 (collectively, the "Fiduciary Rule" or the "Rule").[2]

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[1] IRI is the only national trade association that represents the entire supply chain of the retirement income industry. IRI has more than 500 member companies, including major life insurance companies, broker-dealers, banks, and asset management companies. IRI member companies account for more than 95 percent of annuity assets in the United States, include the top 10 distributors of annuities ranked by assets under management, and are represented by more than 150,000 financial professionals serving over 22.5 million households in communities across the country.

[2] We are submitting this letter today to meet the Department's deadline for comments. However, consistent with the notification posted on the Department's website (https://www.dol.gov/sites/default/files/ebsa/laws-and-

Executive Summary

The following is an overview of our comments and recommendations in response to the questions included in the RFI. We respectfully offer these comments to assist the Department in determining how to revise the Fiduciary Rule in order to preserve consumer choice and access to the products and services they need to attain a financially secure and dignified retirement.

1. The January 1, 2018 Applicability Date Should Be Delayed Until January 1, 2020 or Eighteen (18) Months After Final Action on the Fiduciary Rule.
    a. If the Department adopts changes to the Rule, the industry will need adequate time to implement those changes.
    b. Even if the Department makes no changes to the Rule, the implementation timeline provided for the additional requirements as presently written is unworkable and should be delayed.
    c. Delaying the applicability date will provide time for the Department to constructively engage with the Securities and Exchange Commission (the "SEC"), the National Association of Insurance Commissioners (the "NAIC"), and other regulators to ensure regulatory clarity and consistency.
    d. Delaying the applicability date will allow the Department to assess the impact of the expanded definition of fiduciary and the Impartial Conduct Standards (as defined in the BIC Exemption) with minimal risk of consumer harm, if any.
    e. A delay is appropriate in light of the pending litigation regarding the Rule.

2. There is Significant Evidence that the Fiduciary Rule is Causing Consumers to Lose Access to Valuable Retirement Products and Services.
    a. According to recent surveys, 71 percent of advisers are planning to stop providing advice to at least some of their current small accounts due to the risk and increased costs of the Rule; 35 percent will stop serving accounts under $25,000, and 25 percent will raise their minimum account thresholds.
    b. The number of accounts that have been orphaned (i.e., accounts no longer serviced by an adviser, leaving investors on their own) have increased significantly due to the Rule. In a July 2017 survey of IRI members, a number of our distributor members reported that approximately 155,000 of their clients

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regulations/rules-and-regulations/public-comments/1210-AB82/dates-for-submitting-public-comments.pdf), we hereby reserve the right to submit a supplemental letter to the Department to provide any additional relevant data or information we may obtain after the deadline.

have already been 'orphaned,' with far more accounts expected to be impacted as implementation of the Rule proceeds.

c. Our July 2017 member survey also found the following:

   - 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 Rule.
   - More than 60 percent of the participating distribution firms have, are planning to, or are considering exiting or de-emphasizing target markets such as small IRA holders and small retirement plan sponsors.
   - Nearly 60 percent of the participating insurance companies expect that fee-based annuities manufactured in response to the Rule will result in higher overall fees to the consumer.

3. <u>The Contract Requirement and Warranties in the BIC Exemption are Inappropriate, Unnecessary to Incentivize Compliance, and Incompatible with the Best Interest Standard, and Therefore Should Be Eliminated</u>.

   a. It is inappropriate for a regulator to outsource regulatory enforcement to the plaintiffs' bar without express Congressional authorization.

   b. The contract and warranty requirements creates significant litigation risk for firms and advisers, and are not necessary to incentivize compliance with the Impartial Conduct Standards.

   c. A recent study found that plan sponsors view litigation risk as almost as important as "improving participant outcomes." This fear of litigation is driving many plan fiduciaries to focus on fees to the exclusion of other important considerations, an outcome that is incompatible with the goals of the best interest standard.

4. <u>The Department Should Collaborate With Federal Securities Regulators and State Insurance Regulators</u>.

   a. In concept, IRI and our members would support the development of a streamlined exemption for advisers who adopt policies and procedures designed to achieve compliance with appropriate and workable standards of conduct adopted by other regulators.

   b. The SEC and the Financial Industry Regulatory Authority ("<u>FINRA</u>") have expertise in regulating advisers who sell securities products, and the NAIC has expertise in regulating advisers who sell insurance products. The Department lacks sufficient expertise in these areas.

c. The Department should engage in a constructive dialogue with the SEC, FINRA, the NAIC and the state insurance departments to establish consistent and clear standards for recommendations made with respect to all securities and insurance products.

5. Amended PTE 84-24 Should Be Available for All Annuities and Any Compensation or Other Payments That Satisfy the Impartial Conduct Standards.

   a. PTE 84-24 has for decades been the primary pathway for exempting the sale of annuity and insurance products to plans and IRAs, and IRI believes it should continue to be available for all such products.

   b. All annuities are subject to extensive regulation under state insurance law. The conditions of Amended PTE 84-24, including the Impartial Conduct Standards (in each case including IRI's recommended revisions to those requirements), combined with the comprehensive system of state regulation, provide an effective framework to protect consumers in connection with recommendations of all types of annuities.

   c. Complaint data from FINRA and the NAIC demonstrates the effectiveness of the existing federal and state regulatory regimes. According to FINRA, just 115 cases involving variable annuities were brought in 2016, representing only 3 percent of all cases (3,635 in total). Similarly, the NAIC reports that just 185 annuity suitability complaints were filed with the states in 2016, representing only 1.8 percent of all complaints in the "Life & Annuity" category (9,970 total).

   d. All fixed and variable annuities are insurance products that provide guaranteed lifetime income, and therefore should be treated the same under Amended PTE 84-24.

   e. The Impartial Conduct Standards are now part of Amended PTE 84-24, so there is no need to limit the types of compensation or other payments for which the exemption can be used.

6. The Disclosure Requirements under the BIC Exemption and Amended PTE 84-24 Should Be Streamlined.

   a. The disclosure requirements under the BIC Exemption are exceedingly and needlessly complex, require massive and expensive information technology redesigns and build-outs to support, and are not designed to focus investors' attention on the most important information.

b. The Rule's focus almost exclusively on fees is inconsistent with the Department's goal of ensuring that advisers are acting in their clients' best interest. The disclosure requirements should require that fees be presented in the context of the benefits and services being purchased.

c. The Department should leverage the extensive disclosures already required under its own existing regulations and those of the SEC and state insurance regulators rather than imposing the additional requirements currently included in the BIC Exemption. This can be accomplished by either:

  - Requiring compliance with the disclosure provisions of those other regulations in lieu of the disclosure requirements currently imposed under the BIC Exemption, or
  - Providing that compliance the disclosure provisions of with those other regulations will be deemed to satisfy the BIC Exemption's disclosure requirements.

d. The web disclosure requirements go far beyond what is reasonable, necessary or helpful to consumers, and would serve only to support private litigation, and therefore should be eliminated.

e. The disclosure requirements under Amended PTE 84-24 should be revised to conform to the streamlined BIC Exemption disclosure requirements (including IRI's recommended revisions to those requirements).

7. <u>The Department Should Provide True Grandfathering for All Arrangements and Transactions Entered Into Before June 9, 2017</u>.

a. The current grandfathering provision in the BIC Exemption will effectively require firms and advisers to ignore the ongoing needs of their clients in order to take advantage of the relief provided by the Department.

b. This would be contrary to the overall goal of requiring firms and advisers to always act in the best interest of their clients.

c. It would also run afoul of FINRA's regulatory expectations that advisers should periodically check back with clients to see if their needs or objectives have changed and if their holdings remain appropriate.

8. The Department Should Revise the Fiduciary Definition Regulation and the Impartial Conduct Standards to Address the Multitude of Significant Concerns Raised by the Industry Over the Past Two Years.

    a. The definition of "fiduciary" in the Fiduciary Definition Regulation is overly and inappropriately broad, and should be revised to focus more precisely on conduct that is appropriately regarded as fiduciary in nature, rather than all manner of sales activities.

    b. The definition of "Best Interest" in the BIC Exemption and Amended PTE 84-24 is overly prescriptive. Advisers and financial institutions should be required to adopt policies and procedures designed to put their clients' interests first, but should not be expected to completely disregard their own legitimate business interests.

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IRI and our members respectfully offer the following comments and recommendations in response to the questions posed in the RFI:[3]

The January 1, 2018 Applicability Date Should Be Delayed Until January 1, 2020 or Eighteen Months After Final Action on the Fiduciary Rule (RFI Question 1)

IRI responded to this question in the comment letter we submitted on July 17, 2017.[4] For the reasons outlined in that letter, IRI respectfully recommends that the Department delay the January 1, 2018 applicability date until the later of January 1, 2020 or the date that is eighteen (18) months after the Department takes final action on the Fiduciary Rule.

The following is a summary of the reasons we believe a delay is necessary and appropriate. These reasons are explained in greater detail in our July 17 comment letter.

a. If the Department adopts changes to the Rule, the industry will need adequate time to implement those changes.

b. Even if the Department makes no changes to the Rule, the implementation timeline provided for the additional requirements as presently written is unworkable and should be delayed.

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[3] We believe other commenters are better positioned to respond to the questions in the RFI regarding principal transactions (question 12) and bank deposits and similar investments (question 15), and therefore we have not addressed those questions in this letter. In addition, we note that we have not attempted to address every element of the questions covered in this letter.

[4] Available at https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00134.pdf.

c. Delaying the applicability date will provide time for the Department to constructively engage with the SEC, the NAIC and other regulators to ensure regulatory clarity and consistency.

d. Delaying the applicability date will allow the Department to assess the impact of the expanded definition of fiduciary and the Impartial Conduct Standards with minimal risk of consumer harm.

e. A delay is appropriate in light of the pending litigation regarding the Rule.

As noted in our previous letter, we urge the Department to publicly announce its decision with respect to the possible delay of the January 1, 2018 applicability date as soon as practicable so that our members and other industry participants can appropriately align their compliance efforts with the Department's intent and expectations.

There is Significant Evidence that the Fiduciary Rule is Causing Consumers to Lose Access to Valuable Retirement Products and Services (RFI Questions 2-4)

Over the course of the sixteen months since the final Rule was issued by the Department, IRI members have undertaken wide-ranging efforts to prepare for implementation. In connection with the development of this comment letter, we conducted a survey of a representative sampling of IRI's insurance company and distributor members from July 18 to July 31, 2017 (the "July 2017 IRI Member Survey"). Through this survey, our members reported that they have expended millions of dollars in support of their implementation efforts, which have included, among other things:

- Changes to adviser compensation
- Additional or enhanced data feeds
- New or revised compliance, review and reporting processes
- Training programs
- Development of tools to analyze and document product recommendations
- Development and launch of new or updated financial products

The July 2017 IRI Member Survey showed that our insurance company members have already spent an average of approximately $10 million on implementation, while our distributor members have already spent an average of approximately $14 million. However, there should be no confusion on this point – our members are fully committed to complying with all applicable laws and rules, but this commitment should not be misunderstood as support for or agreement with the Fiduciary Rule. We continue to have extensive concerns about the Rule, including concerns about the overreaching definition of fiduciary and the overly prescriptive formulation of the best interest standard.

IRI and our members do not believe the Fiduciary Rule appropriately balances the interests of consumers in receiving broad-based investment advice. Throughout the rulemaking process, we and many other interested parties repeatedly cautioned the Department about the significant adverse impacts we believed were likely to result from adoption of the Fiduciary Rule. Most significantly, we expressed serious reservations about the likelihood that the Fiduciary Rule would deprive low- and middle-income consumers of access to the wide range of products and services they need to help them achieve a financially secure retirement.

Sadly, we now have significant evidence that our fears have been realized. The 2017 IRI Member Survey revealed the following:

- 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.
- Many firms are still assessing the extent to which existing clients will lose access to their advisers as a result of the Rule. However, 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.
- Half of the insurance companies responding to the Survey reported that some of their distribution partners have dropped the insurer's products from their shelf due to product restrictions and other decisions made as part of their efforts to implement the Rule. As a result of these changes to distributors' product shelves, some of our largest insurer members reported an expected decline in revenue in the hundreds of millions of dollars.
- Nearly 60 percent of the insurance companies that participated in the Survey expect that fee-based annuities manufactured in response to the Rule will result in higher overall fees to the consumer.
- To date, implementation costs for our largest distributor members have ranged from \$13 million to more than \$40 million, with remaining expected costs ranging from \$10 million to more than \$25 million. Our largest insurance company members reported expenditures to date ranging from \$10 million to more than \$30 million, and expected future costs ranging from \$5.5 million to \$15 million.

In addition to our own survey, we understand that a number of other groups conducted their own research in connection with the RFI and that many of those studies also found evidence that the Rule is depriving consumers of access to retirement products and services. One such group, the Independent Insurance Agents & Brokers of America, surveyed its members in July 2017 and found that 38 percent of respondents (primarily small and medium sized "Main Street" advisers) have already stopped or are planning to stop selling and servicing products impacted by the fiduciary rule (primarily annuities) on or before January 1, 2018.[5]

IRI and other commenters also provided extensive new data and information to the Department in connection with its review of the Fiduciary Rule pursuant to the Presidential Memorandum issued on February 3, 2017. A compilation of this new data and information is attached to this letter as Appendix A. The following are some of the more noteworthy and troubling findings described in that compilation:

- A survey of advisers finds 71 percent will stop providing advice to at least some of their current small accounts due to the risk and increased costs of the rule.
- Other surveys found that 35 percent of advisers will stop serving accounts under $25,000, and 25 percent will raise their client minimum account thresholds.
- A major mutual fund provider reported that the number of orphaned accounts on its books tripled in the first quarter of 2017 due to the Fiduciary Rule. These small accounts averaged $21,000. It further estimated that roughly 15 percent of its accounts would be orphaned following full implementation of the Rule.
- A survey of insurance service providers shows 70 percent already have or are considering exiting the market for small balance IRAs and small plans, and half are preparing to raise minimum account requirements for IRAs.
- Lack of access to advice hurts retirement savers—a study shows that investors starting with $25,000 who receive advice save nearly three times more than their non-advised peers. This is due not only to investment recommendations, but to personal assistance in developing better retirement saving habits and other positive financial behaviors.
- Many comments explained that a wide array of financial service providers are responding to the Rule's new litigation risks by limiting the investment types and products they will recommend.

The fact that the Department chose to take the unusual step of making the rule applicable while simultaneously reviewing whether to revise or rescind it should not prevent it from conducting the full review required by President Trump's memorandum. The costs or other

[5] Comment letter submitted by the Independent Insurance Agents & Brokers of America, Inc. (August 3, 2017)

negative impacts of compliance with the Fiduciary Rule will not be experienced primarily during the implementation phase. The Rule will impose significant and ongoing costs, risks, and lack of access to services. The fact that the Fiduciary Definition Regulation and the Impartial Conduct Standards have already been implemented should not in any way deter the Department from conducting a full review of the Rule.

The Contract and Warranty Requirements in the BIC Exemption are Inappropriate, Unnecessary to Incentivize Compliance, and Incompatible with the Best Interest Standard, and Therefore Should Be Eliminated (RFI Questions 5-6)

In our view, the BIC Exemption's contract and warranty requirements are not necessary to incentivize compliance with the Impartial Conduct Standards and should be eliminated. The Department, as well as Treasury, the IRS, the SEC, FINRA, and the state insurance and securities departments, already have adequate and effective tools to enforce the Impartial Conduct Standards and protect consumers. These tools are described in detail in the comment letters we submitted on July 21, 2015[6] and September 24, 2015,[7] which we hereby incorporate by reference into this letter.

The SEC and the NAIC are also currently engaged in efforts to establish a best interest standard of care that will further enhance existing enforcement mechanisms. SEC Chairman Jay Clayton recently issued a public statement[8] in which he asked for public comments to help the SEC "evaluate the range of potential regulatory actions." Similarly, the NAIC has formed a working group to consider possible revisions to the NAIC Suitability in Annuity Transactions Model Regulation (the "NAIC Model"), including possible incorporation of a best interest standard into the NAIC Model.

Moreover, recent experience demonstrates that outsourcing enforcement to the plaintiffs' bar is not an effective way to protect consumers. From 2009 to 2016, plaintiffs in lawsuits alleging breaches of ERISA fiduciary duties received just $116 on average.[9] In fact, the real beneficiaries

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[6] Comment letter submitted by the Insured Retirement Institute (July 21, 2015), available at https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/00626.pdf (the "July 2015 Letter").

[7] Comment letter submitted by the Insured Retirement Institute (September 24, 2015), available at https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/03062.pdf. (the "September 2015 Letter").

[8] Available at https://www.sec.gov/news/public-statement/statement-chairman-clayton-2017-05-31.

[9] DC Dimensions, Summer 2016, ''Fiduciary Benchmarks: Protect Yourself at All Time,'' by Tom Kmak, https://us.dimensional.com/-/media/Dimensional/Documents/US/Auxiliary/Defined-Contribution/Summer-2016/02-Fiduciary-Benchmarks-Protect-Yourself-at-All-Times.pdf

of these cases were the plaintiffs' attorneys, who collected roughly $204 million for themselves.[10]

In February 2017, Morningstar, Inc. conducted a study of the litigation risk created by the contract and warranty requirements and found that class action lawsuits under the BIC Exemption[11] will cost the industry between $70 million and $150 million each year. In the near term, these costs could be several times higher "as firms try to figure out how to determine, demonstrate, and document best interest." Ultimately, significant portions of this litigation expense will likely be passed along to retirement savers in the form of increased costs for products and services.

Retirement savers are also being harmed as a result of this litigation risk in other important ways. For example, a recent Cerulli study found that 55 percent of plan sponsors view litigation risk as a very important consideration when making decisions for their plans.[12] The same study found that "improving participant outcomes" ranked only slightly higher at 63 percent.[13] This fear of litigation is driving many plan fiduciaries to focus on easily quantifiable factors such as the fees associated with particular products or services to the exclusion of other important considerations such as the value of those products or services and their appropriateness for the plan's particular participant population. In our view, this approach is incompatible with the best interest standard, which we believe requires fiduciaries to take a more holistic view of different products and services before making a recommendation to a client.

During the rulemaking process, IRI and numerous other commenters expressed serious concerns about these costs,[14] as well as the risks inherent in deferring interpretation and enforcement of the Fiduciary Rule to fifty different state courts across the country.[15] The Department simply disregarded these extensive comments, assigning no cost estimate to class action litigation in the Regulatory Impact Analysis. As a result, the Department improperly

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[10] Id.

[11] We note that the Department has recently conceded that the BIC Exemption's prohibition on class action waivers in pre-dispute arbitration agreements violates federal law and should be vacated. While we applaud and appreciate this decision, it is important to note that broker-dealers and their registered representatives are subject to FINRA rules that prohibit class action waivers, and therefore will continue to face significant class action litigation risk as long as the BIC Exemption contract requirement remains in place.

[12] Cerulli Associates, The Cerulli Report – U.S. Retirement Markets 2016: Preparing for a New World Post---Conflict of Interest Rule.

[13] Id.

[14] Commenters have also provided extensive new data and information to the Department in connection with the Department's review of the Fiduciary Rule pursuant to the Presidential Memorandum issued on February 3, 2017. A compilation of this new data and information is attached to this letter as <u>Appendix A</u>.

[15] Allowing state courts to interpret ERISA fiduciary standards is also contrary to congressional intent as reflected in ERISA §514(a).

failed to assess the adverse impact associated with one of the most controversial elements of the Fiduciary Rule.

Based on the foregoing, IRI and our members respectfully recommend that the Department remove the contract and warranty requirements from the BIC Exemption.

The Department Should Provide a Flexible Regulatory Environment to Facilitate and Encourage Innovation (RFI Questions 7-10)

We appreciate the Department's interest in encouraging innovation as the industry works to comply with the Fiduciary Rule. However, we believe a streamlined exemption for particular products or product types would essentially amount to the Department picking winners and losers. In our view, it would be extremely dangerous for the Department to get into the business of anointing particular products or product types as 'DOL-approved.' This would actually discourage innovation rather than encouraging it, as many product manufacturers would naturally seek to develop products that would qualify for this preferred treatment, and many advisers would only recommend those products even if other products would actually be in a particular client's best interest (a result that would clearly be at odds with the overarching goal of the Department's regulatory project). We believe innovation should be driven by consumer need and other marketplace forces, not by the need to conform to regulatory requirements.

These questions also highlight an important concern about relying upon an expectation that market innovation will be spurred by a regulation in order to make the regulation itself workable. Many innovative ideas do not make it to market and many that make it to market do not succeed. Assessments of the workability of a regulation should be based upon the conditions at the time the regulation is adopted and should not be tied to the success or failure of particular product innovations.

That being said, we do believe the best way for regulators to encourage innovation is to create a flexible regulatory environment that can easily adapt to new ideas. A system built on a series of narrow exclusions or exemptions will require additional regulatory action in order for new innovations to test the market. By contrast, a broad, principles-based approach will give industry the opportunity to experiment with new ideas to meet evolving consumer needs and desires. Regulators can retain the ability to rein in new innovations if necessary to protect consumers, but regulations should not be designed to prevent such products from coming to market in the first place.

The Department itself has relatively recent experience with a regulation that essentially pre-approved particular types of investments and, as a result, has proven to be needlessly resistant to innovation. In 2008, the Department finalized its Qualified Default Investment Alternative ("QDIA") regulation. The QDIA regulation designated four categories of products into which plan sponsors could, without fear of fiduciary liability (assuming all applicable conditions are satisfied), direct contributions from participants who failed to make their own investment elections. None of those categories were broad enough to include lifetime income products, but in the years that followed, the importance of lifetime income became more prevalent among participants, plan sponsors, regulators, and the media. Unfortunately, the QDIA regulation was not sufficiently flexible to accommodate new products designed to address the increasing demand for lifetime income products without the need for additional regulatory guidance. We urge the Department to retain greater flexibility, both for itself and for the marketplace, as it considers possible changes to the Fiduciary Rule.

In addition, we do not believe a streamlined exemption for innovative products would be necessary if the Department adopts the recommendations provided in this letter. Taken together, the BIC Exemption and Amended PTE 84-24 (including our suggested changes), along with a streamlined exemption for advisers who adopt policies and procedures designed to achieve compliance with updated standards of conduct adopted by other regulators (as discussed in our response to question 11 below), would provide viable paths for most, if not all, future innovations.

The RFI specifically requested extensive information about some of these innovations. With respect to clean shares and T shares, we defer to others who would be better positioned to answer the Department's questions; regarding those products, we would encourage the Department to take all necessary time to consult with the SEC and industry participants if it truly wants to fully understand how they work and how they are sold. We can, however, provide some basic information about fee-based annuities. These products, which do not embed compensation to the adviser in the form of an up-front or trail commission, represent an innovation which may bring value to some consumers, and financial harm to others. Fees for the annuity itself are lower, but total compensation and costs to consumers will depend on various factors, including the length of ownership and specific fee structure. Fee-based products may be appropriate for some consumers, but commission-based products may be more appropriate and less expensive for others, depending on their arrangement with their adviser and their approach to retirement savings. According to the 2017 IRI Member Survey, nearly six in 10 insurers believe fee-based products will ultimately result in higher total costs to consumers than commissionable products.

Many of the concerns described above would also apply to a possible streamlined exemption based on a model set of policies and procedures. Going down this path would be tantamount to bestowing a 'seal of approval' on the policies and procedures outlined in the exemption. In practice, companies consider a wide variety of important factors when formulating their policies and procedures. An approach that will effectively achieve regulatory compliance for a firm that operates in a single line of business, has just one location and employs less than 25 people, would most likely not work for an organization with multiple business lines and thousands of employees in countless offices across the country. Even within a particular organization, different policies and procedures may be needed for different business units depending on, among other things, the other regulatory requirements to which each unit is subject.

Given these complexities, we would encourage the Department to explore more flexible approaches. For example, the Department could issue general, principles-based guidance designed to help firms formulate effective policies and procedures, perhaps including examples to help firms craft specific provisions. Alternatively, the Department could establish a voluntary program through which individual firms could seek guidance evaluating their particular sets of policies and procedures. These are just a couple of ideas we have identified in recent discussions with our members. We would welcome the opportunity to work with the Department to further explore these ideas and other possible approaches.

The Department Should Collaborate With Federal Securities Regulators and State Insurance Regulators (RFI Question 11)

In concept, IRI and our members would support the development of a streamlined exemption for advisers who adopt policies and procedures designed to achieve compliance with appropriate and workable standards of conduct adopted by other regulators. Of course, we would need to see the details of this theoretical exemption before formally endorsing it.

As the Department considers this possible approach and other possible changes to the Fiduciary Rule, we believe it is essential that the Department engage in a constructive dialogue with the SEC, FINRA and the NAIC. The SEC and FINRA have valuable expertise in regulating the securities industry, including regulation of financial professionals who sell securities products.[16] Similarly, the NAIC and the state insurance departments have valuable expertise in regulating the insurance industry, including regulation of financial professionals who sell insurance products.[17] The Department lacks expertise in these areas and should therefore constructively engage with the SEC, FINRA and the NAIC to ensure its regulations are workable and appropriate for the industries they regulate. We are encouraged by the recent public comments from Secretary Acosta and other Department officials acknowledging the need to coordinate with these other regulatory bodies, and by the similar sentiments recently expressed by SEC Chairman Jay

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[16] See comment letter submitted by SEC Commissioner Michael S. Piwowar (July 25, 2017).

[17] See comment letter submitted by the National Association of Insurance Commissioners (August 7, 2017) (describing the extensive system of state insurance regulation applicable to annuity products and sales practices) (the "NAIC Comment Letter").

Clayton[18] and the NAIC,[19] and we urge the Department and its fellow regulators to follow through on those comments.

We believe the goal of this collaboration should be to reach general agreement on appropriate standards of conduct and regulatory requirements to be adopted by the Department, the SEC, FINRA, the NAIC, and the state insurance departments. Unlike the Fiduciary Rule, which applies only to recommendations made with respect to retirement assets, this approach would establish consistent and clear standards of conduct for recommendations made by all licensed financial professionals with respect to any securities or insurance product. Moreover, as the prudential regulators for the securities and insurance industries, the SEC, FINRA, and the state insurance departments have robust examination and enforcement tools at their disposal to effectively ensure compliance (or penalize violators for non-compliance) with any standards of conduct they adopt. These regulatory regimes have proven highly effective at addressing the consumer protection concerns raised by the Department in adopting the Fiduciary Rule. This is clear from an examination of complaint data from both FINRA and the NAIC. According to FINRA, just 115 cases involving variable annuities were brought in 2016, representing only 3 percent of all cases (3,635 in total). Similarly, the NAIC reports that just 185 annuity suitability complaints were filed with the states in 2016, representing only 1.8 percent of all complaints in the "Life & Annuity" category (9,970 total). [20] As noted above, we believe these regulatory mechanisms are far more appropriate than outsourcing enforcement of standards of conduct to the plaintiffs' bar.

The Disclosure Requirements under the BIC Exemption and Amended PTE 84-24 Should Be Streamlined (RFI Question 13)

The disclosure requirements under the BIC Exemption, which are currently scheduled to become applicable on January 1, 2018, are exceedingly and needlessly complex, and require massive and expensive information technology redesigns and build-outs to support. We believe these disclosure requirements can and should be significantly streamlined to focus investors' attention on the most important information including, for example, information about how much they will pay, and what they will get for their money. [21]

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[18] Available at https://www.sec.gov/news/public-statement/statement-chairman-clayton-2017-05-31.

[19] See the NAIC Comment Letter.

[20] National Association of Insurance Commissioners, *Closed Confirmed Consumer Complaints by Coverage Type,* (July 24, 2017), available at https://eapps.naic.org/documents/cis_aggregate_complaints_by_coverage_types.pdf.

[21] *See, e.g.,* Advisory Council on Employee Welfare and Pension Benefit Plans (usually referred to as the ERISA Advisory Council), *Successful Plan Communications for Various Population Segments* (November 2013) ("individuals are overwhelmed by too much information and would benefit from streamlined communication").

This is a critically important point. As noted above, the Rule has been driving plan sponsors to focus almost exclusively on fees.[22] In our view, this myopic focus on fees is inconsistent with the Department's goal of ensuring that advisers are acting in their clients' best interest. To achieve this goal, the Department should revise the disclosure requirements to provide that fees should always be presented in the context of the benefits and services being purchased. Without this context, it is impossible for an adviser to fully and fairly compare products in order to determine which product should be recommended for a particular client.

In the comment letters we submitted on July 21, 2015, and September 24, 2015,[23] we provided detailed recommendations to help the Department develop a more effective, efficient and appropriate disclosure regime under the BIC Exemption. Those recommendations relied on the extensive disclosures already being provided to clients under the Department's existing regulations, SEC rules, and state insurance regulations.[24] We continue to believe the Department should leverage those existing disclosures rather than imposing the additional requirements currently included in the BIC Exemption, some of which are similar to or duplicative of the requirements under those other regulatory regimes. Separately providing the disclosures contemplated by the BIC Exemption will simply pile up more information in front of consumers without meaningfully enhancing their ability to make informed investment decisions. As such, we respectfully recommend that the Department revise the BIC Exemption by either (a) requiring compliance with the disclosure provisions of those other regulations in lieu of the current disclosure requirements, or (b) providing that compliance with the disclosure provisions of those other regulations will be deemed to satisfy the BIC Exemption's disclosure requirements (i.e., a safe harbor approach).

In addition, we believe the Department should eliminate the web disclosure requirements in Section III(B) of the BIC Exemption. Those elements of the web disclosure requirements that would actually have any value for consumers would already be provided to them under the transaction-based disclosures required under Section III(a) of the BIC Exemption (revised as suggested above). The rest of the information required under this section goes far beyond what is reasonable, necessary, or helpful to consumers. In fact, as far as we can tell, the Department actually intended for that additional information to help support efforts to enforce the Rule

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[22] Cerulli Associates, The Cerulli Report – U.S. Retirement Markets 2016: Preparing for a New World Post---Conflict of Interest Rule.

[23] See the July 2015 Letter and the September 2015 Letter.

[24] *See, e.g.,* Comment letter submitted by SEC Commissioner Michael S. Piwowar (July 25, 2017) (discussing and emphasizing the effectiveness of the SEC's disclosure-based regime).

through private litigation. [25] This is not an appropriate reason to impose these excessive disclosure requirements.

Moreover, if the Department does revise the BIC Exemption in accordance with our recommendations, we would also recommend that the disclosure requirements under Amended PTE 84-24 be revised to conform to the streamlined BIC Exemption disclosure requirements. Similarly, we believe the prohibition on misleading statements should be applied and interpreted in a consistent manner under both the BIC Exemption and Amended PTE 84-24. As such, we further recommend that the Department remove the provision in Section II(b) of Amended PTE 84-24 (and Section VII(b) of the version of PTE 84-24 in effect during the current transition period) stating that a failure to disclose a material conflict of interest constitutes a misleading statement.

<u>Recommendations to Make or Increase Contributions Should Not Be Treated as Fiduciary Investment Advice (RFI Question 14)</u>

IRI and our members believe recommendations to make or increase contributions to a plan or IRA are not covered under the Fiduciary Rule and, for the avoidance of doubt, should be expressly excluded from the definition of investment advice. In this regard, we note that the Department effectively confirmed its agreement with this position in the new FAQs issued on August 3, 2017.[26] This is important, particularly given the significant uncertainty caused by the Department's previous guidance on this issue.[27] We respectfully request that the Department

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[25] See *Best Interest Contract Exemption* (April 8, 2016), available at http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=28807. ("The web disclosure is not limited to individual Retirement Investors with whom the Financial Institution has a contractual relationship, but rather is publicly available to promote comparison shopping and the overall transparency of the marketplace for retirement investment advice. Thus, financial services companies, consultants, and intermediaries may analyze the information and provide information to plan and IRA investors comparing the practices of different Financial Institutions.")

[26] U.S. Department of Labor, *Conflict of Interest FAQs (408b-2 Disclosure Transition Period, Recommendations to Increase Contributions and Plan Participation)* (August 2017), at FAQ 2, available at https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/coi-transition-period-2.pdf.

[27] *See, e.g.,* U.S. Department of Labor, *Conflict of Interest FAQs (Part II - Rule)* (January 2017), available at https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/coi-rules-and-exemptions-part-2.pdf (FAQ 9 seems to indicate that unless the recommendation to increase contributions is tied to maximizing the employer match, the communication will be treated as fiduciary investment advice, and FAQ 10 seems to indicate that whether or not the recommendation is fiduciary advice hinges on whether there is compensation tied to the activity). See U.S. Department of Labor, *Conflict of Interest FAQs (Transition Period)*, (May 2017), available at https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/coi-transition-period-1.pdf (FAQ 12 seems to indicate that a recommendation to increase contributions is fiduciary investment advice unless the communication falls within the plan information and general financial, investment and retirement information categories of investment education).

issue additional guidance to make clear that, when a recommendation to make or increase contributions is made along with an investment recommendation, only the investment recommendation would be subject to the fiduciary and prohibited transaction rules and need to comply with the conditions of an applicable prohibited transaction exemption.

Similarly, we believe a recommendation to take a distribution from a plan or IRA should not give rise to fiduciary status, and should be expressly excluded from the definition of investment advice. Such recommendations are made under a wide variety of circumstances, but one of the most common and important involves employees who terminate employment. Many people in that situation would be very likely to cash out their accounts and spend their retirement savings.[28] Advisers can reduce this harmful "leakage" by helping such individuals understand the benefits of rolling their account balance to the retirement plan offered by their new employer (if any) or to an IRA. Limiting this activity by deeming it fiduciary in nature serves no public policy purpose.

Any accompanying recommendation about how to use the proceeds of the distribution (e.g., how to invest the funds once they have been rolled into a new plan or IRA) should be separately evaluated to determine whether it meets the definition of investment advice under the Rule. If fiduciary status is triggered, only the accompanying recommendation regarding the use of distribution proceeds (and not the distribution recommendation itself) should be subject to the fiduciary and prohibited transaction rules and need to comply with the conditions of an applicable prohibited transaction exemption.

The Department Should Provide True Grandfathering for All Pre-Existing Arrangements and Transactions (RFI Question 16)

In our view, Section VII of the BIC Exemption does not provide true grandfathering. We typically think of grandfathering as an exclusion or exemption from the requirements of a new rule for activities conducted before that rule took effect. Section VII purports to provide grandfathering, but it does so on a strictly transactional basis that does not comport with the way advisers and clients typically interact. In the real world, firms and advisers generally try to avoid compartmentalizing different aspects of their client relationships. It would be administratively burdensome to put one part of a single client relationship into one bucket (e.g., assets acquired on or prior to June 9, 2017) and another part of the same relationship into a separate bucket (e.g., assets acquired after June 9, 2017). More importantly, we expect many clients would be confused and frustrated by such arrangements.

[28] Studies have shown that as many as 43 percent of terminated employees will cash out their benefits when changing jobs. *See, e.g.,* Aon 2016 Universe Benchmarks: *Employee Savings and Investing Behavior in Defined Contribution Plans.*

Put another way, Section VII will effectively require firms and advisers to ignore the ongoing needs of their clients in order to take advantage of the relief provided by the Department. This would be contrary to the overall goal of requiring firms and advisers to always act in the best interest of their clients. It would also run afoul of FINRA's regulatory expectations that advisers should periodically check back with clients to see if their needs or objectives have changed and if their holdings remain appropriate.

To avoid these adverse consequences, the Department should replace Section VII with (a) a true grandfathering provision under which the Fiduciary Rule (including the expanded definition of the term "fiduciary") would not apply to arrangements entered into prior to June 9, 2017, (the applicability date of the Fiduciary Definition Regulation), including future advice regarding any assets acquired prior to that date, and (b) a streamlined PTE for recommendations to acquire new assets after June 9, 2017 in accounts opened prior to that date, with satisfaction of the best interest standard serving as the sole condition for the exemption.

Amended PTE 84-24 Should Be Available for All Annuities and Any Compensation or Other Payments That Satisfy the Impartial Conduct Standards (RFI Question 17)

IRI respectfully recommends that the Department revise Amended PTE 84-24 to permit advisers to rely on this exemption in connection with sales of all annuities, including "fixed-rate annuity contracts" ("Fixed Annuities") as well as variable annuities ("VAs") and fixed indexed annuities ("FIAs"). PTE 84-24 has for decades been the primary pathway for exempting the sale of annuity and insurance products to plans and IRAs, and IRI believes it should continue to be available for all such products. After January 1, 2018, however, Amended PTE 84-24 will only be available for Fixed Annuities; VAs and FIAs will no longer be eligible for this exemption. As we explained in the comment letter we submitted to the Department on July 21, 2015,[29] the primary attributes of annuity products are their guaranteed lifetime income features; the inclusion of investment or investment-like features in certain types of annuity products does not justify this disparate treatment.

In the preamble to Amended PTE 84-24, the Department asserted that, in light of "the complexity, risks, and enhanced conflicts of interest associated with" VAs and FIAs, "the conditions of PTE 84-24 are insufficiently protective to safeguard the interests of plans and IRAs investing in these products." We emphatically disagree with this conclusion. As discussed below, the addition of the Impartial Conduct Standards alone would render the conditions of Amended PTE 84-24 sufficient to protect consumers. In fact, as we explained earlier in this letter, we believe many of the additional conditions in the BIC Exemption, including the contract and warranty requirements, are neither necessary nor appropriate and should be

[29] See the July 2015 Letter.

eliminated. If the Department agrees to remove those requirements and make the other changes suggested in this letter, the levels of consumer protection provided by each exemption will be much more closely and appropriately aligned.

All annuities are also subject to extensive and effective regulation under state insurance law above and beyond the requirements of PTE 84-24. For example, insurance companies that issue annuities must comply with capital and reserving requirements, and insurance agents are subject to robust sales practice rules.[30] In sum, we believe the conditions of Amended PTE 84-24, together with the comprehensive regulations imposed by the states, are well-equipped to protect consumers in connection with recommendations of all types of annuities. This added layer of state regulation also creates compliance requirements for issuers and distributors of annuity products that more than offset any hypothetical competitive advantage annuities might enjoy *vis-à-vis* products covered only by the BIC Exemption.

Moreover, the removal of FIAs from Amended PTE 84-24 is particularly problematic for independent insurance agents, many of whom are small businesses or sole proprietorships. These agents will be unable to satisfy the BIC Exemption unless they join a broker-dealer or other "Financial Institution" willing to assume the associated fiduciary liability. This option is not viable for most insurance-only licensed agents who offer FIAs or group annuities. As a result, the ability of these agents to continue serving their clients will be severely limited. Unfortunately, the Department's proposed BIC Exemption for insurance intermediaries, which was intended to provide a solution to this issue, has serious flaws and would have to be substantially overhauled in order to achieve that goal. As such, we believe restoring FIAs to PTE 84-24 is the most appropriate solution to this issue.

We also note that, in allowing the Fiduciary Definition Regulation and the Impartial Conduct Standards to take effect on June 9, 2017, the Department concluded that "much of [the consumer harm caused by conflicted advice] could be avoided through the imposition of fiduciary status and adherence to basic fiduciary norms, particularly including the Impartial Conduct Standards."[31] With this in mind, the Department should be confident that consumers

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[30] As we noted in previous comment letters, many of these sales practices rules have been substantially enhanced over the past decade. The Department's regulatory impact analysis gave no meaningful consideration to the effectiveness of these relatively new rules.

[31] See *Definition of the Term "Fiduciary"; Conflict of Interest Rule-Retirement Investment Advice; Best Interest Contract Exemption (Prohibited Transaction Exemption 2016-01); Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Prohibited Transaction Exemption 2016-02); Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, 84-24 and 86-128* (April 7, 2017), available at https://www.federalregister.gov/documents/2017/04/07/2017-06914/definition-of-the-term-fiduciary-conflict-of-interest-rule-retirement-investment-advice-best (the "Final Delay Release").

will be equally protected regardless of whether VAs and FIAs are sold under Amended PTE 84-24 or the BIC Exemption, both of which include the Impartial Conduct Standards.

In a similar vein, IRI believes the inclusion of the Impartial Conduct Standards in Amended PTE 84-24 obviates the need for any restrictions on the types of payments for which the exemption can be used. Under the provisions currently scheduled to take effect on January 1, 2018, only Insurance Commissions[32] would be eligible for PTE 84-24. The narrow definition of Insurance Commission is inconsistent with the widely-held view that the original version of PTE 84-24 placed no restrictions on the types of payments permitted under the exemption. More importantly, such restrictions are not necessary in light of the Department's expectation that the Impartial Conduct Standards will adequately protect consumers from potential harm caused by conflicted advice. Put simply, barring certain types of payments under this exemption serves no legitimate regulatory purpose as long as the Impartial Conduct Standards are being met. For example, product manufacturers may provide marketing support in the form of a due diligence training allowance to help advisers learn about and understand innovative annuity product features. Such training helps advisers in their efforts to act in their clients' best interest, and therefore, from a public policy perspective, should not be discouraged or prohibited. Any material conflicts of interest associated with the provision of such training can be appropriately described, and the reasonable compensation standard can provide meaningful guardrails on the financial value of the training program. As such, IRI respectfully recommends that the Department revise Amended PTE 84-24 to eliminate any restrictions on the types of payments for which relief is available.

The Exclusion for Communications With Independent Fiduciaries With Financial Expertise is Based on the False Premise that Americans are "Incapable of Looking Out for Their Own Best Interests" (RFI Question 18)

In the preamble to the 2015 proposal, the Department expressed the view that the counterparty carve-out included in the proposal should not be applied to transactions involving retail investors, including small plans, IRA owners, and plan participants and beneficiaries, because, "as a rule," investment recommendations to such retail customers do not fit the arm's length characteristics that the carve-out was designed to preserve.[33] The final Rule recast that carve-out as the exclusion for communications with independent fiduciaries with financial expertise, and the specific parameters of the carve-out were revised. However, the Department

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[32] "Insurance Commission" is defined as "a sales commission paid by the insurance company to the insurance agent or broker or pension consultant for the service of effecting the purchase of a Fixed Rate Annuity Contract or insurance contract, including renewal fees and trailers, but not revenue sharing payments, administrative fees, or marketing payments."

[33] 80 FR 21941

clearly continued to believe that, “as a rule,” consumers are incapable of looking out for their own best interests when engaging in arm’s length bargaining with financial service providers.

IRI does not agree with the Department’s assessment of American consumers. We also note that this determination is inconsistent with the position taken by Congress in enacting ERISA § 404(c) and with the views espoused by President Trump[34] and Secretary Acosta.[35] The conclusion that all individuals and small 401(k) plan fiduciaries are so lacking in financial sophistication as to be incapable of independent thought and choice has not been adequately supported by the Department, and is now depriving plans and individuals of the opportunity to shop the financial services marketplace for the investment arrangements that best fit their needs. Instead, the Rule forces consumers to do business with a fiduciary adviser whether or not a fiduciary adviser is wanted or needed.

The Department Should Revise the Fiduciary Definition Regulation and the Impartial Conduct Standards to Address the Multitude of Significant Concerns Raised by the Industry Over the Past Two Years.

In the preamble to the final rule revising the applicability date of the Rule, the Department noted that, “[f]ollowing the completion of the examination, some or all of the Rule and PTEs may be revised or rescinded, including the provisions scheduled to become applicable on June 9, 2017.”[36] While the RFI focuses primarily on the elements of the BIC Exemption and Amended PTE 84-24 that have not yet become applicable, IRI and our members continue to have significant concerns about the Fiduciary Definition Regulation and the Impartial Conduct Standards. The Department’s assertion that the Fiduciary Definition Regulation and the Impartial Conduct Standards are “among the least controversial aspects of the rulemaking project,” is simply not true.[37] Our concerns are identified and explained in great detail in the comment letters we submitted to the Department on July 21, 2015, and September 24, 2015.[38]

One important example of these concerns relates to the overbreadth of the revised definition of fiduciary. The Fiduciary Definition Regulation significantly expands the circumstances under which a person would acquire fiduciary status under ERISA and Section 4975 of the Internal

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[34] Fiduciary Duty Rule, Memorandum for the Secretary of Labor, 82 Fed. Reg. 9675 (February 7, 2017) (“One of the priorities of my Administration is to empower Americans to make their own financial decisions.”)

[35] Acosta, Alexander, Wall Street Journal, *Deregulators Must Follow the Law, So Regulators Will Too* (May 22, 2017), available at https://www.wsj.com/articles/deregulators-must-follow-the-law-so-regulators-will-too-1495494029 (“Americans should be trusted to exercise individual choice and freedom of contract. At a practical level, this means Washington should regulate only when necessary. Limiting the scope of government protects space for people to make their own judgments about what is best for their families.”)

[36] See the Final Delay Release, at16906.

[37] Id.

[38] See the July 2015 Letter and the September 2015 Letter.

Revenue Code of 1986, as amended. This revised and expanded definition inappropriately characterizes as fiduciary in nature a broad spectrum of financial marketing and sales activities where no reasonable expectation can exist that an adviser has been engaged by a client to act as an unbiased and impartial source of recommendations under a legal obligation to disregard their own interests as a seller of investment products or asset management services. For the reasons outlined in our previous letters, we respectfully recommend that the Department revise the definition of "fiduciary" to focus more precisely on conduct that is appropriately regarded as fiduciary in nature rather than all manner of sales activities.

Another important concern raised in our previous letters relates to the definition of the term "Best Interest" in the BIC Exemption and Amended PTE 84-24. We believe this definition is overly prescriptive and should be revised to make clear that advisers and financial institutions must always put their clients' interests first, but would not be required to completely disregard their own legitimate business interests.

The phrase "without regard to the financial or other interests of the fiduciary, any affiliate or any other party" is problematic because it appears to require that any advice provided wholly ignore the business and economic reality that advisers and annuity providers must generate enough revenue to cover their costs and earn a reasonable profit in order to stay in business.

We do not believe the Department intended to require advisers to completely disregard their own business interests. Rather, IRI believes that the Department intended to require advisers and financial institutions to adopt policies and procedures designed to achieve compliance with ERISA's prudence rule and ensure that the investor's interests are always considered first and foremost. Current and past Department officials have consistently described the best interest standard as 'putting the client's interests first.' Moreover, many courts have held that, where taking the best course of action for a participant or beneficiary would lead to an "incidental benefit" to a fiduciary, such incidental benefit is permitted by ERISA.

* * * * *

Conclusion

In an age when saving and preparing for retirement is squarely on the shoulders of individuals, financial professionals will have an important part in helping their clients develop retirement plans and grow their savings. The Fiduciary Rule is already limiting consumer choice and depriving lower- and middle-income consumers from accessing affordable assistance with retirement planning. We believe the revisions recommended in this letter will enable the Department to establish a best interest standard while preserving Americans' access to retirement planning products and services.

If you have questions about anything in this letter, or if we can be of any further assistance as the Department works to improve the Fiduciary Rule, please feel free to contact me or Lee Covington, IRI's Senior Vice President and General Counsel.

Sincerely,

Catherine J. Weatherford
President & CEO
Insured Retirement Institute

Appendix A

NEW DATA SHOWS DOL FIDUCIARY RULE HARMING SMALL RETIREMENT SAVERS

Comments Also Highlight Procedural and Analytical Flaws in Rulemaking Process

Executive Summary

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

Specifically:

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

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

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

New Information: Loss of Consumer Access to Retirement Advice

- According to a 2016 study, Americans who work with a financial professional save more than Americans who do not, including saving twice as much over a seven- to 14-year period.[1] (IRI, Davis & Harman, FSR and Chamber)
- A 2016 study by CoreData found that 71 percent of financial professionals will disengage from at least some retirement savers because of the fiduciary rule, 64 percent think the fiduciary rule will have a large negative impact on their mass-market clients (i.e., investors with less than $300,000 in net investable assets), and 39 percent think that financial advice will become too expensive for most retirement savers. On average, these financial professionals estimate they will no longer work with 25 percent of their mass-market clients, creating an advice gap for low-balance investors.[2] (IRI, Davis & Harman, ABA, Market Synergy, SIFMA, ACLI)
- A 2016 study by A.T. Kearney found that by 2020, broker-dealer firms (including wirehouses, independents, and dually-registered broker-dealer/registered investment advisers) will collectively stop serving the majority of the $400 billion currently held in low-balance retirement accounts. [3] (IRI, Davis & Harman, FSI)
- In a 2017 survey of IRI member firms, 70 percent of respondents either already have or are considering exiting smaller markets such as lower balance IRAs and small employer based plans, and nearly half already have or are considering raising IRA account minimums. [4] (IRI)
- A 2017 survey by the National Association of Insurance and Financial Advisors ("NAIFA") found that nearly 90 percent of financial professionals believe consumers will pay more for professional advice services, 75 percent have seen or expect to see increases in minimum account balances for the clients they serve, and 91 percent have already experienced or expect to experience restrictions of product offerings to their clients. [5] (IRI, NAIFA)
- Nearly every financial institution that has disclosed its plans publicly will be changing products and services available to retirement investors, restricting choices, and changing pricing.[6] (SIFMA)
- According to a recent SIFMA survey of 25 financial firms that would be impacted by the Rule, more than half of the firms were considering moving IRA brokerage clients to call center services only, several firms were considering moving clients to a self-directed structure, and nearly three quarters of the responding firms said their plans would not permit small accounts to have advisory accounts. (SIFMA)
- Over 50 percent of respondents to the SIFMA survey anticipated offering only advisor services to a subset of their current IRA brokerage customers. 92 percent of responding firms stated that their Rule compliance plans could limit or restrict products for retirement investors, and over 75 percent of the respondents stated their Rule compliance plans could restrict or restrict services available to retirement investors. (SIFMA)
- One report notes that 35 percent of advisers surveyed "will move away from low-balance accounts" (*i.e.*, less than $25,000 in assets).[7] And "nearly one in four advisers said that they will likely increase

their current client minimums as a result of the fiduciary rule, focusing their attention on higher-net worth clients and more profitable relationships."[8] (FSR)

- In many cases, our members have been informed by their intermediary partners that they will no longer service certain account holders in light of the rule. These so-called "orphaned" account holders already number in the hundreds of thousands (and industry participants indicate that the numbers will climb substantially as implementation efforts proceed) and will be left without access to advice. Many will be forced to pay more for advice as they lose access to commission-based arrangements (ICI)
- One large mutual fund provider reports that its number of orphaned accounts nearly doubled in the first three months of 2017, and that the average account balance in these orphan accounts is just $21,000. Further, it projects that ultimately 16 percent of the accounts it services will be orphaned this year because of the fiduciary rule. Extrapolating this prediction suggests that at least 1.6 million small retirement savers have already lost access to investment assistance since January 2017, and an additional 1.6 million are likely to lose access after the rule becomes applicable. (Chamber, ICI)
- According to an informal survey of ICI members in 2017, 31 out of 32 mutual fund companies reported either having received orphaned accounts or receiving notices regarding some volume of accounts that will become orphaned. The average account balance of those accounts where an intermediary has resigned is $17,138. The expectation is that the number of orphaned accounts likely will run into the hundreds of thousands. (ICI)
- The National Conference of Insurance Legislators ("NCOIL") adopted a resolution stating that "the rule will prevent consumer access to crucial retirement education and services, ultimately harming the very people it seeks to aid." (Market Synergy)
- According to a February 2017 survey of more than 1,000 investors conducted by J.D. Power, more than half (59 percent) who pay commissions now say they either "probably will not" (40 percent) or "definitely will not" (19 percent) be willing to stay with their current firm if it meant being forced to move to fee-based retirement accounts. (Market Synergy)
- The American Action Forum estimates that anywhere from 2.3 million to 14.7 million consumers will face significant changes to their retirement and financial advice. The Rule has caused several large companies to leave the market or scale back sales, affecting an estimated 92,000 advisors and at least 2.3 million consumers. "[A] conservative estimate of 25 to 35 for each of the 92,000 affected advisers still yields 2.3 million to 3.2 million consumers with significant changes to their retirement and financial advice."[9] (ICI)
- A 2017 report indicates that the rule will result in additional charges to retirement investors of approximately $800 per account or over $46 billion in aggregate.[10] (FSR, FSI, NAIFA)
- Based on a minimum balance requirement of $30,000, the Rule could force 28 million Americans out of managed retirement accounts; based on a minimum balance of just $5,000, over 13 million would lose access to managed retirement accounts.[11] (SIFMA, NAIFA, FSI)

- Many advisors plan to exit the business entirely. In a blind online poll of 459 advisors conducted by Fidelity Clearing & Custody Solutions from August 18-26, 2016, 10 percent of advisors reported they are planning to leave or retire from the field earlier than expected because of the rule, and another 18 percent said they are "reconsidering their careers as advisors.[12]
- "For example, effective April 10, 2017, specific distribution partners of Pacific Life will scale back the retirement products they offer, limiting competition and choice. Advisors plan to be more selective of the new investors they choose to service which will limit access to retirement information and personalized advice for many. In addition, distributors continue to identify and eliminate clients with small to modest account balances in anticipation of the added compliance costs and heightened litigation risks generated by compliance with the new rule. As a result, a significant number of existing investors could lose access to an advisor to talk to, answer questions, and who can help encourage them to save more and remain invested over time."[13]
- "According the 2016 Global Survey of Financial Advisors published by Natixis Global Asset Management, more than three-quarters of advisors surveyed believe increased regulations could lead to higher costs for their clients. The rule is specifically mentioned as being one of the primary drivers of increased regulatory costs. More alarming to small businesses, 38 percent of respondents said they were likely to "disengage from smaller clients." Because retirement plans sponsored by small businesses often pale in comparison to larger corporate retirement plans in terms of assets invested, small businesses face a greater likelihood of being dropped by their financial advisors."[14]
- "It is estimated the rule could disqualify up to 7 million IRA holders from investment advice and reduce the number of IRAs opened annually by between 300,000 and 400,000."[15]
- "According to Cerulli, two-thirds (66 percent) of advisors believe that small investors will have less access to professional financial advice as a result of the rule. And, according to a recent report by CoreData Research, 71 percent of surveyed U.S. advisors plan to disengage from "mass market" investors because of the DOL rule and these advisors estimate they will no longer service 25 percent of their current clients – creating a potential "advice gap" for low balance investors." [16]
- Due to the requirements of BICE "Ladenburg will be forced to preclude some lower cost investment options that may be appropriate for some clients and reduce available product offerings to only those that pay the same level compensation (even if that compensation is higher) to the Financial Institution. This will likely cause a broad reduction across multiple product categories and, in some categories, may reduce available products from over 100 to less than 10."[17]

<u>New Information: Loss of Consumer Access to Retirement Products</u>

- Some distribution firms and financial professionals have already significantly scaled back their use of commission-based products such as variable annuities because of concerns about the potential implications of the fiduciary rule on recommendations of such products. In fact, despite the existence of a rising stock market, which has always led to increased sales of variable annuities, sales declined by 21.6 percent from $130.4 billion in 2015 to $102.1 billion in 2016.[18] (IRI)

- Adverse effects on annuities have already occurred. “The variable annuity industry took a beating in 2016, with several of the top sellers inking losses upwards of 25 percent on the year and some exceeding 40 percent. The Department of Labor's fiduciary rule, issued in its final form last spring, played a big role in the industry's bruising, observers said.”[19] (Davis & Harman, IRI)

- Advisors recognize that moving away from certain products will be part of the adjustment process to the new normal established by the fiduciary rule. About a third (32 percent) believe shifting away from certain products, such as annuities and non-traded REITs, is one of the biggest challenges posed by the fiduciary rule.[20] (SIFMA, Davis & Harman)

- In 2015, variable annuities represented 56 percent of IRA annuity sales and 46 percent of 2016 IRA annuity sales. LIMRA projects that variable annuity purchases will decrease another 20-25 percent in 2017 if the rule goes into effect. Several factors contributed to declining variable annuity sales, primarily the BICE and other components of the rule. LIMRA also projects that sales of indexed annuities will drop by similar levels because of the rule.[21] (SIFMA)

- For IRA purchases, sales declined 22 percent in 2016 compared to the prior year.[22] The ambiguous regulatory structure of the rule is expected to result in additional decreases in purchases of variable annuities, which represents a significant amount of IRA annuity purchases. (SIFMA)

- More than 80 percent of respondents to the 2017 IRI survey have already introduced, plan to introduce, or are considering introducing fee-based variable annuities. However, those products are unlikely to be widely available in the near-term and may not be appropriate for all retirement savers, including some for whom a traditional commission-based variable annuity would be more economical, less costly, and likely in their best interest. [23] (IRI)

- Several large intermediaries have already announced a variety of changes to service offerings, including firms no longer offering mutual funds in IRA brokerage accounts; others offering no IRA brokerage accounts at all; firms reducing web-based educational tools; and firms raising account minimums for advisory fees.[24] (ICI)

- Recent media reports have highlighted the decisions being made by some firms to change their service models and product availability, including (a) moving clients to fee-based accounts, (b) eliminating commission-based IRAs; (c) raising investment minimums for commission-based IRAs; (d) eliminating variable annuity products; and (e) excluding certain products from commission-based IRAs (*e.g.*, annuities, mutual funds, and exchange-traded funds).[25] (FSR)

- Many firms have already determined the BIC Exemption is unworkable for certain products, and the substantial threat of unwarranted litigation cannot be justified for certain accounts or that the BIC exemption in its entirety is simply too burdensome.[26] (ICI)

- Many companies will be inclined to reduce the universe of available investments to effectively mitigate potential conflicts of interest arising from different compensation amounts and cost structures, which the company does not control. Likewise, investment choice will be limited to ensure that financial institutions can comply with the numerous initial and ongoing disclosure requirements applicable to BICE. The technology and operational capabilities necessary to meet these disclosure obligations inevitably will cause us and others to offer fewer products to control the costs of these efforts.[27]

- "Firms have restricted product offerings to certain clients, thereby limiting consumer choice, and have abandoned traditional, lower-cost compensation arrangements for advisors (e.g., commissions, rather than high upfront management fees that small and first- time savers cannot afford) to avoid the cost of complying with the BIC Exemption and mitigate the threat of costly class action lawsuits."[28]
- "AAF found that three major companies have already left part of the brokerage business, and an additional six are drawing down their business or switching to a fee-based arrangement, depriving more consumers of investment advice."[29]
- "Over the 12-month period ending on September 30, 2016, industrywide sales of variable annuities with guarantees declined 24 percent."[30]
- "The National Economic Research Association estimates more than 57 percent of current retirement savings account holders will be forced out of their current plan by this rule. Economists from the Brookings Institution estimated the consumer loss could be $80 billion – twice as much as was projected by the Department of Labor – and a report from economic consulting firm Oliver Wyman concluded the rule could raise the price of financial advice by nearly 200 percent."[31]
- "According to the Insured Retirement Institute, 2016 sales of all annuities declined 7.6 percent from 2015, and 2016 sales of variable annuities, which under the rule will fall under the complicated BICE regulations, fell 21.65 percent from 2015. Fourth quarter 2016 fixed indexed annuity sales declined 7 percent from third quarter 2016 sales. For 2017, the LIMRA Secure Retirement Institute projects that total sales of US individual annuity sales will drop 10 percent to 15 percent, while sales of variable and indexed annuities will drop as much as 20 percent to 25 percent."[32]
- "Most notably, 91 percent of respondents [to a recent survey of NAIFA members] have already experienced or expect to experience restrictions on product offerings to their clients, nearly 90 percent believe consumers will pay more for professional advice services, and 75 percent have seen or expect to see increases in minimum account balances for the clients they serve."[33]
- "In fact, nearly half of NAIFA's members (46 percent) already have experienced a restriction of product offerings to their clients, and another 45 percent anticipate that such restrictions are forthcoming. More specifically, 68 percent of our members have been told that they cannot recommend certain mutual fund classes to clients, and over 70 percent say they cannot recommend certain annuities."[34]
- Due to BICE's requirements "KMS will be forced to preclude some lower cost investment options that may be appropriate for some clients and reduce available product offerings to only those that pay the same level compensation (even if that compensation is higher) to the Financial Institution. This will likely cause a broad reduction across multiple product categories and, in some categories, may reduce available products from over 100 to less than 10."[35]

- The Oxford Economics report warned that the DOL has "dramatically underestimated" the cost to comply with the new rule and that smaller firms would find it difficult to stay in business. The Oxford Economics study estimates the fiduciary rule will result in startup costs ranging from $1.1 million to $16.3 million per firm, depending on firm size. The study also found that because of the cost burdens, firms will shift their business model towards fee-based advising and create a minimum balance for client accounts. These account minimums will effectively force smaller investors into self-advised or robo-advice accounts. As compliance costs rise, fees for investors and account minimums rise, causing middle and lower class investors to be priced out of professional investment advice. The impact of being priced out of professional investment advice will have a permanent, long-term impact on investor's retirement savings."[36]

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

- Reuter updates previous analyses based on data from 1994-2004 with newer data from 2004 – 2012. He finds a statistically significant decline in the apparent underperformance in earnings of commission broker sold, actively-managed mutual funds compared to actively-managed direct-sold funds. Instead of the 110 basis point disparity reported by Del Guericio and Reuter in their 2014 paper on which the Department relied for its regulatory impact analysis, Reuter reports that over the 2004-2014 period the disparity declined to 64 basis points. This decline suggests that the putative benefits estimated by the Department for the fiduciary rule and the predicted costs of delaying its implementation are grossly overvalued.[37] (Chamber, ABA, SIFMA, FSI)
- Studies show that unadvised households tend to hold fewer equities than advised households. The likelihood of owning any stocks or stock-based mutual funds increases by 67 percent with the use of an advisor and the proportion dedicated to stock positions increases by 39 percent. Academic work clearly shows that asset allocation, not mutual fund selection, explains, on average, 100 percent of performance. If the rule results in a reduction of equity allocations by only 15 percent, the ICI estimated that would result in a performance decline of 50-100 bps per year, on average, or $95 billion and $189 billion over the next 10 years and between $202 billion and $404 billion over the next 20 years. (ICI, SIFMA)
- New economic studies estimate that investors could lose $109 billion over 10 years because of the rule's implementation. This would amount to $780 million per month in losses to investors. A 60-day delay would thus save investors $402 million in lost returns over 60 days. A 180-day delay would save more than $1.2 billion. Even a 60-day delay would amount to $414 million in lost returns saved for investors over the first year if the rule ultimately goes forward as now structured and $542 million over a 10-year period (at a three percent discount rate). These lost returns far exceed the Department's estimated $104 million losses in the form of foregone gains— gains that, as shown above, are widely overstated. (SIFMA, ICI)
- Kinniry, et al., found that having a financial professional can make up to a 300 basis point difference in annual compound returns. They found that the greatest contributing factor of assistance, amounting to 150 basis points in annual compound rate of return, was the "behavioural coaching" element of the interactions between a customer and a financial professional.[38] (Chamber, FSR)

- A paper casts doubt on the social benefits of the Department's promotion of passive index fund investing. The paper shows that despite the apparent advantages to some individual investors, widespread and growing adoption of the strategy could distort capital markets in ways that could slow overall economic growth. The author shows how inclusion of a stock in an index fund may artificially raise its internal cost of capital calculations and discourage otherwise profitable investment decisions. He also illustrates how an index fund investor may be exposed to unforeseen risk of loss.[39] (Chamber)
- A report finds that many retirement savers are adverse to assistance from call centers or robots. The personal connection with a financial professional is important for educating and motivating savings behavior.[40] (Chamber)
- Research from Vanguard shows that human contact from advisors helps investors to stay invested in the market for the long-term, instead of trying to time the market.[41] (ICI, FSI)
- "Studies indicate that households that have worked with a financial advisor over a 15-year period "have about 290 percent more financial assets than non-advised households," even though half of these households had less than $25,000 in savings when they initially began to work with an advisor. "The discipline imposed by a financial advisor on households' financial behavior and increased savings of advised households are key to improving asset values of households relative to comparable households without an advisor." Indeed, some studies find that "behavioral coaching can add 1 percent to 2 percent in net return."[42]

New Information: Increased Litigation

- The increased litigation stemming from the inappropriate use of the private right of action in enforcing the BIC Exemption will result in $70 and $150 million in costs to the industry each year.[43] (IRI, Chamber, FSI)
- Data shows that class action lawsuits like the type that would flow from the rule provide almost no benefit to the class members of the action, but rather just help their lawyers.[44] (Chamber, ICI, FSR, Market Synergy)
- Companies interviewed by the Chamber suggest insurance costs could exceed two to three times the cost estimated by the Department. Some respondents to Chamber interviews cited numbers as high as $10,000 per professional per year for Errors and Omissions coverage. 23 percent of NAIFA members have already seen an increase in E&A premiums, while 60 percent anticipate such an increase. (Chamber, NAIFA)
- The expanded incentive for class action litigation results in defendants settling with an extremely litigious plaintiffs' bar instead of spending years tied up in discovery. A survey of lawsuits filed against fiduciaries in recent years demonstrates how plaintiffs use these settlements to fund future lawsuits.[45] (ARA, ICI)
- Many advisors are fearful of litigation, as the CoreData survey found that "Advisors are also in a heightened state of readiness for a potential rise in lawsuits related to the fiduciary rule. Nearly two in 10 advisors (18 percent) believe preparing for potential litigation will be one of the biggest

challenges they must overcome. And 12 percent think the need to invest in appropriate technologies to aid compliance and implementation constitutes a major challenge."[46] (SIFMA, Davis & Harman)

- A recent SIFMA survey of 25 financial firms that would be impacted by the Rule found that more than 60 percent of the responding firms stated that they anticipated some or all of the costs resulting from the potential increase in litigation and liability insurance to be passed on to clients. (SIFMA)
- In 2016, nearly 4,000 FINRA arbitration cases were filed by consumers alleging broker-dealer wrongdoing (only 158 of those cases were decided in favor of the consumer)-meaning that broker-dealers spent a lot of time and money defending these cases.[47]
- A SIFMA survey indicated "…more than 60 percent of the responding firms stated that they anticipate that some or all of the costs resulting from the potential increase in litigation and liability insurance may be passed on to clients."
- "An equity analyst from Morningstar stated that annual litigation costs will be $70MM-$150MM per year."[48]
- "A February 2017 study prepared by the Lockton Companies indicated that the costs to get through a motion to dismiss range from $500,000-$750,000. Beyond that, discovery costs alone can reach between $2.5 million and $5 million."[49]
- "Participants are not the primary beneficiaries of these awards, as a Fiduciary Benchmarks survey conducted in 2016 concluded that out of $698 million awarded, attorneys received $204 million and the average participant award was $116."[50]

New Information: Compliance Costs

- The Securities Industry and Financial Markets Association estimates that annual compliance costs will range from $240 million to $570 million over the next ten years.[51] (SIFMA)
- Small broker-dealers face the greatest financial risk under the rule, forcing potential consolidation of broker-dealers.[52] (SIFMA, FSI, FSR)
- One recent study by the American Action Forum found reported compliance costs of at least $106 million in 2016, representing up-front costs from just four companies. [53] (Market Synergy)
- The rule presents many compliance and operational hurdles for advisors to overcome. As expected, advisors are preparing for an increase in paperwork. A majority (57 percent) believe increased paperwork stemming from reporting and disclosure requirements will be one of the top three challenges of the fiduciary rule**.** Compliance training is a concern for more than a quarter (28 percent) of advisors.[54] (SIFMA, Davis & Harman)
- The DOL's RIA grossly underestimated the cost of the rule. FSI members have already incurred costs of $189 million to implement the Rule and estimate they will spend an additional $205 million when the Rule's implementation resumes on June 9. This puts the start-up costs for the regulations at 20 times higher than the DOL's updated RIA's estimate. The total implementation costs for FSI

members are estimated to be $394 million, while annual operating expenses are estimated at $230 million. Management and compliance planning make up 20 percent of current costs. If FSI members' experience is extrapolated across the entire broker-dealer industry, FSI estimates that the 10-year cost of the Rule will be $14.2 billion, three times higher than the DOL had estimated.[55] (FSI)

- "The costs that will be incurred to comply will most likely force smaller firms to consolidate or close their doors. In other words, lost jobs. A Morningstar quote for their technology solution which would assist with compliance procedures was $1,014,540 annually. We don't have $1,000,000 of net income annually. How would we pay for this? Other solutions quoted in the several hundred thousand dollar range, again annually. We have already spent over $300,000 in legal costs and staff hours trying to develop our compliance procedures. We won't survive."[56]
- "The proposed rule has already substantially increased our compliance costs. We estimate compliance costs have increased 450 percent as a result of this rule."[57]
- "Our research has found that almost all retail investors will see their costs increased by 73 to 196 percent due to a mass shift toward fee-based accounts. Further, firms providing investment advice will see an average of $21.5 million in initial compliance costs and $5.1 million in annual maintenance costs. Even worse, up to 7 million Individual Retirement Accounts (IRAs) would fail to qualify for an advisory account due to the balance too low to be sustainable for the advisor. In the shorter term, we found that the fiduciary rule, as written, will result in over $1500 of duplicative fees charged per household retirement account."[58]
- "AAF also found reported compliance costs of more than $106 million in 2016, representing up-front compliance costs of just four companies."[59]
- "Industry estimates show that the rule will cost $5 billion to implement and $1 billion annually to maintain."[60]
- "Implementing the DOL's new fiduciary rule for retirement accounts will cost the brokerage industry $11 billion in revenue over the next four years, according to a recent study from A.T. Kearney, a consultant."[61]
- "The Oxford Report estimated that the rule would result in startup costs ranging from $1.1 million to $16.3 million per [Individual broker dealer] firm, depending on firm size."[62]
- "To date, Advisors Excel has spent in excess of $1 million in preparation for the rule. Across the financial industry, compliance estimates range from Ameriprise spending in excess of $11 million in the first part of 2016, to an estimate by the Securities Industry and Financial Markets Association ("SIFMA") indicating start-up costs for large and medium broker- dealers would total $4.7 billion with on-going costs of $1.1 billion."[63]
- A new report showed that to comply with the Fiduciary Rule, Primerica believes it will spend between $4 million and $5 million every year, and Ameriprise Financial has already spent $11 million on DOL-related compliance activities as of September 2016.[64] (FSI)

Procedural Flaws

- An inquiry initiated by Senator Ron Johnson (R-Wisconsin) in 2015 found the Department "was predetermined to regulate the industry and sought evidence to justify its preferred action." In other words, the Department first concluded that it wanted to change the rules governing investment advice fiduciaries, and then sought to justify that conclusion. (IRI, Davis & Harman)
- The Department failed to consider how the rule would likely create an "advice gap" for low- to middle-income families. The Department dismissed concerns of loss of access, and instead found "little evidence" that "financial advisers improve retirement savings." However, this conclusion is contradicted by the Department's own assessment in a prior rulemaking that investment mistakes cost investors approximately $114 billion per year, that access to financial assistance reduced the cost of those mistakes by $15 billion per year, and that increased access to financial assistance would enable them to save billions more. (IRI)
- The Department chose to ignore evidence regarding the impact of similar rules established in other jurisdictions. Most notably, following the United Kingdom's move to a fee-based compensation model, the U.K. regulator issued a report in March 2016 confirming that retirement savers – particularly those with lower incomes – were adversely affected and acknowledged that its "high standard of advice is primarily accessible and affordable only for the more affluent in society."[65] Rather than taking advantage of the opportunity to learn from mistakes made by other countries, the Department simply denied the existence of an "advice gap" in the U.K. and dismissed the possibility that a similar "advice gap" would develop in the U.S. under the fiduciary rule. (IRI, Chamber, ICI and Davis & Harman)
- Under Executive Order 12866[66] and related guidance issued by OMB,[67] consideration of viable alternatives is a fundamental element of federal agency rulemaking. However, the lack of consideration given to all relevant costs of the fiduciary rule prevented the Department from properly evaluating less burdensome alternatives that would have greatly reduced the costs of the fiduciary rule, harmonized the Department's regulatory regime with that of the SEC and, because they would have applied only to relationships in which the client has no reasonable expectation of fiduciary status, would not have caused any meaningful consumer harm. However, as a result of the Department's flawed process, it arbitrarily rejected these and other alternatives. (IRI)
- According to the Johnson Report discussed above, the Department failed to adequately consider comments from expert regulators and professional staffers from the SEC, OIRA and the Treasury Department expressing concerns and offering recommendations regarding the rule. (IRI, Davis & Harman)
- "Further, the Department of Labor underestimated the impact of the rule on small and independent businesses by insufficiently fulfilling its obligations under the Regulatory Flexibility Act (RFA). The RFA requires agencies to consider the impact of their regulatory proposals on small entities, to analyze effective alternatives that minimize small entity impacts, and to make their analyses available for public comment. It is the role of the U.S. Small business Administration's Office of Advocacy to advance the views, concerns, and interests of small business before Congress, the

White House, federal agencies, federal courts, and state policy makers. The Office of Advocacy is the government's expert on the RFA. In this role, the Office of Advocacy comments to federal agencies regarding the impact of proposed regulations on small business and provides feedback on agency analyses of the regulatory impact. Under the RFA, an agency is required to examine whether its proposed rule will have a significant economic impact on a substantial number of small entities. If the agency determines that its proposed rule will have such an impact, it is required to prepare an initial regulatory flexibility analysis (IRFA). The IRFA must meet several requirements spelled out by section 603 of the RFA, including what small businesses are expected to be directly impacted, the major cost factors, and consideration of all significant regulatory alternatives. The RFA requires agencies to publish the IRFA, or a summary, in the Federal Register at the same time it publishes the proposed rulemaking. In its public comment letter to the Department of labor of July 17, 2015, the Office of Advocacy wrote that it had found the IRFA for the rule deficient."[68]

Analytical Flaws

- According to a February 2017 analysis by the American Action Forum, it is unclear how CEA found that $1.7 trillion of IRA assets involved conflicts of interest. Total affected IRA assets are significantly less. Retirement account assets were $7.3 trillion in 2013, 86.2 percent of which, by the CEA's own definition, were not "conflicted." That leaves less than $1 trillion in so-called "conflicted" assets. And even that amount is too large because it represents total "conflicted" assets across all retirement accounts, while the CEA's analysis was limited to IRA assets only. Total "conflicted" IRA assets are some amount less than $1 trillion. Also, as the CEA stated, the $1.7 trillion figure is some combination of front-load funds and variable annuity in IRAs. By including the annuity market, the CEA increased total affected assets by approximately $600 billion, or about 50 percent. (Market Synergy, ACLI, SIFMA)
- The Final RIA is deficient because the regulation is built on two false premises: all commission-based sales are conflicted, and all fee-only advice is always unconflicted and serves retirement savers' best interest. Neither premise is correct, and neither is supported by the final RIA. (ACLI)
- The Department's Regulatory Impact Analysis only briefly addressed the impact the rule would have on jobs, noting the rule could have "some social costs." [69] (IRI, Davis & Harman)
- In projecting the costs of the rule, the Department did not give due consideration to the costs of the rule specifically applied to annuity manufacturers and distributors, despite several studies made available to the Department demonstrating the costs.[70] (IRI)
- The Regulatory Impact Analysis overstated the benefits of the fiduciary rule, underestimated the fiduciary rule's direct and indirect costs to the financial services industry and retirement savers, and, as described above, failed to give meaningful consideration to the costs to retirement savers from lost access to retirement assistance (including assistance with guaranteed lifetime income products such as annuities) and the transaction-based fee model as well as the costs of class action lawsuits arising from the BIC Exemption. The record shows those costs total tens of billions of dollars. (IRI, ICI)

- The Department relied on flawed and problematic factors and data in their Regulatory Impact Analysis projections. Specifically, the Department admitted to basing savers' projected financial gains on research regarding "only one" issue: the purported "conflict that arises from variation in the share of front-end-loads that advisers receive when selling different mutual funds that charge such loads to IRA investors." This research provides no basis for regulating products—such as annuities—that may not invest in mutual funds at all, and was not even a proper assessment of mutual fund performance. (IRI, ICI, FSR, FSI)
- Additionally, in estimating that the average mutual fund sold by brokers underperformed its benchmark, the Department improperly used performance data on certain unrepresentative funds to draw conclusions about the entire mutual fund market. The Department compounded this error by relying on data for the period 1993 through 2009 (a cherry-picked sample encompassing the entire global financial crisis and nearly none of the recovery) and basing its underperformance estimate not on actual holding periods, or even over a full market cycle, but rather on the single year in which funds were purchased. A series of comment letters from the Investment Company refuted this data, finding the rule could cost investors $109 billion in additional fees.[71] (IRI, ICI, ACLI, SIFMA, NAIFA)
- Vanderbilt Professor and former SEC Chief Economist Dr. Craig Lewis noted the research relied on by the Department did not analyze the performance of mutual funds held in annuities, relied on old data not reflecting the current marketplace, and the author of one of the key studies later revised his work to show the "cost" of conflicts was about 1/6th of the amount originally estimated.[72] (Chamber, ABA, SIFMA)
- The Department was far too optimistic in relying on "robo advisers" to alleviate the potential loss of access to retirement advice for small savers. The Chamber of Commerce is currently unaware of any "robo advisor" that recommends annuity products to generate retirement income, despite the clear need for those products. (Chamber, ICI)
- The Department seemingly concludes that "robo advisors" and low-expense passive investment options are the best course of action for retirement investors, while ignoring the reality that there is no "one size fits all" investment strategy and even if some investors would benefit from this development, others would be harmed. The Department failed to address this potential impact in their Regulatory Impact Analysis. (Chamber, FSI)
- DOL failed to acknowledge that annuities are governed by a distinct, customized, and comprehensive regulatory framework that was enhanced in 2010 to account for annuities' unique features. The dated mutual fund studies relied upon by the Department, which focus primarily on investment performance in the historical period 1991 to 2005, do not measure the efficacy of targeted and more rigorous annuity-specific rules. (ACLI)
- "DOL's cost analysis is flawed on two accounts. First, DOL states that the fiduciary rule will save retirement savers $17 billion a year. It came to this conclusion by taking a uniform 1 percent off of the total amount of assets in IRAs in the United States. From a statistical standpoint, DOL failed to take into account the asset-weighted performance of funds. Craig Lewis of Vanderbilt's Owen School

of Business provides an example of how this skews an analysis: "[A] non-asset weighted study examining nine funds each with $1 million invested yielding a 1 percent return and one fund with $10 million invested yielding a 10 percent return would show an average return of 1.8 percent. But an asset-weighted study looking at the same 10 funds would show an average return of 5.7 percent. By ignoring which funds investors actually invest in, the report fails to achieve its stated objective of measuring the market-wide impact of conflicted advice in retirement accounts." Second, DOL vastly underestimated the costs of compliance with the fiduciary rule. DOL estimated total startup compliance costs at $5 billion and ongoing costs of $1.5 billion. Even if true, these would make the fiduciary rule one of the most expensive regulations in history, but the costs are much higher than DOL's original estimates. AAF found that the fiduciary rule would cost $31.5 billion in total costs and $2 billion in annual burdens, making it the most expensive rule of 2016 and the second most expensive non-EPA rule since 2005."[73]

- "Among other things, the updated analysis should account for the following: (1) the Department should acknowledge that the data comprising most of the studies relied on by CEA are from the late 1990s and early 2000s, when there was scant overlap in the marketing and sale of broker-sold funds versus no-load funds. The competitive landscape now is markedly different, with 90 percent of front-load mutual funds also having no-load shares. (2) The author of one of the academic studies cited by CEA, Jonathan Reuter, issued an updated analysis that looked at more recent mutual fund performance (from 2003 to 2012) and concluded that broker-sold funds underperform no-load funds by an average of 18 basis points, significantly narrower than the 100-basis point difference cited by CEA. This means that CEA greatly overestimates with its projected $17 billion figure. (3) A survey of financial advisors by CoreData Research that was conducted after the fiduciary rule was finalized (October 2016) found that 71 percent plan to disengage from some mass-market investors due to the fiduciary rule. On average, these advisors further estimate that they will no longer service 25 percent of their mass-market clients, creating a significant likely advice gap for low-balance investors."[74]

- "The Department commented in its original release of the proposed rule that the "research has shown that disclaimers are ineffective in alerting retail investors to the potential costs imposed by conflicts of interest," yet the Department has constructed a rule that does just that. The rule as written adds dozens of pages of disclaimers and disclosures for consumers to review in addition to the ones imposed by state insurance regulation."[75]

- "First, the Department's premise that investors will gain from the rule is incorrect. Instead, investors will incur substantial quantitative and qualitative losses. The rule has the potential to increase consumer costs by $46.6 billion, or $813 annually per account, in addition to the $1,500 in duplicative fees for retirement savers that have already paid a fee on their commission-based accounts. The RIA's assessment of the "Small Saver Market" is woefully inadequate. For example, the RIA spends a mere 14 pages of 376 assessing the very market segment the rule purports to protect."[76]

- "Separately, the Investment Company Institute has pointed out that new economic studies estimate that investors could in fact lose $109 billion over 10 years because of the rule's implementation."[77]

- "For example, a Vanguard study from last September shows that having a financial professional's assistance can increase compound annual returns by 300 basis points, fully half of which is due not to investment selection, but to teaching better saving habits and other behavioral changes. Another paper discusses factors the Department did not consider in its analysis, showing the effects a financial professional has in encouraging increased savings and financial discipline. These studies show that the Department underestimated the costs and overestimated the gains of the rule for individual retirement investors—when these investors lose access to financial professionals, regardless of how they are paid, they lose valuable financial assistance causing real harm."[78]

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[8] *Id*. at 13.

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[11] Id.

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

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

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

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

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