JACKSON®

1 Corporate Way
Lansing, MI 48951
Phone: 517/702-2513
Fax: 517/702-2445
james.sopha@jackson.com

James R. Sopha
President

August 7, 2017

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

Re: RIN 1210-AB82 – Request for Information Regarding the Fiduciary Rule[1] and Prohibited Transaction Exemptions (the "RFI")[2]

To Whom it May Concern:

Thank you for the opportunity to respond to the RFI. Question #3 asks whether the Fiduciary Rules appropriately balance consumer freedom and protection.[3] In response, Jackson National Life Insurance Company ("Jackson") answers with an emphatic "No!" The Fiduciary Rules are harming retirement savers more than they are helping them and worsening the growing retirement crisis confronting our country. The Rules are decreasing the availability and utilization of insured products that retirement savers can use to protect and grow their savings and, concomitantly, increasing retirement savers' exposure to market and longevity risk. The Rules are also making it more difficult for retirement savers to access advice, especially small- and mid-size investors. For those who can afford advice, the Rules are reducing consumer choice in the type of products offered and the fee arrangements available.

Jackson urges the U.S. Department of Labor ("DOL") to repeal the Fiduciary Rules and work in coordination with regulators, the industry, and other interested parties to develop a path forward

---

[1] When referenced herein, the "Fiduciary Rules" (or "Rules") consist of the Definition of the Term "Fiduciary"; Conflict of Interest Rule-Retirement Investment Advice, and subsequent amendments; Prohibited Transaction Exemption ("PTE") 2016-01 (the "Best Interest Contract Exemption" or "BICE"); Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (PTE 2016-02); and PTEs 75-1, 77-4, 80-83, 83-1, 84-24 and 86-128, 82 Fed. Reg. 16902 (Apr. 7, 2017), https://www.gpo.gov/fdsys/pkg/FR-2017-04-07/pdf/2017-06914.pdf.

[2] Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions, 82 Fed. Reg. 31278 (July 6, 2017) (to be codified at 29 C.F.R. pts. 2509, 2510, and 2550), https://www.gpo.gov/fdsys/pkg/FR-2017-07-06/pdf/2017-14101.pdf.

[3] Question #3 asks, in full, "Do the Rule and PTEs appropriately balance the interests of consumers in receiving broad-based investment advice while protecting them from conflicts of interest? Do they effectively allow Advisers to provide a wide range of products that can meet each investor's particular needs?" 82 Fed. Reg. 31279.

that better balances consumer freedom and protection. In the event that the DOL chooses to retain the Rules, then Jackson urges immediate adoption of the following modifications:

- Maintain variable annuities and fixed index annuities in PTE 84-24;
- Create a seller's exemption that excludes sales communications that do not purport to constitute fiduciary investment advice from the Rules' definition of a "recommendation";
- Delay the application of the BICE;
- Clarify that all recommendations to make or increase contributions to a retirement account or product are excluded from the Rules' definition of a "recommendation";
- Expand and clarify the grandfathering provisions in the Rules; and
- Remove from the BICE the prohibition on contract language reflecting parties' agreement to arbitrate claims that might otherwise be brought in class action litigation.

Jackson is well-positioned to offer informed insight.

Jackson and its U.S. affiliates employ more than 5,000 workers, who manage more than $199 billion in annuities held in accounts that qualify as Section 408 Individual Retirement Annuities. In 2016, Jackson was the largest provider of variable annuities in the United States.[4]

Jackson's insurance products are offered by more than 150,000 financial advisers affiliated with more than 600 independent broker-dealers, wirehouses, financial institutions and independent insurance agents. Jackson is also affiliated with four retail broker-dealers with more than 3,200 registered representatives, who deal directly with retirement savers seeking advice. Thus, Jackson has a unique perspective from both a manufacturer's and a retail distributor's point of view on retirement savings and income products.[5]

Jackson is also a wholly owned subsidiary of Prudential plc, a financial services firm located in the United Kingdom ("UK").[6] As discussed in more detail below, Prudential has first-hand experience with the adverse consequences of comparable regulation adopted in the UK that eliminated commission payments from product providers to advisers and platforms and resulted in increased costs and a loss of access to professional investment advice for millions of UK citizens.[7]

---

[4] LIMRA Secure Retirement Institute, *U.S. Individual Annuities Sales Survey*, (2017). (Last visited July 28, 2017), http://www.limra.com/Posts/PR/Data_Bank/_PDF/2016-Q4-Annuity-Company-Rankings.aspx.

[5] Jackson National Life Distributors LLC ("JNLD") and National Planning Holdings, Inc. ("NPH") are affiliates of Jackson. JNLD serves as the wholesale distributor of Jackson's variable annuity products, is registered as a broker-dealer with the Securities and Exchange Commission ("SEC") under the Securities Exchange Act of 1934, and is a member of the Financial Industry Regulatory Authority, Inc. ("FINRA"). NPH is a FINRA member broker-dealer holding company, providing retail distribution of a broad variety of products and services to retirement savers.

[6] Prudential plc (NYSE: PUK) is a company incorporated in England and Wales. Prudential plc is not affiliated in any manner with Prudential Financial, Inc., a company whose principal place of business is in the United States of America.

[7] Three years ago, the United Kingdom adopted the Retail Distribution Review ("RDR"), which "aimed to improve the level of professionalism within the intermediary sector, remove the potential for commission bias and enhance consumers' understanding of the services they were receiving." HM Treasury, Financial Advice Market Review Final Report, p 3 (Mar. 2016), https://www.fca.org.uk/publication/corporate/famr-final-report.pdf. The negative outcomes of this regulatory change are discussed later in this letter. *See also*, Deloitte, *Bridging the Advice Gap: Delivering Investment Products in a Post-RDR World*, A Deloitte Insights Report (2012), https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/financial-services/deloitte-uk-fs-rdr-bridging-the-advice-gap.pdf.

Our country confronts a retirement crisis.

No discussion of the Rules should occur in the absence of context. For the first time in our country's modern history, Americans are predominantly dependent on their personal savings and Social Security to the money they need to support themselves in retirement. They are not prepared. Only 23 percent of baby boomers believe that their savings will last them through the rest of their lives. According to the U.S. Government Accountability Office, 41 percent of U.S. working households age 55 to 64 have no retirement savings; 55 percent of these same households have less than $25,000 in retirement savings.[8] The Center for Retirement Research at Boston College has concluded "that, as of 2013, more than half of today's households will not have enough retirement income to maintain their pre-retirement standard of living, even if they work to age 65 – which is above the current retirement age – and annuitize all their financial assets, including the receipts from a reverse mortgage on their homes."[9]

Retirement savers are not the only ones at risk. The retirement crisis also presents grave dangers for federal, state, and local governments, which may have to contend with tens of millions of elderly Americans with insufficient retirement savings. A recent white paper from the World Economic Forum estimated that the U.S. retirement savings gap (the difference between what retirees will need to support themselves in retirement versus what the government, employers, and individuals have saved for this purpose) is currently $28 trillion and will grow to $137 trillion by 2050.[10] The latter figure is nearly eight times U.S. annual GDP. Given this context of inadequate retirement savings for millions of Americans, the DOL (and every other governmental agency) should promote policies that increase, not decrease, retirement savings, access to advice, and the availability of products that enable Americans to protect and grow their retirement savings.

The Fiduciary Rules are having the opposite effect. By drastically expanding the definition of "fiduciary" and "recommendation" through a complete re-writing of a 40-year-old, well-understood test, the Rules extend the application of the ERISA fiduciary duty standard to virtually every interaction between individual retirement savers and advisers. Jackson estimates that the Fiduciary Rules now govern approximately 70 percent of the retail advice market. Not surprisingly, that market is responding by attempting to mitigate the well-known legal and regulatory risks of being an ERISA fiduciary by declining to offer services to retirement savers with small and mid-size accounts, moving to fee-based arrangements, and reducing product availability. These industry-wide mitigation efforts are having the effect of decreasing access to advice for millions of Americans, making that advice more expensive in many cases when it is available, and substantially

---

[8] U.S. GOV'T ACCOUNTABILITY OFF., GEO-15-419, MOST HOUSEHOLDS APPROACHING RETIREMENT HAVE LOW SAVINGS (May 2015), http://www.gao.gov/products/GAO-15-419. *See also*, Elyssa Kirkham, *1 in 3 Americans Have $0 Saved for Retirement*, *GOBANKINGRATES*.COM (Mar. 16, 2016), https://www.gobankingrates.com/retirement/1-3-americans-0-saved-retirement/.

[9] Alicia H. Munnell, Wenliang Hou, & Anthony Webb, *NRRI Update Shows Half Still Falling Short*, 14-20 Center for Retirement Research at Boston College 1-9 (Dec. 2014), http://crr.bc.edu/wp-content/uploads/2014/12/IB_14-20-508.pdf.

[10] World Economic Forum, *We'll Live to 100 – How Can We Afford It?*, (May 2017), http://www3.weforum.org/docs/WEF_White_Paper_We_Will_Live_to_100.pdf. *See also*, Nari Rhee, *The Retirement Savings Crisis: Is it Worse Than We Think?*, NATIONAL INSTITUTE ON RETIREMENT SECURITY (June 2013), http://www.nirsonline.org/storage/nirs/documents/Retirement%20Savings%20Crisis/retirementsavingscrisis_final.pdf, estimating the collective retirement savings gap among working households age 25-64 to be between $6.8 to $14 trillion.

decreasing utilization of the one and only product that offers retirement savers the opportunity to protect and grow savings: variable annuities.

I. Variable Annuities Should Continue to be Eligible for Relief Under PTE 84-24.

There is no reasonable basis for the DOL to exclude variable annuities from PTE 84-24. In the rationale offered in the Amendment to PTE 84-24, the DOL stated that PTE 84-24 "historically provided relief for certain parties to receive commissions when plans and IRAs purchased recommended insurance and annuity contracts"[11] and acknowledged that "lifetime income products are increasingly critical for retirement savers due to the shift away from defined benefit plans."[12]

In attempting to balance this critical and increasing need for lifetime income products and consumer protection, the DOL weighed the benefits to retirement savers from the various types of annuities offered (fixed rate, fixed index, and variable). In the end, the DOL concluded that fixed rate annuities will be the only type of annuity that will continue to be eligible for relief under PTE 84-24, and that fixed index and variable annuities "should be sold under the more stringent conditions of the [BICE.]"[13] The DOL favored fixed rate annuities because their payments are "predictable"[14] and disfavored fixed index and variable annuities because they "typically require the customer to shoulder significant investment risk and do not offer the same predictability of payments as Fixed Rate Annuity Contracts."[15]

This rationale is mistaken and contrary to sound investment and public policy:

- Retirement savers who purchase and hold variable annuities with lifetime income guarantees shoulder no investment risk that will adversely impact the dependability of their income payments (i.e., a decrease in the value of their investments will not decrease the value of their guaranteed lifetime income benefit, but an increase in the value of their investments may increase the amount of their guaranteed lifetime income benefit);
- Undersaved retirement savers need to grow their assets; and
- A country facing a retirement crisis ought to be encouraging them to do so.

Two real-life examples are illustrative.[16] Client A purchased a variable annuity with a lifetime income guarantee in the fourth quarter of 2005 -- before the financial crisis. She initially invested $480,000 and immediately began taking her guaranteed income for life of $24,000 per year. Despite these regular and reliable income payments, Client A's account value grew to $596,615 by

[11] Amendment to and Partial Revocation of Prohibited Transaction Exemption (PTE) 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters, 81 Fed. Reg. 21,147, 21148 (Apr. 8, 2016) ("PTE 84-24").
[12] 81 Fed. Reg. at 21152.
[13] 81 Fed. Reg. at 21153.
[14] 81 Fed. Reg. at 21152.
[15] 81 Fed. Reg. at 21153.
[16] The examples of Clients A and B may not be representative of the experience of other customers and is no guarantee of future performance or success. Fees and restrictions vary depending on the benefits selected by the customer, and other customers may pay higher or lower fees than Clients A and B. Guarantees are backed by the claims paying ability of the issuing insurance agency.

September 2007. Due to the financial crisis and market performance thereafter, the account value dropped to $318,294 by March 2009. Client A's guaranteed retirement income, however, was not affected by the market loss suffered in the financial crisis and remained at $24,000 for the life of the account.[17]

Client B purchased a variable annuity in March 2010 for $590,283. He immediately began taking his guaranteed income of $29,514 per year for life. Due to positive market performance, his account value continued to increase, resulting in an increased guaranteed lifetime withdrawal amount of $41,074 per year. Had Client B invested in a fixed rate annuity with a predictable payment, there would have been zero opportunity to increase his annual, guaranteed lifetime income. The return would have been defined by a predictable, but low and unchanging, interest rate. The flip side of predictability is the complete absence of an opportunity to grow retirement savings, which our country desperately needs retirement savers to do.

Variable annuities allow Americans to address their greatest risk and fear in retirement: outliving their assets.[18] Variable annuities protect savings against market and longevity risk through guaranteed lifetime income and death benefits. They also offer retirement savers the opportunity to grow savings on a tax-deferred basis through the construction of a diversified portfolio of investment strategies, including fixed account options with minimum guaranteed returns. Since a majority of variable annuities are held by investors with annual income under $100,000, they need an opportunity to grow their assets.[19]

The Fiduciary Rules have created a tilted playing field that disfavors variable annuities and fixed index annuities and favors fixed annuities.

Despite the clear need to **increase** access to products that offer retirement savers the opportunity to protect and grow their savings, the Fiduciary Rules have created a tilted and unwise playing field that is significantly **discouraging** and **reducing** the use of variable annuities and fixed index annuities.

Total industry-wide sales of variable annuities declined almost 22 percent in 2016. Over the same time period, sales of some individual, formerly top-selling, variable annuities have declined by 25 to 40 percent.[20] In the first quarter of 2017, total sales of variable annuities declined an additional 4.6 percent from the prior quarter, and 10.2 percent when compared with the first quarter of 2016.[21] Sales of fixed index annuities have also fallen in recent quarters.[22] For 2017 and 2018, the LIMRA

---

[17] Client A passed away seven years after purchasing her variable annuity. Her beneficiaries received $438,877 in remaining account value (death benefit).

[18] *How to Not Run Out of Money in Retirement*, ALL THINGS CONSIDERED (Apr. 27, 2016), http://www.npr.org/2016/04/26/475759586/how-to-not-run-out-of-money-in-retirement.

[19] Press Release. Insured Retirement Institute, IRI Issues Third-Quarter 2015 Annuity Sales Report (Dec. 15, 2015) (on file with author).

[20] Greg Iacurci, *Department of Labor's fiduciary rule blamed for insurers' massive hit on variable annuity sales*, INVESTMENTNEWS, (Mar. 28, 2017}, http://www.investmentnews.com/article/20170328/FREE/170329922/department-of-labors-fiduciary-rule-blamed-for-insurers-massive-hit.

[21] Press Release, Insured Retirement Institute, IRI Issues First-Quarter 2017 Annuity Sales Report (June 6, 2017), https://www.myirionline.org/newsroom/newsroom-detail-view/iri-issues-first-quarter-2017-annuity-sales-report.

[22] *Id.*

Secure Retirement Institute projects that total variable annuity sales will continue to drop 5 to 10 percent, bringing them to their lowest level since 1998.[23]

Certainly, declining sales of variable annuities are not the product of consumer preferences. A 2017 Insured Retirement Institute (IRI) survey found that more than 85 percent of consumers believe they need a source of guaranteed lifetime retirement income other than Social Security.[24] In a recent survey conducted by IRI and Jackson, 80 percent of retirement savers said they would purchase an investment product providing guaranteed lifetime income, even if it cost more than an alternative.[25] Eighty percent of advisers participating in the IRI/Jackson survey said that annuities' guaranteed lifetime income features have had a positive impact for their clients.[26] More than half of the advisers predicted that some of their clients will run out of money during retirement if they do not buy annuities.[27] Yet, 60 percent of advisers reported that legal and regulatory barriers are very or somewhat impactful in reducing annuity purchases by retirement savers.[28]

In Jackson's experience, the decline in variable and fixed index annuity sales are directly related to the DOL's decision to remove these annuities from PTE 84-24 and subject them to the much more burdensome requirements of the BICE.[29] The treatment of variable and fixed index annuities under the Fiduciary Rules has changed several times. Prior to the adoption of the Fiduciary Rules in April 2016, advice and sales involving variable and fixed index annuities were subject to PTE 84-24. The Fiduciary Rules changed this, and neither variable nor fixed index annuities were going to be eligible for relief under revised PTE 84-24 when it was originally scheduled to go into effect on April 10, 2017. On April 7, 2017, however, the DOL published a second revised PTE 84-24 so that variable and fixed index annuities remain eligible for relief under it, but only until January 1, 2018. This modification strongly suggests that the DOL found sufficient evidence in the regulatory record to conclude that extending relief for variable and fixed index annuities under PTE 84-24 satisfies the standards for PTEs in ERISA and serves the interests of plans and their beneficiaries and participants.

---

[23] Todd Giesing, *US Individual Annuities 4th Quarter 2016*, LIMRA SECURE RETIREMENT INSTITUTE, p 2, (2016); *See also* Cyril Tuohy, *Indexed Annuity Sales Could See First Decline in a Decade, LIMRA Predicts*, INSURANCENEWSNET.COM (May 23, 2017), https://insurancenewsnet.com/innarticle/indexed-annuity-sales-see-first-decline-decade.

[24] Insured Retirement Institute, *Boomer Expectations for Retirement 2017* (2017), https://www.myirionline.org/docs/default-source/research/iri_boomers-expectations-for-retirement-2017.pdf.

[25] IRI and Jackson, *The Language of Retirement 2017: Advisor and Consumer Attitudes Toward Securing Income in Retirement*, (Mar. 2017), will be available at http://www.irionline.org/newsroom in August 2017.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] By contrast, sales of fixed rate annuities have grown. There is no logical explanation for the different trajectories for sales of different annuities other than the tilted regulatory playing field that the DOL and the Rules have created by removing variable and fixed index annuities from PTE 84-24 and leaving fixed index annuities as the only type of annuity eligible to rely on PTE 84-24. This distinction is harming investors. While both variable and fixed index annuities offer protection against market and longevity risk, fixed rate annuities offer a very modest rate of growth (particularly in this historically low interest rate environment). For this reason, fixed rate annuities are appropriate only for retirement savers with very low risk tolerance and already-adequate savings. Variable annuities offer the opportunity to grow assets at rates consistent with a wide variety of asset classes from among which the investor can choose or construct a diversified portolio. In this market environment, fixed rate annuities are less preferable than variable annuities for the millions of Americans who desperately need to grow their retirement resources and would willingly pay for insurance to protect against market downturns.

If the DOL proceeds with its current plan to remove variable annuities from PTE 84-24 on January 1, 2018, then all "recommendations" relating to variable annuities and all commission-based sales of variable annuities will be subject to the BICE. The BICE's requirements are exceedingly complex, and virtually every aspect of a financial institution must be reviewed and altered to comply with the BICE, including training, forms, disclosures, technology, compensation, operations, marketing, legal, compliance, and governance. Many financial institutions have taken, or are in the process of taking, action to avoid the extensive burdens of the BICE. Some have banned the use of commission-based products altogether in retirement accounts so that they can avail themselves of the so-called "level fee" exemption to the use of the best interest contract. This marked shift away from commission-based products is dramatically and adversely affecting the recommendation of annuities, since 99 percent of annuities have historically been sold on a commission basis. As discussed below, even if fee-based annuities gain favor with retirement savers, they are not the best option in all circumstances.

The exclusion of variable annuities from PTE 84-24 is increasing retirement savers' market and longevity risk.

Most retirement savers are undersaved and should reasonably be expected to attempt to grow their assets. Variable annuities offer the opportunity to grow retirement savings while also offering protection against market and longevity risks. If advisers are discouraged from recommending products like variable annuities, then market and longevity risks will be increasingly "managed" through the application of simplistic and ineffective rules of thumb, such as the so-called "4 percent rule" for systematic withdrawals.[30] The "4 percent rule" promotes the construction of a diversified portfolio from which the consumer withdraws 4 percent per year to fund 25-30 years of retirement. The reasoning has been that withdrawing this small amount every year, while obtaining the opportunity for market growth with the remainder of the portfolio, will preserve the retirement saver's resources and allow the resources to continue to grow so they will last for a minimum of 25-30 years (not for life). In fact, the original and subsequent research behind the "4 percent rule" exposes its risk and inaccuracy in predicting a protected stream of guaranteed lifetime income for retirees.

William Bengen's original research in 1994, which is believed to have established the "4 percent rule," was premised upon asset class returns <u>without taking into account</u> fees and taxes.[31] Using Bengen's original research, but taking into account the fact that the retirement saver will have to pay fees and taxes in addition to the desired 4 percent withdrawal (assuming advisory fees and taxes of 2 percent per annum), the "4 percent rule" would have failed and resulted in the retirement saver running out of money in retirement in 61 percent of historical 30-year periods.

---

[30] PWC, *Leveraging Behavioral Simulation to Enhance the Four Percent Rule*, (Mar. 2015), noting:

> [I]t is important to point out that many rules of thumb such as the Four Percent Rule ... are based on mortality assumptions that are undergoing constant revision. The Four Percent Rule makes the assumption that households spend 25 years in retirement. However, The Economist reports that life expectancy in wealthier nations has been revised upwards by about 2.5 years every decade for the past 50 years.

http://www.pwc.com/us/en/insurance/publications/four-percent-rule.html.

[31] William P. Bengen, *Determining Withdrawal Rates Using Historical Data* 7 (4) J. FIN. PLANNING: 171–180 (1994), http://www.retailinvestor.org/pdf/Bengen1.pdf.

More recent research, which accounts for the current low interest rate environment, demonstrates that the risk of systematic withdrawal plans like the 4 percent rule has increased considerably over the last two decades. For example, a research study in 2013 that examined the effect of low interest rates on systematic withdrawal strategies concluded, "The success of the 4 percent rule in the U.S. may be an historical anomaly, and clients may wish to consider their retirement income strategies more broadly than relying solely on systematic withdrawals from a volatile portfolio."[32] Subsequent research by David Blanchett shows that the addition of guaranteed income through annuities and pensions drastically increases the amount of sustainable income a retiree can take at the same risk level. Under his model's assumptions, those with a moderate income stability preference (income risk tolerance) can take only 2.5 percent systematic withdrawals if they have no guaranteed income, but as much as 4.2 percent withdrawals with 50 percent guaranteed income and 6.8 percent withdrawals with 95 percent guaranteed income.[33]

The removal of variable annuities from PTE 84-24 is therefore reducing retirement savers' ability to eliminate their market and longevity risk through pooling. Variable annuities provide individual retirement savers with the opportunity to transfer their risks (e.g., the risk that they will die unexpectedly, live longer than expected, and/or be unlucky and suffer a market downturn shortly before or during retirement) to an insurance company's balance sheet. The insurance company pools the risks of its investors. Pooling reduces an individual's risk, for example, of living longer than expected simply because some other person in the pool may live a shorter life than expected. But annuity providers also supplement the value of pooling mortality and other risks by employing sophisticated hedging strategies to mitigate the risk of stock market declines and interest rate movements that are beyond the capabilities and budgets of individual retirement savers. These strategies are more akin to, albeit often more sophisticated than, the expert-driven investment strategies of large defined-benefit pension plans. Also, like defined-benefit plans, annuities provide guaranteed incomes to those retirement savers. Such a sophisticated solution is something an individual retirement saver could never execute or afford on his or her own through the application of the 4 percent rule or anything like it.

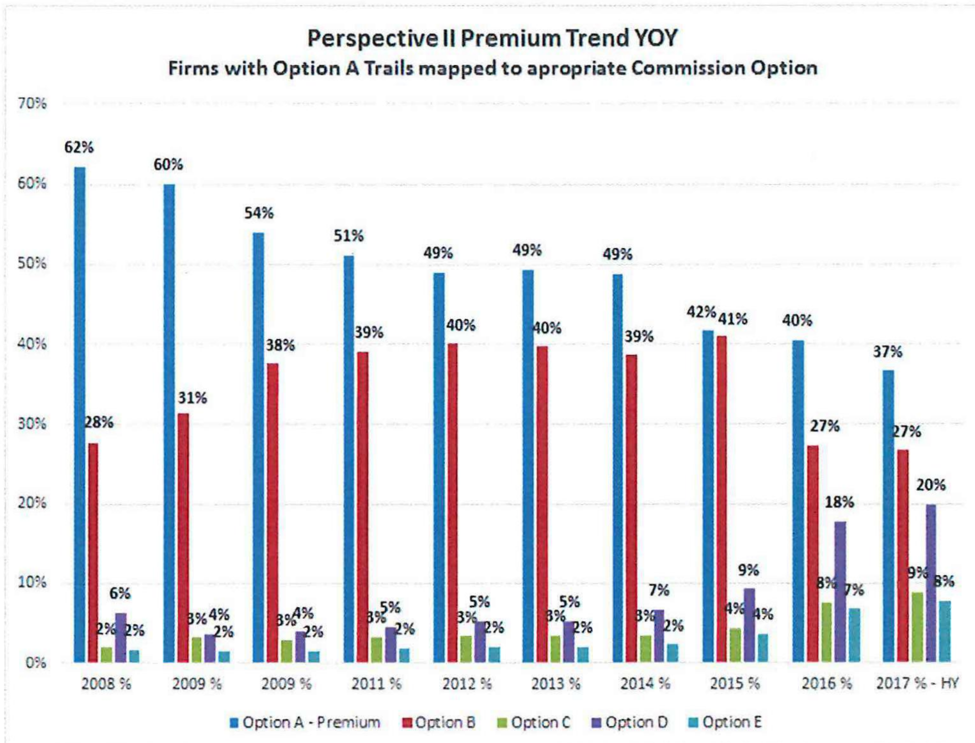
The DOL also disregarded market developments when weighing perceived risks.

The DOL's decision to remove variable annuities from PTE 84-24 was based, in part, on its mistaken perception that variable annuities present "conflicted payment structures" because of "advisers' incentives to secure the annuity purchase, which can be quite substantial."[34] In fact, even before the Fiduciary Rules were adopted, the compensation payments for variable annuity sales were evolving away from high up-front commissions towards fee-based models. Recently, this trend has accelerated due to the Fiduciary Rules.

---

[32] Michael Finke, Wade D. Pfau, & David M. Blanchett, *The 4 Percent Rule Is Not Safe in a Low-Yield World*, 26 (6) J. FIN. PLANNING: 46–55 (2013).
[33] David M. Blanchett, *The Impact of Guaranteed Income and Dynamic Withdrawals on Safe Initial Withdrawal Rates*, 30 (4) *J. FIN. PLANNING*: 42–52 (2017).
[34] 80 Fed. Reg at 21154.

For example, commission payouts to advisers at Jackson on our Perspective II product, our most popular variable annuity product, have trended away from option A, which pays higher upfront commission, and have started favoring commission options B, C, D and E, which have lower upfront commission and longer trails (i.e., fee payments to advisers in the years following a sale).[35]



In response to the greater use of fee-based billing arrangements, there has been a corresponding and significant increase in registration of fee-based annuity products. In the last 18 months, over 38 fee-based variable annuities have been launched or filed with the SEC. More than 80 percent of respondents to a 2017 IRI survey have already introduced, plan to introduce, or are considering introducing fee-based variable annuities.[36]

As a leader in annuity sales in the United States, Jackson offers an excellent example of new generation fee-based products. Jackson introduced its first fee-based variable annuity in 2016. In September 2017, Jackson will introduce a next generation of its fee-based variable annuity called Perspective Advisory II, which has no commission, no trail, and no other sales charge; requires no surrender charge (i.e., a charge paid by the investor for withdrawing more than a certain percentage of the value of the annuity for a prescribed number of years after purchase); and offers

[35] Option A is a 7 percent commission all upfront, Option B is 5 percent upfront with an annual trail of 0.50 percent, Option C is 3.5 percent upfront with a 0.75 percent annual trail, Option D is 5.5 percent upfront with a 0.25 percent trail years 2-7 and a 1 percent trail years 8+, and Option E is 2 percent upfront with a 1 percent annual trail. These represent Jackson's standard rates for Perspective II, however Broker Dealers may request special commission rates or reduce the number of commission options available.

[36] Comment Letter from Davis & Harman LLP to the Securities and Exchange Commission (June 29, 2017), https://www.sec.gov/comments/ia-bd-conduct-standards/cll4-1831305-154551.pdf.

Class I (Institutional) share funds that do not include a 12b-1 fee.[37] The selling adviser will receive no sales compensation from Jackson. All compensation to the selling adviser will be paid directly by the retirement saver based upon the fee arrangement negotiated between the retirement saver and the adviser. Further, Jackson does not expect that there will be any variance in the fee paid to the adviser by the retirement saver based upon the features and benefits that the retirement saver chooses in the annuity. For example, an investor purchasing Perspective Advisory II can select from over 90 investment options and an *a la carte* menu of death and guaranteed income benefits when selecting an annuity. Jackson expects that a selling adviser will earn the same compensation regardless of the optional benefits that the client selects.

Even though Perspective Advisory II is an excellent solution for retirement savers with sufficient funds to establish a relationship with a fee-based adviser, fee-based insurance products must still overcome regulatory and platform integration obstacles before they are likely to be widely used. Fee-based annuities currently constitute approximately 1 percent of all annuity sales and, even apart from the fiduciary rules, still have significant impediments to their widespread utilization.[38] For example, FINRA Rule 2330 and NAIC 275-1 were adopted to address regulators' concerns about sales of annuities with high up-front commission costs and long surrender periods.[39] They impose significant additional requirements on sales of annuities that do not apply to sales of other products, such as a mutual fund. Based on an analysis prepared by Jackson, it takes approximately two days and 200 pages of documentation to complete a mutual fund transaction. In contrast, due to FINRA Rule 2330 and NAIC 275-1, it takes approximately five days and 1,000 pages of documentation to complete a variable annuity transaction. These regulatory burdens are likely to deter a fee-based adviser from recommending a fee-based annuity and will tend to steer the adviser's recommendation to other products, such as a mutual fund, which will require far less work but may not be in the retirement savers' best interest because those products do not mitigate

---

[37] The following are responses to some of the additional questions asked by the DOL about new fee-based annuities in Question #8.

Q: What regulatory filings are necessary for such annuities?
A: There are no differences in the regulatory filings necessary to register a fee-based annuity and a commission-based annuity.

Q: How long is it anticipated to take for an insurance company to develop and offer a fee-based annuity?
A: Fee-based annuities have existed for many years. They simply have not been utilized by investors or advisers for reasons discussed later in this letter. Jackson has observed that it does not take any longer to develop and offer a fee-based annuity than a commission-based annuity.

Q: Would fee-based annuities differ from commission-based annuities in any way other than the compensation structure?
A: Annuities typically offer a variety of options and benefits, which change from time to time and product to product. Nevertheless, Jackson does not believe that there is anything special about the manufacture of a fee-based annuity that dictates it differs from a commission-based annuity, except for the compensation structure.

[38] Scott Stoltz, *Do Fee-Based Annuities Have a Future?*, THINKADVISOR (July 3, 2017), http://www.thinkadvisor.com/2017/07/03/do-fee-based-annuities-have-a-future.

[39] SEC/NASD Report, JOINT SEC/NASD REPORT ON EXAMINATION FINDINGS REGARDING BROKER-DEALER SALES OF VARIABLE INSURANCE PRODUCTS (June 2004), https://www.sec.gov/news/studies/secnasdvip.pdf; Self-Regulatory Organizations; National Association of Securities Dealers Notice of Filing of Proposed Rule and Amendment ... to Sales Practice Standards and Supervisory Requirements for Transactions in Deferred Variable Annuities; Exchange Release No. 34-52046A, (July 19, 2005), https://www.sec.gov/rules/sro/nasd/34-52046a.pdf; FINRA, 2015 Regulatory and Examination Priorities Letter (Jan. 6, 2015), http://www.finra.org/industry/2015-exam-priorities-letter.

market and longevity risk. Jackson does not believe that it is in retirement savers' interests for FINRA Rule 2330 or NAIC 275-1 to apply to sales of the next generation of fee-based annuity that has no up-front commission and no surrender charges. Nonetheless, those regulations apply today, and it will be difficult for fee-based variable annuities to be widely offered to retirement savers until these rules are modified.

The DOL and other policymakers should be doing everything they can to encourage greater utilization of guaranteed income products, or at least ensure that they are on a level playing field with other retirement products that do not offer valuable insurance-type features like lifetime income guarantees and death benefits. The removal of variable annuities and fixed index annuities from PTE 84-24 is having the exact opposite effect and should not go forward on January 1, 2018. Rather, the DOL should modify PTE 84-24 to keep the currently effective formulation of PTE 84-24, which provides relief for variable and fixed index annuities while also imposing the Impartial Conduct Standards on advisers who recommend these products. This better balances consumer freedom and protection with the mis-selling risks perceived by the DOL.

II. The Fiduciary Rules should be amended to include a seller's exemption.

In addition to allowing variable annuities and fixed index annuities to rely on PTE 84-24, the DOL should also adopt a seller's exemption to ensure that insurance products remain accessible to retirement savers.

In his May 22, 2017, opinion commentary in *The Wall Street Journal* announcing his decision not to delay the Fiduciary Rules' June 9, 2017, applicability date, Secretary Alexander Acosta declared:

> America was founded on the belief that people should be trusted to govern themselves. . . [and] to exercise individual choice and freedom of contract . . . . Limiting the scope of government protects space for people to make their own judgments about what is best for their families.

Retirement savers seeking investment advice should enjoy the benefits provided by the freedom to choose that Secretary Acosta defended in his opinion commentary. In particular, they should be able to choose from three models when planning for their retirement:

1. Unsolicited business – When no "recommendation" is made to the "do-it-yourself" retirement saver, the current standards for the execution of unsolicited orders should apply.
2. Sales – When a representative of a broker, dealer, insurance company, or other retirement products provider seeks to sell a retirement product, the suitability standards established in federal securities laws and state insurance laws should apply. Both the SEC and the National Association of Insurance Commissioners are presently exploring how to strengthen these standards.
3. Fiduciary advice – When an adviser offers fiduciary investment advice, the adviser should be subject to the highest standard of care. This standard should apply uniformly to sales of securities and non-securities (e.g., insurance products), regardless of whether the funds are retirement savings (i.e., "qualified") or other kinds of personal savings (i.e., "non-qualified").

This strategy preserves consumer choice and protection so long as advisers and financial institutions (a) clearly and plainly declare the capacity in which they are acting before any interaction with a retirement saver takes place; and (b) conform to the standards associated with the advertised capacity. Simply, there should be no confusion among retirement savers about the nature of the service or relationship offered. For example, sales people should be required to clearly and prominently disclose their non-fiduciary status. In addition, they must be prohibited from using labels and other self-descriptions that may suggest they offer fiduciary services (e.g., "investment adviser," "financial advisor," "financial planner"). Further, retirement savers should be provided with education and disclosures about the distinctions between these standards.

One important reform to move toward this more rational regulatory framework for retirement investment advice would be the creation of a common-sense "seller's exemption" in the Fiduciary Rules. The Fiduciary Rules provide that any communication that can reasonably be viewed as a "suggestion that [a retirement saver] engage in or refrain from taking a particular course of action" regarding retirement assets is deemed to be a "recommendation" that transforms the provider of the communication into a fiduciary under ERISA.[40] While there are exclusions for certain narrowly prescribed general marketing materials, this definition of "recommendation" is far too expansive and does not reflect the fact that efforts to sell products to customers are qualitatively different from the provision of investment advice, and should not subject the salesperson to fiduciary status under ERISA. Sales conduct should not be treated as a "recommendation" constituting "investment advice" that transforms the salesperson into a fiduciary so long as the salesperson:

(a) discloses to a retirement saver that he/she is not a "fiduciary," a "financial planner," an "investment adviser," or someone engaging in the functions of these professions;
(b) discloses to the retirement saver that he/she represents a particular company (or companies) seeking to sell retirement (and other financial) products;
(c) discloses accurate information about the products, including all fees and expenses;
(d) avoids any material misrepresentations about the products or the salesperson's relationship to the products and the company (or companies) producing them;
(e) engages in an arms-length sales transaction with a retirement saver; and
(f) recommends a product that is "suitable" for the retirement saver under applicable insurance or securities laws.

The DOL should promulgate a new regulation pursuant to the Administrative Procedures Act that modifies the new definition of "fiduciary"[41] by including a "seller's exemption."

III. The Application of the BICE is significantly reducing retirement savers' access to advice and should be delayed.

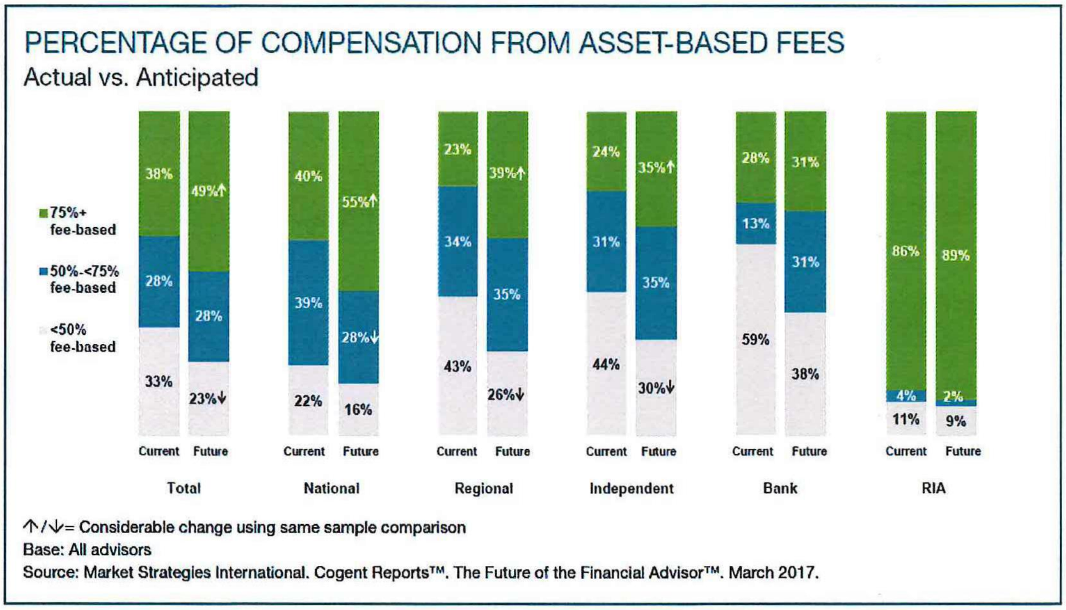
The onerous requirements of the BICE have resulted in a trend away from commission-based compensation arrangements and towards fee-based compensation arrangements. This trend is having the harmful effect of reducing access to advice for small and mid-size retirement savers and, in some instances, increasing the cost of advice for those retirement savers with sufficiently large assets to access advice. To address this harmful effect of the Rules, the DOL should delay the application of the entire BICE (i.e., make inapplicable those portions of the BICE that are currently

[40] 82 Fed. Reg. 16902.
[41] 29 C.F.R. § 2510.3–21 (2017).

applicable) until a better balance can be identified between preserving retirement savers' access to advice and the harm that the DOL perceives is presented by commission-based compensation arrangements. The exploration and resolution of this issue should be coordinated with the SEC, FINRA, and the states – the regulatory agencies that have been principally responsible for regulating commission-based compensation arrangements for decades. In no event should the portions of the BICE that are not currently applicable become applicable on January 1, 2018, as currently planned.

The BICE is increasing the incidence of fee-based compensation arrangements.

A third party industry report by Cogent illustrates that in 2017 a greater percentage of advisers (49 percent up from 38 percent in 2016) will receive at least 75 percent of their total compensation from asset-based fees. [42]



On average, advisers are expected to see a growth of asset-based fee compensation of nearly 7 percent with a drop of commission compensation of 9 percent.[43] In recent surveys, only 30 - 40 percent of advisers said that they expect commission-based products will still exist in 10 years.[44] Some financial institutions have already started the journey towards a fee-only industry by

---

[42] Meredith Lloyd Rice, *Ranks of Fee-Based Advisors Expected to Swell*, (Mar. 13, 2017), http://www.marketstrategies.com/blog/2017/03/ranks-of-fee-based-advisors-expected-to-swell/?utm_campaign=Wealth%20Newsletter%2FInformational&utm_source=hs_email&utm_medium=email&utm_content=45267384&_hsenc=p2ANqtz--IlwtyO0cY9FmJCyoLsOVk5w6Z4LpsO6zY5AJupWELQIHrWVIeUDLeYy5ho6RB8PB6tERr9SWxWw147PbRHSDaZdFQnw&_hsmi=45267384.

[43]Cerulli Associates, *The Cerulli Report – US Advisor Metrics 2016* at Exhibit 8.01.

[44] Investment News Research, *The Economics of Change: How the DOL Fiduciary Rule Will Set Money In Motion and Alter Business Models Across the Advice Industry*, INVESTMENTNEWS, (May 6, 2016)..

indicating that they will no longer allow new brokerage IRA accounts and will shut down all commission-based sales.[45]

For example, one of the largest financial institutions in the country sent the following notice to its clients:

> [B]eginning April 10, 2017 [the date the DOL Rules were initially scheduled to become applicable], [we] will no longer offer new advised brokerage IRA accounts. We plan to encourage our retirement clients to talk with their adviser about whether to move their brokerage IRA accounts to our Investment Advisory Program if they would like to continue to receive investment advice. Legacy retirement assets – those in a ... IRA brokerage account before April 10, 2017 – can remain in that account, and will continue to have the benefit of our investment recommendations to hold or sell after April 10, 2017; however, under the new DOL rule, beginning April 10, 2017, retirement clients won't be able to add to legacy assets, or have the benefit of our investment advice about new purchases in their IRA brokerage accounts.

As explained above, this trend towards fee-based arrangements is adversely affecting access to and utilization of guaranteed income products, which have historically been sold on a commission basis. It is also making advice more difficult to access for small and mid-size retirement savers.

The Fiduciary Rules are reducing access to advice.

These heightened costs, and the unquantified costs and risks of litigation, excise taxes, and other potential penalties stemming from the Fiduciary Rules, make the small fees associated with low-balance accounts uneconomical for retirement investment advisers.[46] A 2017 American Action Forum analysis concludes that the Fiduciary Rules will result in additional annual charges to retirement savers of approximately $800 per account or over $46 billion in aggregate as advisers try to cover the new costs and risks.[47] Some surveys and estimates indicate that up to 7 million individual retirement account owners could lose access to investment advice altogether, and the number of IRAs opened annually could be reduced by between 300,000 and 400,000.[48]

---

[45] Greg Iacurci & Christine Idzelis, *Broker-dealers Split on Commissions in Wake of DOL Fiduciary Rule*, INVESTMENT NEWS, (Oct. 30, 2016), http://www.investmentnews.com/article/20161030/FREE/161029902/broker-dealers-split-on-commissions-in-wake-of-dol-fiduciary-rule *See also* Megan Leonhardt, *Why Edward Jones Won't Let Investors Buy Funds, ETFs in IRAs*, TIME MONEY, (Aug. 22, 2016), http://time.com/money/4459130/edward-jones-bans-funds-etfs-in-iras.

[46] A 2010 survey of 3,372 members of the National Association of Insurance and Financial Advisors (NAIFA) found that most members involved in securities activities believe that the legal implications of a fiduciary standard will increase their compliance costs. At that time, 65 percent of NAIFA members said that if compliance costs were to go up 15 percent as a result of the introduction of a fiduciary standard, they would take actions that could limit access to financial advice. These actions included the limitation of their practice to affluent clients only (31 percent) and an increase in fees for their clients (14 percent) Forty-one percent of these advisers say "few," "very few," or "none" of their clients could absorb an increase. LIMRA, *NAIFA 2010 Membership Survey*, (Nov. 2010), *http://www.naifa.org/NAIFA/media/GovRel/reports/Research/limrasurveyresults.pdf*.

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

[48] Melanie Waddell, *New Evidence of Fiduciary Rule's Harm, Chamber Report Says*, THINKADVISOR; (May 30, 2017), http://www.thinkadvisor.com/2017/05/30/new-evidence-of-fiduciary-rules-harm-chamber-repor; *See also* Melanie Wadell, *The Debate Over 'New Evidence' and the Fiduciary Rule*, THINKADVISOR, (July 3, 2017), http://www.thinkadvisor.com/2017/07/03/the-debate-over-new-evidence-and-the-fiduciary-rul.

In the extreme, some advisers and financial institutions are leaving the business altogether, or eliminating or significantly restricting the services offered to retirement investors. In a blind online poll of 459 advisers conducted by Fidelity Clearing & Custody Solutions, 10 percent of advisers reported they are planning to leave or retire from the field earlier than expected because of the Rules, and another 18 percent said they are "reconsidering their careers as advisers."[49] 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.[50] Even if advisers do not leave the industry, they are limiting or denying access to smaller account clients. A 2016 study by CoreData found that 71 percent of financial professionals will disengage from at least some retirement savers because of the Fiduciary Rules, and 64 percent think the Fiduciary Rules will have a large negative impact on their mass-market clients (i.e., retirement savers with less than $300,000 in net investable assets). On average, these financial professionals estimate they will no longer work with 25 percent of their mass-market clients, creating an advice gap for low-balance investors.[51]

Recent evidence suggests that these estimates and predictions are starting to become reality. One large broker-dealer has announced that it will move 28,000 variable annuity accounts to house accounts, also known as orphaned accounts, before the end of September 2017. Thereafter, these consumers will no longer have an advisor assigned to their account. The U.S. Chamber of Commerce (the "Chamber") reported that a large mutual fund provider has indicated 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 in 2017 because of the Fiduciary Rules. The Chamber extrapolated this prediction to suggest 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 Rules become applicable.[52] These accounts could represent over $400 billion in retirement savings that will now be unable to access professional financial advice.[53]

---

[49] Comment Letter from the National Association of Insurance and Financial Advisors to the Office of Regulations and Interpretations Employee Benefits Security Administration (Mar. 10, 2017), , (quoting ThinkAdvisor, *DOL Fiduciary Has Many Advisors Mulling Career Change: Fidelity Survey*, (Nov. 3, 2016).

[50] A.T. Kearney, *The $20 billion impact of the new fiduciary rule on the U.S. wealth management industry*, (Oct. 2016), https://www.atkearney.com/financial-institutions/dol-fiduciary-rule.

[51] CoreData Research, *Fiduciary rule to leave US mass-market investors stranded, study shows*, (Nov.2016), http://www.valuewalk.com/wp-content/uploads/2016/11/Fiduciary-rule-Press-Release- percentE2 percent80 percent93-CoreData-Research.pdf; Another report suggests that 35 percent of overall advisors say they will discontinue servicing low-balance IRAs which would result in $333.9 billion in assets being orphaned; InvestmentNews, *The Economics of Change: How the DOL Fiduciary Rule Will Set Money In Motion and Alter Business Models Across the Advice Industry*, p 6 *(May 6, 2016)*. 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. *See* A.T. Kearney, *supra* note 50.

[52] Comment Letter from the Chamber to the Employee Benefits Security Administration (Apr. 17, 2017), https://www.uschamber.com/comment/comment-letter-ebsa-regarding-the-economic-impact-the-dols-fiduciary-rule.

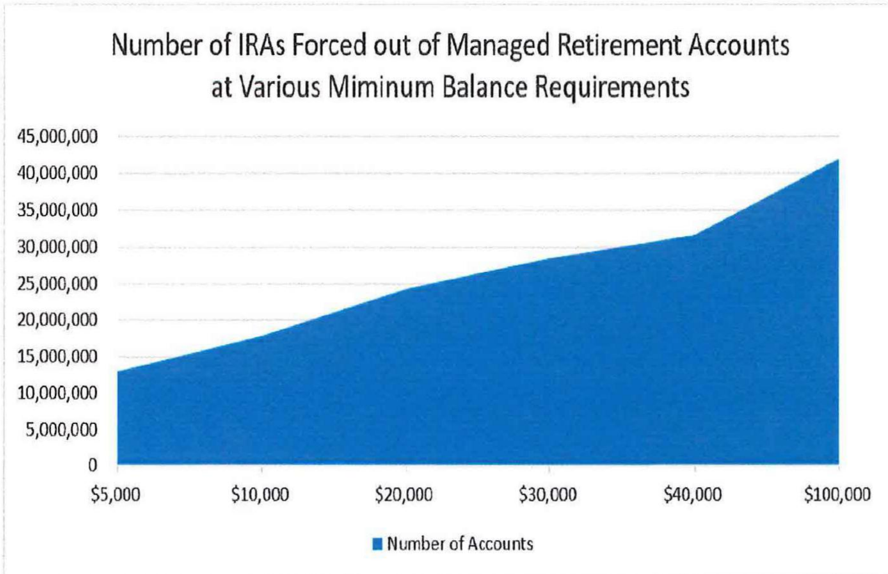
[53] A.T. Kearney, *supra* note 50.

This loss of advice is troubling because, as the very premise of the Fiduciary Rules acknowledges, investment advice matters immensely to retirement investment outcomes. There is wide agreement that retirement planning for the typical retirement saver is extremely difficult. It requires understanding an array of investment strategies and investment risks, and a variety of products for implementing those strategies and managing those risks. Studies indicate that the experience and stewardship offered by a financial adviser can enhance investor returns between 1.8 percent and 3.0 percent annually.[54] A little more than five years ago, the DOL itself estimated that access to financial advice reduced the cost of retirement saver "mistakes" by $15 billion per year, and that increasing access to financial advice would enable retirement savers to save billions more.[55] Successful retirement planning also requires retirement savers to understand their own mortality and morbidity risks, their current economic circumstances, their likely future economic circumstances, their retirement income needs, their tax exposure in various scenarios, and their risk tolerance, among other things. The National Conference of Insurance Legislators recognized the Fiduciary Rules' negative impact on the availability of retirement planning advice and adopted a resolution opposing the Fiduciary Rules stating that "the Rule[s] will prevent consumer access to crucial retirement education and services, ultimately harming the very people it seeks to aid."[56]

As advisers and financial institutions seek to disengage from smaller account investors, they have increased minimum account sizes, and it is expected that these minimums will rise even further. Median and average policy minimums have increased over the years for qualified variable annuity policies, starting at an average account size of $8,300 in 2011 and growing to over $10,000 in 2017.[57] Nearly half of Insured Retirement Institute members responded to a recent survey that they already have or are considering raising IRA account minimums.[58] This trend is exacerbated by the push to fee-based advisory platforms which generally have higher minimum account requirements (generally above $25,000) than the minimum account size for commission-based accounts. Depending on the minimum account size, the number of IRAs forced out of managed retirement accounts could be extremely large.[59]

---

[54] ISECTORS, LLC REPORT, FINANCIAL ADVISORS ADD VALUE 1.8% -3.3% ANNUALLY (2014), http://isectors.com/wp-content/uploads/2015/03/2014.06.30-Financial-Advisor-Value-FINAL.pdf. *See also* Ryan Rich, Colleen M. Jaconetti, Francis M. Kinniry Jr., Donald G. Bennyhoff, & Yan Zilbering, *Putting a value on your value: Quantifying Vanguard Advisor's Alpha in Canada* (2015), https://www.vanguardcanada.ca/documents/value-on-your-value-tlrv.pdf.
[55] Investment Advice —Participants and Beneficiaries, 76 Fed. Reg. 66136, 66152 (Oct. 25, 2011) (to be codified at C.F.R. pt. 2550), https://webapps.dol.gov/federalregister/PdfDisplay.aspx?DocId=25414.
[56] NAT'L CONF. OF INS. LEGISLATORS, *Resolution in Opposition to the United States Department of Labor (DOL) Fiduciary Rule, Adopted by the Life Insurance & Financial Planning Committee on July 14, 2016 and the Executive Committee on November 20, 2016,*http://ncoil.org/wp-content/uploads/2016/12/DOL-resolution-portland-11-20-16.pdf.
[57] Morningstar, Annuity Ownership by Household Income, COGENT REPORTS 2015 INVESTOR BRANDSCAPE, 2015, on file with author.
[58] Comment Letter from Davis & Harman, *supra* note 36.
[59] Milloy, *supra* note 47.



Jackson's parent company, Prudential plc, has first-hand experience with the adverse consequences of comparable regulation adopted in the UK. When the UK enacted rules to eliminate commission-based payment arrangements, they found that the rules had real and significant adverse effects on retirement savers, particularly those with lower income. The rules increased the costs and reduced the accessibility of personalized investment advice. The UK Financial Services Authority (predecessor to the current Financial Conduct Authority ("FCA") launched the Retail Distribution Review ("RDR") in 2006 which led to a number of rules that came into effect at the end of 2012. These rules were designed to make the retail investment market work better for consumers. A key provision of these rules was the elimination of commission payments from product providers to advisers and platforms (i.e., third-party payments).

The result of the RDR reforms has been a 26 percent reduction in the number of FCA registered advisers providing financial advice to retail clients of moderate means during the period leading up to and following the effective date of the new rules.[60] This reduction has resulted in an "advice gap" as advisers withdraw from serving small accounts that are no longer profitable. The advice gap means that many small account investors are now unable to get the financial advice they need.

In 2015, the FCA conducted a Financial Advice Market Review (the "Review") to assess whether the advice market in the UK was working following the RDR changes.[61] In the final report of the Review, published in March 2016, the FCA noted that while the changes did impact conflicts of interest, it created a situation where "advice is expensive and is not always cost effective for consumers, particularly those seeking help in relation to smaller amounts of money or with simpler

[60] Barclays, *Asset Management/Life Insurance UK Savings Conference 2015: What we learnt*, p 27, (June 9, 2015), https://live.barcap.com/PRC/servlets/dv.search?contentPubID=FC2145798&bcllink=decode. *See also* Association of Professional Financial Advisers, *The Advice Market Post RDR Review* (2014), http://www.apfa.net/documents/publications/APFA-report-the-advice-market-post-RDR-June-2014.pdf.
[61] HM TREASURY FINANCIAL CONDUCT AUTHORITY, FINAL REPORT, FINANCIAL ADVICE MARKET REVIEW (March 2016), https://www.fca.org.uk/publication/corporate/famr-final-report.pdf.

needs."[62] The Review has forced political and regulatory leaders in the UK to consider the advice gap as a serious issue that requires a solution.[63] The FCA identified advice as a priority in its 2016/2017 Business Plan.[64] In its regulatory impact analysis, the DOL entirely and inappropriately dismissed the significant cost to consumers from a reduction in access to advice from the Fiduciary Rules, concluding, "the UK's experience lends support of the Department's conclusion that its reforms . . . are unlikely to result in a significant diminution of advice."[65] This prediction, which was ill-conceived at the time, has been proven wrong as the Fiduciary Rules are being implemented.

Small account investors are among the very groups who most need to be encouraged to plan for retirement. These investors often need assistance in understanding their retirement needs and risk profiles. Periodic in-person meetings to update their investment plan and advice during periods of market uncertainty help to achieve this goal. A sound and responsible retirement policy intended to ameliorate the retirement crisis would support making personal advice and guaranteed income products more, not less, accessible. Retirement savers benefit from financial planning, behavioral coaching, and guidance that personal investment advice provides. Research has clearly shown that having a retirement plan improves both the amount saved and consumer confidence.[66] If only a limited number of advisers are willing to provide customized investment plans and ongoing advice to smaller retirement savers given the costs and risks associated with serving the accounts, the result could be to exacerbate the retirement crisis.

The Fiduciary Rules are reducing the type of products offered and, in some cases, increasing the cost of advice.

In response to the Fiduciary Rules, distributors are limiting products and product features for a variety of reasons, including simplification of product menus to reduce the additional costs and risks of continued fiduciary oversight, reduction of perceived conflicts of interest from different compensation and cost structures, and to ensure the ability to comply with numerous and ongoing disclosure requirements.[67] In a survey of members of the National Association of Insurance and

---

[62] *Id.* at 5. The report references a survey conducted in 2016 on behalf of the Association of Professional Financial Advisers in which 69 percent of advisers said that they had turned away potential clients in the last 12 months. The primary reason is that it was not economical to serve customers with lower amounts to invest. *Id.* at 6.
[63] Naomi Rovnick & Emma Dunkley, *FCA Proposes Reforms to Close 'Advice Gap'* FINANCIAL TIMES, (Mar. 14, 2016), https://www.ft.com/content/4324f4dc-e9c8-11e5-888e-2eadd5fbc4a4.
[64] FINANCIAL CONDUCT AUTHORITY, BUSINESS PLAN 2016/2017, https://www.fca.org.uk/publication/corporate/business-plan-2016-17.pdf .
[65] *See* DEPARTMENT OF LABOR ANALYSIS, REGULATING ADVICE MARKETS, DEFINITION OF THE TERM "FIDUCIARY" CONFLICTS OF INTEREST - RETIREMENT INVESTMENT ADVICE - REGULATORY IMPACT ANALYSIS FOR FINAL RULE AND EXEMPTIONS, §2.10, at 78 (2016), https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/conflict-of-interest-ria.pdf.
[66] Survey, Lisa Greenwald, Craig Copeland, & Jack VanDerhei, *The 2017 Retirement Confidence Survey: Many Workers Lack Retirement Confidence and Feel Stressed About Retirement Preparations*, Employee Benefit Research Institute No. 431 (Mar. 21, 2017), https://www.ebri.org/pdf/briefspdf/EBRI_IB_431_RCS.21Mar17.pdf.
[67] *See* Michael Wursthorn, *New Retirement Rule Is Delayed, but Not Its Impact*, Wall St. J. (Apr. 8, 2017); Michael Wursthorn, *A Complete List of Brokers and Their Approach to "The Fiduciary Rule,"* Wall St. J. (Feb. 6, 2017); Michael Wursthorn, *Edward Jones Shakes up Retirement Offerings Ahead of Fiduciary Rule,* Wall St. J. (Aug. 17, 2016) (Edward Jones announces it will limit mutual fund access for retirement savers in accounts that charge commissions); Steve Daniels, *Why State Farm agents are getting out of the investment game*, Crain's Chicago Business, (Sept.. 3, 2016) (State Farm directs 12,000 securities-licensed agents to no longer provide their clients with mutual funds, variable annuities and other investment products); Daisy Maxey , *New Rule Helps No-Loan Funds—But Investors Still Need to Watch for Other Fees,* Wall St. J. (Nov. 7, 2016) (Charles Schwab stops selling fund share classes with frond-end sales loads in May 2016); Jeff Benjamin, *DOL Fiduciary Rule Class-Actions Costs could Top $150M a Year,*

Financial Advisors, 46 percent of respondents reported that they had already experienced a restriction of product offerings to their clients, and another 45 percent anticipate that such restrictions are forthcoming.[68] Adviser concerns with compliance with the Fiduciary Rules mean that advisers that previously offered products from 20 mutual fund or insurance providers may now offer products from only four or five providers. Superficially, this is good for Jackson, as we are the largest manufacturer of guaranteed lifetime income products in the United States. Jackson typically makes the short list of providers whose products will be offered by advisers because of our strong track record and financial strength; however, we think the narrowing of options is bad for retirement savers and the overall vibrancy and resilience of the market for retirement products.

By aggressively discouraging commission-based arrangements, the Fiduciary Rules are also, in some cases, increasing the costs of variable annuities and other products for many retirement savers. The table below documents the potential cost difference to a retirement saver and demonstrates that a retirement saver may rationally prefer to purchase a variable annuity on a commission basis with a surrender charge, rather than on a fee basis with full liquidity.

Variable Annuity Fee Based (fully liquid) vs. Traditional Based Structure (7-year surrender schedule) Comparison				
	Fee Based Prouduct	Fee Calculation	Traditional Product*	Fee Calculation
Account Size	$100,000		$100,000	
Average Mortality, Expense & Administration Fees (annual)	0.46%**	$460	1.30%	$1,300
Annual Contract Maintence Fee (waived for Accounts > $50,000	$0	$0	$0	$0
Average Advisory Fee (annual)***	1.25%	$1,250	n/a****	$0
Total Annual Fee		$1,710		$1,300
Annual % of Account Value		1.71%		1.30%
	*B-share variable annuity with 7-year declining surrender charge schedule			
	** Carriers used to calculate average M&E&A: Prudential Premier Advisor, Nationwide Destination Architect 2.0			
	*** Average Advisory Fee (source: Investment News, "The 2014 Financial Performance Study of Advisory Firms), advisors have discretion to charge from 0.25% to 3.00% annually			
	****Commission paid by product manufacturer, is not deducted from account value at product issue			

Using the charges described above and assuming that the advisory fee is withdrawn from the account, a $100,000 initial investment held over a 10-year period of flat (0 percent) annual returns would result in an account value of $87,734 for the commission-based sale compared to an account value of $84,157 for the fee-based sale. The commission-based product has an account value $3,577 (4 percent) greater than the fee-based product. By making it harder for retirement savers to

InvestmentNews, (Feb. 9, 2017) (discussing how some firms, including Merrill Lynch, Capital One, and Commonwealth Financial Network, have already announced plans to use a streamlined [BIC Exemption] that does not include a contract or variable commission rate, making them exempt from class-action lawsuits andother firms will be rolling the dice.); Jed Horowitz & Mason Braswell, *Merrill to End Commission-Based Retirement Business on Retail Accounts*, AdvisorHUB, (Oct. 6, 2016), https://advisorhub.com/exclusive-merrill-end-commission-based-retirementbusinessretail-accounts/ (Merrill Lynch announces, in response to the fiduciary rule, that its 14,000 brokers cannot receive commissions for advice on retirement accounts and will have to shift clients who remain with the firm to fee-based advisory accounts).

[68] Blog Post, NAIFA Survey Gauges Impacts Of DOL Fiduciary Rule, National Association of Insurance and Financial Advisors, (Apr. 17, 2017), http://www.naifa.org/news-publications/naifa-blog/april-2017/naifa-survey-gauges-impacts-of-dol-fiduciary-rule.

gain access to commission-based products, the DOL is, in some cases, reducing, not increasing, the savings of retirement savers.

Retirement savers should have a true choice and a level playing field between a commission-based structure with a surrender charge period and a fee-based product structure with full liquidity – not have that choice dictated or heavily influenced by DOL regulations that make commission-based sales so onerous and risky that financial institutions and advisors choose not to offer them. The DOL should therefore make inapplicable those portions of the BICE that are currently applicable and should not make the remaining portions of the BICE applicable on January 1, 2018, as currently scheduled. All regulators, including the DOL, SEC, FINRA, and the states should work together on a solution that better balances the preservation of retirement savers' access to advice and any perceived risks to consumers from commission-based compensation arrangements.

IV. Recommendations to make or increase contributions to a retirement account should never constitute fiduciary advice subject to the Fiduciary Rules.

An adviser's recommendation to make or increase contributions to a retirement account should not be treated as a "recommendation" subject to the Rules. As noted above, providers of retirement advice add value by, among other things, encouraging more savings by their clients. Given that millions of Americans have inadequate retirement savings, the DOL should strongly encourage recommendations to increase retirement savings, not discourage them. Yet, the Fiduciary Rules are having the exact opposite effect since a portion of them became applicable on June 9, 2017.

At Jackson, we have many happy clients who purchased variable annuities years ago. These transactions were not subject to the Fiduciary Rules. For years, many of those clients who hold their variable annuity in a retirement account have regularly and periodically contributed additional amounts to their variable annuity. When the Fiduciary Rules were proposed and adopted, Jackson was concerned that advisers would cease making recommendations to contribute additional amounts to variable annuities in retirement accounts. Under the Fiduciary Rules, making such a recommendation (even on a variable annuity that was purchased years ago, before the Fiduciary Rules were even proposed) means that the adviser becomes a "fiduciary" under the Rules to the extent that the recommendation results in the adviser receiving any compensation on the additional amounts contributed. Jackson was concerned that for the same reason that many advisers are declining to service small and mid-size accounts (i.e., the costs and risks of providing the service under the Rules exceed the compensation received), they would also be unwilling to recommend additional contributions to existing non-fiduciary arrangements that would make them fiduciaries under the whole arrangement.

As we predicted, this is exactly what is happening. Between June 9, 2017, and the end of July 2017, Jackson has observed a 20 percent decline in contributions to variable annuities that were purchased in retirement accounts before June 9, 2017. The reasoning of the adviser in such situations is understandable. The logic of regulations that operate to discourage contributions to retirement savings accounts is not. The DOL should therefore amend or clarify the Rules to provide that (i) general recommendations to make or increase retirement savings, and (ii) specific recommendations to make additional contributions to investments purchased prior to the June 9, 2017, applicability date will never be deemed "recommendations" that trigger fiduciary responsibility and liability.

V. The grandfathering provisions of the Rules should be expanded and clarified.

The "grandfathering" provisions of the Rules are problematic. They have sown confusion regarding their applicability to certain retirement investment advice and transactions, particularly transactions involving products like variable annuities, which frequently involve advice relationships that last over many years.[69] Further, the existing grandfathering provisions in the Rules are fundamentally flawed and obliterate consumer choice.

Under the Rules, as described above, a consumer who is satisfied with a longstanding non-fiduciary relationship is, in most instances, thrust into a fiduciary relationship when advice is first given after the applicability date of the Rules. This creates a perverse incentive for salespersons and representatives who were not formerly deemed to be fiduciaries to refrain from communication with their clients after the applicability date (if the representative concludes that the costs and risks of being deemed a fiduciary outweigh any benefits of offering the recommendation). As reviewed immediately above, Jackson is observing a significant decrease in representatives' willingness to recommend additional contributions to retirement accounts after June 9, 2017, when such recommendations began to trigger fiduciary responsibility and liability. Jackson therefore proposes a framework that preserves consumer choice and gives consumers the option to "opt in" to a fiduciary relationship if the consumer chooses. Consumers should have a choice about how they want to engage with their adviser. If a consumer is currently engaged in a non-fiduciary relationship she wants to maintain, she should be able to maintain it. If the consumer prefers to switch to a fiduciary relationship that covers advice delivered in the future, she should be able to (and currently can) make this change of her own volition, and not be forced into this change by the DOL.

VI. The BICE should allow agreements to arbitrate all disputes.

Section II (f)(2) of the BICE provides that relief is not available if the contract required by the BICE includes a voluntary agreement by the parties to arbitrate disputes that might otherwise be pursued in class action litigation. As Secretary Acosta suggested in his June 7, 2017, testimony before the House Appropriations Sub-Committee on Labor, Health and Human Services, Education, and Related Agencies, this provision in the BICE violates the freedom of parties to craft contracts on their preferred terms.[70] In addition, this BICE provision is in tension, at least, with the policies underlying the Federal Arbitration Act, 9 U.S.C. § 1 *et seq*.

Secretary Acosta recently reaffirmed this position in the DOL's "Brief for Appellees" in *Chamber of Commerce v. U.S. Dep't of Labor*, No. 17-10238 (5th Cir. July 3, 2017). The brief argues that the BICE provision prohibiting the parties to agree to arbitrate claims that may be brought as class action litigation should be vacated calling it "...a discriminatory obstacle to arbitration that cannot be

---

[69] For example, one of the nation's largest broker dealers has sent the following message to some of its clients:

> In response to the new fiduciary rules established by the Department of Labor (DOL), [we] will no longer support qualified annuities unless they are held in custodial ownership registration. As a result, your company will need to remove our firm as broker/dealer and agent of record on contracts that have failed to move into custodial ownership before the DOL fiduciary rule goes into effect.

[70] Statement of R. Alexander Acosta: Budget Hearing Before the H. Subcomm. On Labor, Health and Human Services, Education, and Related Agencies Comm. On Appropriations, 115th Cong. (2017), (statement by R. Alexander Acosta, Secretary of Labor).

harmonized..." with the Federal Arbitration Act.[71] The brief also argues that "the [s]everance of the condition would not impair the function of the exemption or of the fiduciary rule in general ..."[72] The DOL should harmonize the position it has taken in the 5th Circuit, and the similar position taken by the Solicitor General in the U.S. Supreme Court in *National Labor Relations Board v. Murphy Oil USA, Inc.*,[73] with the language of the BICE.

VII. Conclusion

With the near-disappearance of defined-benefit pensions from the American retirement landscape, variable annuities are the only product that provides a reliable lifelong "retirement paycheck," protection of retirement savings from a wide variety of risks, and the opportunity to grow savers' resources into an adequate fund of retirement savings. For many investors, variable annuities should be considered as an integral component of their retirement plan. Variable annuities enable retirement savers to increase the amount of income they can generate from their retirement savings while lowering the risk that they will run out of money in retirement. For our country, variable annuities offer a viable, private (not government) solution to the growing retirement crisis. The greater the number of retirement savers who purchase insurance products with lifetime income guarantees, the lower the risk that our country will have to address millions of elderly Americans who do not have sufficient funds to live in retirement. Yet, variable annuities have been wrongly maligned in the process of promulgating and implementing the Fiduciary Rules -- unfairly so, and to the detriment of retirement savers. Jackson urges the DOL to consider and implement the changes to the Fiduciary Rules recommended in this letter, which will help to address the retirement savings adequacy crisis, while preserving consumer choice and protection.

Sincerely,

James R. Sopha
President

[71] Brief for Appellee at 48, Chamber of Commerce of the United States of America v. United States Department of Labor, 2017 U.S. App. LEXIS 6168 (2017) (No. 17-10238).
[72] *Id.* at 49.
[73] *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir.), *cert. granted*, 137 S.Ct. 809 (Jan. 13, 2017) (No. 16-307).