Consumer Federation of America

October 24, 2017

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, D.C. 20210

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

Ladies and Gentlemen:

We are writing on behalf of the Consumer Federation of America (CFA)[1] to address comments submitted to the Department by industry rule opponents in response to the most recent Request for Information (RFI) on the Conflict of Interest (or "fiduciary") rule and its related exemptions. In preparing this letter we reviewed comment letters submitted by the major industry trade associations opposed to the rule, including the Securities Industry and Financial Markets Association (SIFMA), the Investment Company Institute (ICI), the Financial Services Institute (FSI), the National Association of Insurance and Financial Advisors (NAIFA), the Insured Retirement Institute (IRI), and industry lobbyist Kent Mason of Davis & Harman. In each case, these commenters claim to offer "new evidence" showing that the Department's fiduciary rule is harming retirement savers by depriving them of access to advice, reducing their choice of investment products, and increasing their costs. But even a cursory review of their letters confirms that their purported "new evidence" suffers from the same fatal flaws as all of their previously provided "evidence."

- They fail to provide concrete information that can be tested for accuracy and reliability, making it impossible for the Department to substantiate their claims regarding the rule's supposedly harmful impact.
- Instead, the "evidence" these industry rule opponents provide comes primarily in the form of surveys of a select group of industry members, unaccompanied by information on either the survey questions asked or the identity and characteristics of the survey population.

[1] The Consumer Federation of America is a non-profit association of nearly 300 consumer groups that was established in 1968 to advance the consumer interest through research, advocacy, and education.

- Where commenters do provide data and assumptions that can be tested for accuracy and reliability, those data and assumptions don't comport with real world evidence of how the retirement investment advice market is responding to the rule.

In developing the economic analysis on which the rule is based, the Department followed rigorous procedures to ensure that it met its twin obligations to base its analysis on "the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation" and to "ensure the objectivity of any scientific and technological information and processes used to support the agency's regulatory actions."[2] Now the burden of proof falls on rule opponents to show why revisions to the rule are warranted, based on the same level of high-quality, independently verifiable data. In light of that fact, if rule opponents had serious and credible evidence that the rule is harming retirement savers, they would have every reason to submit it. They have not. Certainly, nothing they have offered in their most recent round of comments rebuts the Department's robust and comprehensive findings and analysis in promulgating the rule. Nor does it provide the Department sufficient data on which it can rely to revise or rescind the rule and its exemptions. As we explain in greater detail below, for the Department to rely on the flimsy and biased "evidence" provided by rule opponents to justify revisions to the rule would be arbitrary and capricious and subject the Department to legal challenge.

I. Industry rule opponents fail to provide concrete evidence to back their claims that the rule is harming retirement investors.

Each of the comments we reviewed purported to provide "new evidence" that the Department's conflict of interest rule is hurting the retirement investors it is intended to benefit. Specifically, these commenters claim large numbers of retirement investors, particularly small savers, are losing access to advice as firms raise their account minimums in response to the rule, while others are purportedly being forced into higher-cost fee accounts. According to this negative picture of the rule's effects, those who continue to receive advice through commission accounts are also being harmed, as their choice of investment products is narrowed. In making these claims, however, industry rule opponents fail to provide any concrete information that can be tested for accuracy and reliability to substantiate their claims. They typically do not, for example, identify specific firms that are making the changes they claim are pervasive, provide information on the customers that they claim are being affected, or describe how exactly the accounts in question are being revised. Instead, they prefer to speak in generalities that make it impossible to assess such claims for accuracy and reliability.

A. Industry rule opponents have failed to substantiate their claims that investors are losing access to advice as a result of the rule.

Throughout the rulemaking process, industry rule opponents have made a series of allegations to support their claim that the rule would harm, rather than help, retirement savers.

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[2] As described in Executive Orders 12866 and 13563. *See* Economic Analysis of Federal Regulations Under Executive Order 12866, January 11, 1996, http://bit.ly/2gDoYb0**;** Executive Order 13563 -- Improving Regulation and Regulatory Review, January 18, 2011, http://bit.ly/2na4Crh.

Initially, this argument was premised on the unfounded assumption that commissions would not be permitted under the rule, a claim they continued to make in the face of repeated denials by Department officials. Once the evidence that commissions were permitted was irrefutable, they argued that this was a mere technicality, since no firm can or would rely on the Best Interest Contract Exemption (BIC) in order to offer commission accounts. Now that this prediction has also been soundly rebutted, and the evidence continues to mount that a large majority of firms would continue to offer commission accounts under the rule, these groups have had to come up with a new argument to support their claim that retirement investors, and particularly small account holders, would lose access to advice as a result of the rule.

They have based that claim on the allegation that, all across the industry, firms are raising their account minimums and orphaning small accounts. As we noted in our August comment letter, many industry rule opponents have included statements in their comments that, "Minimum account balances in advisory accounts are being revised upwards and consumers' access to retirement planning services will be limited by these changes as investors with low account balances are being moved to different account types."[3] In making that claim, however:

- They do not identify which firms have revised clients' account minimums upwards, nor do they provide any other verifiable information that would permit the Department to assess how prevalent this practice is.
- For firms that are raising account minimums, they provide no information that would enable the Department to assess the terms on which firms are revising account minimums upwards, including what they are revising the minimum from and to, whether a number of the firm's accounts are affected or just retirement accounts, and how, if at all, the nature of the account is being changed in the process.
- They do not provide any information that would allow the Department to assess how many customers are being affected by such upward revisions in account minimums for retirement accounts. Nor do they provide information on firms that have taken the opposite approach, of lowering account minimums, including how many investors are benefiting from these changes.

Those making this statement also fail to make clear whether they are referring to changes in account minimums for actual advisory accounts or, as appears more likely, for brokerage accounts misleadingly characterized as "advisory" accounts. Logic suggests that, to the degree this adjustment in account minimums is occurring to any significant extent, it would be brokerage accounts, rather than advisory accounts, that would be affected. After all, true advisory accounts were already being held to a fiduciary standard prior to the rule and are less likely to face significant changes as a result of its adoption. Moreover, as we have documented in previous letters, the publicly available evidence clearly shows that advisory account minimums are decreasing markedly as technology allows advisers to offer advice more efficiently and affordably to even very small accounts.[4]

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[3] *See* Letter from Barbara Roper and Micah Hauptman, CFA, to the DOL, August 7, 2017, at FN 2, http://bit.ly/2fa6Ggy.

[4] *Id*.; Letter from Roper and Hauptman, CFA, to the DOL, April 17, 2017, http://bit.ly/2uABfCv. After our previous submissions, more firms have announced new advisory and commission-based offerings. *See, e.g*., Press Release, Voya, "Voya Financial Expands its Suite of Retail Solutions with new Voya Select Advantage Advisory IRA," August 23, 2017, http://prn.to/2yLHtAt; Michael Thrasher, *Sister Broker/Dealers Are First To Use The New Mutual-Fund-Only Platform*, WealthManagement, September 28, 2017, http://bit.ly/2hZYLA6.

As further evidence that this claim is based more on opinion than factual data, NAIFA reports that 75 percent of respondents to its member survey "have seen *or expect to see* increases in minimum account balances for the clients they serve."[5] (Emphasis added.) Even here, however, NAIFA fails to distinguish between changes that have already been made and speculation about changes that might occur. Nor does NAIFA provide the underlying information that would allow the Department to assess the objectivity of the survey questions or the survey participants, the level of knowledge of survey respondents, or the validity of the responses. Without that supporting data, the survey findings cannot be given serious weight as evidence of investor harm.

IRI purports to have uncovered evidence that small accounts are being "orphaned" as a result of the rule, losing access to advice as a result. Based on a survey of its members, IRI indicated that "a number of our distributor members reported that approximately 155,000 of their clients have already been 'orphaned,' with far more accounts expected to be impacted as implementation of the Rule proceeds."[6] As is typical of such surveys, however, the IRI survey failed to provide the underlying data that would enable the Department to assess the accuracy of this claim or the impact any such changes may have had on investors. As we have noted previously, the fact that the number of orphaned accounts may have risen in the wake of the rule tells us nothing about whether investors whose accounts have been orphaned have lost access to advice as a result.

There are at least two reasons why it doesn't automatically follow that investors whose accounts are orphaned are being harmed as a result. As several broker-dealer trade associations have pointed out, brokers provide "episodic" sales recommendations, and do not accept responsibility to monitor accounts between transactions to ensure that the investor is continuing on course. (Indeed, that is one of their primary objections to being held to a fiduciary standard.) But, if the investor wasn't being actively "advised" prior to the account's being orphaned -- as would likely be the case for a buy and hold investor with only a small amount invested -- then the investor hasn't lost access to *advice,* or otherwise been harmed, just because the account is now being held directly at the mutual fund company instead of at the brokerage firm. Indeed, the investor could see his or her costs drop as a result of the move if the broker was charging an IRA custodial fee or imposing other similar charges. Second, should the investor decide at a future date that she wants advice, there are many firms willing to advise investors with even very small accounts under a fiduciary standard, as we have documented in our previous letters.[7] Indeed, consistent with the Department's own economic analysis, there's a good chance that the investor who has previously been getting conflicted sales recommendations would get better advice and cheaper product recommendations as a result of the positive market developments attributed to the rule.

Interestingly, this "finding" by IRI prompted a mocking response from one reporter who closely follows the financial services industry. In an article in *InvestmentNews* published shortly

[5] Letter from Paul R. Dougherty, NAIFA, to the DOL, August 4, 2017, at 2, http://bit.ly/2laaL6S.
[6] Letter from Catherine J. Weatherford, IRI, to the DOL, August 7, 2017, at 8, http://bit.ly/2i0PNlQ.
[7] See Letter from Roper and Hauptman, CFA, April 17, 2017, http://bit.ly/2uABfCv; Letter from Roper and Hauptman, CFA, to the DOL, August 7, 2017, http://bit.ly/2fa6Ggy.

after the IRI "study" was released, Bruce Kelly made his skepticism regarding this claim clear.[8] He wrote: "Soon, the country will be filled with sad little brokerage accounts, desperate for a home, bereft of financial advice and lost in the shadows, according to the industry's story line. This prediction makes me think of a doe-eyed Oliver Twist looking up to a row of stern Wall Street brokers, clutching a financial plan to his chest and begging, 'Please, sir, I want some more ... financial advice.' Wall Street banks, the wirehouses, have been cutting service to smaller accounts for years to reduce costs. Where was the financial advice industry's outrage then?" Kelly asked. "And the thing is, plenty of advisers will work with those small accounts. Young reps and advisers starting out in the business would be desperate to pick up these orphans and provide them a home. And a robo-adviser like Betterment would be a logical place to park a small orphan of $5,000 to $10,000. To my knowledge, there has been no hue and cry from the public that supports the financial advice industry's position," he concluded.

Our point is not to deny the possibility that some accounts may be orphaned as a result of the rule. But industry rule opponents, including IRI, have failed to provide verifiable evidence that it is occurring on a large scale or having a harmful impact when it does. As Kelly points out, if hundreds of thousands of investors were actually losing and missing valuable services that weren't available elsewhere, we'd presumably be hearing directly from them, not the people whose business is to profit off of them. Without that additional evidence, the Department can't reasonably conclude investors are being harmed or, if they are, that the harm is sufficient to justify changes to the DOL's regulatory approach, particularly when weighed against the overwhelmingly positive effects of the rule in other areas. And, before relying on any such claims, the Department must demand that industry back their claims with solid, verifiable data so that their claims can be independently validated.

In short, before it can rely on this claim that the rule is causing investors to lose access to advice in order to justify changes to the rule, the Department would need reliable data it could use to determine how widespread the practice of raising account minimums and orphaning accounts has been, what impact it has had, and whether retirement investors generally, and small savers in particular, continue to have access to advice from a variety of sources and under a variety of business models. Moreover, even if the Department verified that a significant percentage of firms had raised their account minimums on commission accounts in response to the rule, it could only conclude that investors had lost access to *advice* as a result if it found that, contrary to their legal arguments, the firms in question were offering investment advice in the affected accounts prior to the rule's adoption. As we discuss in greater detail below, however, industry rule opponents continue to conflate arm's length commercial sales transactions with advice when it serves their purposes to do so, further undercutting the legitimacy of their arguments about investors' purported loss of access to advice.

If the Department accepts the industry groups' legal argument that brokers and insurance agents were merely engaged in arm's length commercial sales transactions prior to the rule, then any customers who lose access to their services as a result of the rule can't be deemed to have lost access to *advice*. On the contrary, if by applying a best interest standard and imposing limits on conflicts of interest, the rule succeeds in transforming these conflicted sales recommendations

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[8] Bruce Kelly, *Plenty of advisers eager to scoop up 'orphaned' accounts*, INVESTMENTNEWS, August 17, 2017, http://bit.ly/2itW0uF.

into true fiduciary advice, then millions of investors will actually *gain* access to advice as a result of the rule. Similarly, to the extent that some brokers or insurers do choose to raise their account minimums rather than serve small accounts under a best interest standard, retirement investors who transfer their accounts to one of the many fiduciary advisers willing to serve smaller accounts are also likely to enjoy benefits that far outweigh any temporary inconvenience associated with the transition. The Department cannot reasonably ignore those benefits when assessing the rule's impact on access to advice.

B. Industry rule opponents have failed to substantiate their claims that the rule is harming investors by forcing them into "higher cost" fee accounts.

The same failure to provide supporting data is evident in industry rule opponents' claim that retirement investors are being forced to shift to fee accounts and that they are paying higher costs as a result. Among those claiming to provide new evidence that this is occurring is Kent Mason, who comments "on behalf of a group of [unnamed] firm clients."[9] Instead of providing actual data that firms are shifting customers into fee accounts, Mason points to a document by industry consultant AT Kearney in which it outlines near-term strategies broker-dealers should consider in implementing the rule. Specifically, AT Kearney suggests that brokers should "consider accelerat[ing] the transition to fee-based services and advisory, and evaluat[ing] account thresholds to continue serving, for example, accounts greater than $200,000."[10] Mason cites this recommendation as if it constituted evidence that firms had chosen to adopt the recommended strategy.

However, as we have discussed in our previous comments, it is an easily verifiable fact that many firms have chosen to maintain asset-based thresholds well below that $200,000 figure. In addition, many broker-dealers have shown an ability and willingness to continue to offer commission accounts with insignificant minimums as an option under the rule. In short, while many firms may have taken AT Kearney's advice and *considered* these strategies, most have chosen not to adopt them. Instead, they have shown themselves to be both more flexible and more innovative than Mason and AT Kearney credit them with being.

To assess the claim that investors are being inappropriately shifted into fee accounts, and that they are paying high costs as a result, the Department would need to know: what firms are making the change and on what terms, what fees they are charging on the fee accounts, how investors' total costs -- including fees and underlying investment costs -- compare before and after the shift, and whether investors are receiving added services that they both want and need to justify any added costs. Commenters have failed to provide any such data.

Moreover, as we noted in our recent letter to Secretary Acosta,[11] even if the Department were to conclude that investors were being inappropriately shifted into fee accounts or forced to pay excessive fees in those accounts, that would be evidence of an enforcement failure, not a

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[9] Letter from Kent Mason, Davis and Harman, to the DOL, August 3, 2017, http://bit.ly/2yHHsM3. While Mason is not forthcoming about who his specific clients are, his firm has acknowledged previously that they represent insurance companies, mutual funds, and brokerage firms on this issue. *See* Letter from Randolph H. Hardock, Davis and Harman, to the DOL, February 9, 2011, http://bit.ly/2hZSynL.
[10] A.T.Kearney study: The $20 billion impact of the new fiduciary rule on the U.S. wealth management industry, August 2016, http://bit.ly/2op0ste.
[11] Letter from Roper and Hauptman, to Secretary Acosta, DOL, October 3, 2017, http://bit.ly/2hYZ1is.

problem with the rule itself. On the contrary, the rule's provisions requiring that firms recommend the type of account that is best for the investor and charge reasonable fees in light of services offered are specifically designed to prevent the harmful impact on investors that the rule opponents claim is occurring. The Department has all the regulatory tools it needs to prevent that harm, if it concludes that any such harm is indeed occurring. We strongly encourage the Department to investigate this allegation and take forceful enforcement action if it finds the allegation to be accurate.

C. Industry rule opponents have failed to substantiate their claim that investors are being harmed as a result of reductions in product offerings.

The industry rule opponents' claims that investors are being harmed by a reduction in choice of investment products is similarly devoid of factual support. Commenters generally rely on industry surveys to support this claim. For example, in a survey of NAIFA members from April 2017, 91 percent of respondents indicated they "have already experienced or expect to experience restrictions on product offerings to their clients."[12] As discussed above, the NAIFA findings make it impossible to distinguish between changes that have occurred and changes that its members think might occur in the future. Further, as we discuss in greater detail in the next section, none of the surveys submitted by rule opponents meet the standards of objectivity and verifiability that would enable the Department to rely on their findings.

Moreover, both NAIFA and SIFMA present their "findings" that firms appear to be making changes to their investment menus as evidence of investor harm. As we have documented at length in our earlier comment letters, however, executives from leading firms have acknowledged that decisions to cull a portion of their investment offerings represent long-overdue due diligence, are focused on which investments can best compete on cost and quality under a best interest standard, and have improved the quality of product offerings without inappropriately limiting the range of options they have available to recommend. The industry rule opponents, including NAIFA and SIFMA, fail to provide the underlying data that would enable the Department to assess whether the changes in product menus represent investor harm, as rule opponents allege, or beneficial changes of the type the rule was intended to bring about.

Perhaps no better evidence of the rule's beneficial effect on investment offerings exists than the CoreData survey, ironically cited by Mason and others as evidence of the rule's harm.[13] According to CoreData, 60 percent of "advisors" responding to the survey said that they will decrease allocations to non-traded REITs in response to the rule. But true advisers subject to a fiduciary duty don't typically sell non-traded REITs because, as we described in our March and April comments, these investments are rife with conflicts, are highly illiquid, and seriously underperform traded REITs.[14] It is only by paying generous compensation to sellers that they have in the past managed to thrive. The fact that so many of those surveyed by CoreData were

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[12] Letter from Paul R. Dougherty, NAIFA, to the DOL, August 4, 2017, at 2, http://bit.ly/2laaL6S.

[13] Press Release, Core Data research, "Fiduciary rule to leave US mass-market investors stranded, study shows," November 2016, http://bit.ly/2op4cLa.

[14] *See* Letter from Roper and Hauptman, CFA, to the DOL, March 17, 2017 at 12, (citing Brian Henderson, Joshua Mallett, and Craig McCann, Securities Litigation and Consulting Group, Inc., "An Empirical Analysis of Non-Traded REITs," 2015, http://bit.ly/2lHE0tl); Letter from Roper and Hauptman, CFA to the DOL, April 17, 2017, at 23-24 (citing Benjamin P. Edwards, "Conflicts & Capital Allocation," Ohio State Law Journal, Vol. 77, 2017, Forthcoming, http://bit.ly/2nlbP8v).

selling this product prior to the rule is a tell-tale sign that the survey respondents were not true advisers but instead broker-dealers who call themselves “advisors” in order to push the sale of investments that pay them the highest commissions. If, as the survey suggests, these brokers are now dropping the sale of an investment that has been responsible for untold investor losses, that should be viewed as evidence that the rule’s best interest standard and restriction on conflicts is working as intended to benefit investors.

The Department cannot reasonably rely on the skimpy and inconclusive information provided to conclude that retirement investors are being harmed through a reduction in choice of investment products and that changes to the rule are justified as a result. To do so, it would need concrete evidence regarding a broad cross-section of firms showing: whether and how firms are changing their product menus in response to the rule; whether, as a result of those changes, the quality of investment offerings firms have available to recommend has improved or declined; and whether the resulting product menus include a robust array of offerings supporting compliance with a best interest standard. To the degree that some temporary limits in offerings may have resulted from the need to change harmful and conflicted sales compensation, the Department should also include in its assessment the remarkable innovations firms have already developed, or can soon make available, to support implementation of the rule.

Given the complete lack of credible, verifiable, quantitative data to back up industry rule opponents’ claims regarding the rule’s harmful impact, the Department cannot reasonably rely on these comments to justify revisions to the rule. In the absence of verifiable evidence, for example, the Department cannot simply point to the fact that it received comments to this effect to justify changing the rule. To do so would be arbitrary and capricious and subject the Department to legal challenge

II. Surveys and other “studies” submitted by industry rule opponents fail to meet basic standards of objectivity and transparency necessary to support reliance on their findings.

The industry trade groups whose letters we reviewed are well positioned to provide the kind of concrete data necessary to justify changes to the rule, if that data exists. Their members make up the vast bulk of the population of financial firms and professionals affected by the rule. The fact that these groups have chosen not to provide any such data to support their claims regarding the rule’s harmful impact strongly suggests that the evidence does not exist and that their claims are unfounded. To distract from this shortage of credible, verifiable data to support their claims, they have chosen to submit industry surveys as if their findings constituted reliable evidence regarding how firms are implementing the rule. This section of our letter describes surveys provided by SIFMA, FSI, NAIFA, and IRI and explains why none of them meet basic standards that would allow the Department to independently assess their conclusions.

As noted above, the Department must ensure that any information it relies on to assess the rule’s impact is objective. As such, it is of paramount importance that the Department receives the information it needs to assess the reliability of study findings. In the case of surveys, that means the Department must receive information regarding identity and business models of survey participants, including how they were selected and how well they understand the rule’s requirements. The Department must be able to review both the overall survey methodology and the actual survey questions asked, as well as the raw data on how survey respondents answered specific questions. Only then can the Department verify their findings, regarding how they intend to comply with the rule, for example, against actual practices. None of the surveys submitted to the Department by these groups meet those basic standards of objectivity and reliability.

In this sense, these most recent "studies" are entirely consistent with previously submitted "studies." As we have noted before, and the Department has generally concurred, what the industry groups submit as studies are really just advocacy pieces designed to advance their goal of rendering the Department's fiduciary rule toothless.[15] As a result, the Department cannot reasonably rely on their unsubstantiated "findings" as any more reliable than any other opinion expressed by commenters in support of the rule. To the degree that their findings conflict with actual verifiable evidence, those findings must be rejected outright. If the Department were to rely on these biased and opaque findings to justify revisions to the rule, that would be arbitrary and capricious and subject the Department to legal challenge.

A. *SIFMA-Deloitte Study and FSI-Oxford Economics Study repeat flawed approach that led the Department to question the findings of previous studies.*

In an effort to create the appearance that credible and independent third parties have provided economic analysis that contradicts the Department's Regulatory Impact Analysis (RIA), SIFMA "engaged" Deloitte to "facilitate a study" on the operational impacts of the rule.[16] However, the report makes clear that Deloitte's role was extremely limited and did not include generating the data on which the study is based or verifying the validity of the findings.[17] On the first page following the Table of Contents, for example, Deloitte states, "The findings presented are based on the analysis of information and data provided to Deloitte. Deloitte has analyzed, aggregated and summarized the information provided, but was not asked to and did not independently verify, validate or audit the information provided during the course of the engagement." Deloitte reiterates that statement in a footnote on page 5.

The study fails to clearly describe either the methodology that was used or the assumptions that were made to reach the report's conclusions. Most importantly, SIFMA failed

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[15] *See, e.g.*, Letter from Roper and Hauptman, to the DOL, August 7, 2017, "More broadly, as we have discussed at length in previous comments, the studies that industry rule opponents have submitted to challenge the Department's economic analysis do not withstand close scrutiny. Better viewed as advocacy pieces than as economic analysis, these studies have some common characteristics: they misrepresent market data that is publicly available; they make unverifiable claims based on proprietary data that they refuse to make publicly available; and they engage in speculation about the rule's effects without basis in logic or fact. In this way, they are akin to earlier industry studies that based their conclusions on the assumption that the rule would prohibit commissions despite repeated assurances from Department officials that that was not the case. Studies that share these characteristics cannot reasonably be relied on as presenting a factual assessment of how the market is functioning or developing."

[16] Letter from Lisa Bleier, SIFMA, to the DOL, August 9, 2017, Appendix 1 (SIFMA-Deloitte, The DOL Fiduciary Rule: A study on how financial institutions have responded and the resulting impacts on retirement investors), http://bit.ly/2yJHYus.

[17] SIFMA adopted the same approach in their July 2015 comment, in which SIFMA stated, "The findings represent the views expressed by the SIFMA Working Group as communicated to Deloitte through facilitated discussions and surveys. Deloitte has aggregated and summarized these views, but was not asked to and did not independently verify, validate or audit the information presented by the SIFMA Working Group." Letter from Kenneth E. Bentsen, SIFMA, to the DOL, July 20, 2015, http://bit.ly/2i0eBut.

to make the underlying data available to independent parties, including the Department, academics, market analysts, or the general public, so that the conclusions they reached could be scrutinized and tested.

Moreover, this “study’s” “findings” were based on interviews with just 21 of the hundreds of SIFMA member firms. The study provides no data about who these firms are, how they were chosen, or whether they are representative of the market. Nor are we told which individuals at the firms were interviewed and how knowledgeable they are regarding the rule. No survey document is included showing precisely what questions were asked. Nor has SIFMA made available raw data on the answers that were given, though providing the data should be quite manageable given the very small sample size. When presented with SIFMA’s similarly compiled July 2015 “study,” the Department expressed these same concerns and asked for more meaningful information that would allow the Department to review the findings and underlying data and methodology.

The Department described the request and the reasons behind its request for additional information in its RIA. It states, “In an August 26, 2015, letter to Kenneth E. Bentsen, Jr., SIFMA President and CEO, the Department requested supplemental information from SIFMA regarding the survey. Specifically, the Department asked for the following information: (1) the identities of the 18 SIFMA members that participated in the survey, or a characterization of how closely these firms generally represent or differ from the industry at large; (2) a description of the methodology used to select the firms for participation in the survey and any other information that might assist in assessing the generalizability of the survey findings; (3) any scripts, questionnaires, and/or survey instruments used to illicit [sic] response from the survey participants; (4) raw survey data in csv format, or in the absence of such data, descriptive statistics, including means and ranges by firm size category for each question posed to respondents.”[18]

The RIA goes on to describe the far from satisfactory response it received to its request. It states, “Mr. Bentsen responded to the Department in a letter dated September 24, 2015. With respect to the first request, Mr. Bentsen stated that the survey participants could not be identified, because they required anonymity as a precondition to participating in the survey. He did not characterize the firms other than to restate the report’s observations that the firms represent a diverse business mix, and that the large- and medium-sized firms that completed the survey are representative of the firms in their respective categories. With respect to the second request, Mr. Bentsen stated that SIFMA requested the working group members to complete the survey, and that 18 of the 40 SIFMA member firms responded. In response to the Department’s request to receive the survey instrument, SIFMA provided a two page document that set forth the purpose and assumptions of the survey, target profiles for the survey, and key cost components. The document stated that the purpose of the survey was ‘to obtain a high-level firm cost estimate of (1) the total dollar amount it would cost your firm to build and implement the current DOL Proposal, and (2) the total dollar amount it would cost for your firm to maintain the current DOL Proposal on a yearly basis.’ The document also said that ‘[r]esults are based on respondents’ best

[18] DOL, Regulating Advice Markets, Definition of the Term “Fiduciary,” Conflicts of Interest - Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions, April 2016, at 207-208, http://bit.ly/2mT9Gfq.

estimates based on current understanding of the proposed rule's requirements,' and cautioned that the 'results should not be relied upon or used for purposes of budgeting and planning.' Mr. Bentsen stated that SIFMA could not provide raw survey data beyond what was provided in the report due to SIFMA's agreement with its members that completed the survey. He also said the survey enabled, but did not require, participants to submit separate cost estimates in categories, and that some, but not all, participants provided more granular cost estimates. He said SIFMA could not provide granular detail on survey responses other than what is outlined in the report without risking revealing the identity of survey respondents."[19]

In yet another industry survey that replicates its past failures, FSI engaged Oxford Economics to conduct a "study" of the economic consequences of the rule, focusing on the perspective of FSI members.[20] The survey report states that Oxford Economics interviewed "leading executives" in the independent financial advisor community.[21] Like other industry surveys discussed here, the report doesn't provide any of its underlying data or methodology. Among other things, it fails to describe:

- What member firms were interviewed, why it chose to interview those firms, and the extent to which they are or are not representative of the independent broker-dealer community;
- Who the "leading executives" from those member firms are who were interviewed and why they were selected to be interviewed;
- What questions were asked and how they were phrased; and
- What answers were provided.

Absent that information, there's simply no way to assess the validity of the findings. It is impossible to determine, for example, whether survey respondents were specifically selected to present the most negative view of the rule possible or whether the interviewer primed the participants to embellish their estimates. We do know that survey respondents were assured their identities and their answers would be confidential, so no one, including the Department, could check to determine if their answers accurately reflected actual practices. According to the FSI, "Discussions were wide ranging, including both prepared questions and an open-ended invitation to provide any additional information. The interviews were documented but not recorded; however, anonymity was a precondition of those interviewed."[22]

As with the SIFMA study, only a small handful of member firms participated in the study. According to the survey report, "All FSI firms were invited to participate; 14 ultimately did so. One of these 14 was not able to provide detailed cost breakouts, only total start-up and recurring costs...leaving 13 firms in our survey (five small, five medium, and three large)." Moreover, although the experience of independent contractors is particularly relevant under the independent broker-dealer business model, Oxford Economics apparently interviewed only "leading executives" from 10 firms as part of its follow-up interviews. No explanation is provided for why Oxford conducted follow-up interviews with 10 firms' executives when 14

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[19] *Id*.
[20] Letter from David T. Bellaire, to the DOL, August 7, 2017, Appendix 2, http://bit.ly/2gyqGXl.
[21] FSI has also claimed in court that its members are not advice providers but rather merely engaging in arm's length commercial sales transactions.
[22] Letter from David T. Bellaire, to the DOL, August 7, 2017, Appendix 2, at 34, http://bit.ly/2gyqGXl.

firms participated in the survey. Ultimately, the extremely small and potentially skewed survey sample raises serious questions about whether the findings are even remotely representative of the effect of the rule on either independent broker-dealers or the broader market. Despite these limitations, Oxford uses this small subset of firms to extrapolate costs for the entire independent broker-dealer market. This is simply indefensible.

Just as the DOL raised concerns with SIFMA-Deloitte's questionable survey in 2015, the Department also raised concerns with the 2015 FSI-Oxford Economics survey and asked for more meaningful information that would allow it to review the findings and underlying data and methodology. As described in the Regulatory Impact Analysis, the Department issued an essentially identical data request to FSI Executive Vice President David T. Bellaire that it had sent to SIFMA's Bentsen, and got an only slightly more satisfactory response. The RIA states that, "Mr. Bellaire responded to the Department in a letter dated September 24, 2015. With respect to the first question, he stated that the cost estimates were derived entirely from the email survey, and that the interviews informed the email survey because the categories were hashed out through back-and-forth discussions. Mr. Bellaire did not identify the survey participants. He characterized the participants as representing a cross-section of FSI's member independent financial services firms. Mr. Bellaire provided the initial email survey and the basic script that organized the interviews with financial institutions to the Department. He did not provide raw survey data but stated that the report included the overall mean and median for each cost category and the average total costs by firm size and that the email survey split out costs by business process required to comply with the proposal, not by provision of the rule."[23]

In its RIA, the Department specifically referenced the concerns that we had previously raised in our comment letters about the SIFMA and FSI reports. The Department then stated, **"The Department largely shares the commenters' concerns about both the SIFMA and FSI reports. These data are problematic due to small sample sizes, selection issues, lack of peer review, lack of independent verification, and the reports' omission of details about sample composition, survey design, and data collection. All of these factors cast doubt on the accuracy and reliability of these data.** (The Department notes that the data from the SIFMA comment letter to the SEC that were used in estimating the costs associated with the 2015 Proposal suffer from the same issues.) Moreover, the reports do not appear to account for the prospect of market adjustments that will favor business models and firms that achieve compliance at lower cost. The Department has particular concerns about the cost estimates provided for small firms. The SIFMA Working Group chose to exclude small firms from their report of total costs due to concerns about how representative the small firms in their sample were. While FSI did not express similar concerns, the same issues seem likely to be present. Small firms are numerous and very diverse, and it seems particularly unlikely that the three firms that responded to FSI's survey that were categorized as small could be representative of the small firm population as a whole."[24] (bolded for emphasis)

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[23] DOL, Regulating Advice Markets, Definition of the Term "Fiduciary," Conflicts of Interest - Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions, April 2016, at 208-209, http://bit.ly/2mT9Gfq.
[24] *Id*.

It is disappointing that SIFMA and FSI, which based on these previous exchanges must have understood the Department's inability to make extensive use of such limited and questionable data, have chosen to replicate their approach in these "studies." They seem to take for granted that the Department will be less rigorous in examining the data this time around. The Department must not fulfill these cynical expectations. Instead, we expect the Department to adopt the same level of rigor in analyzing SIFMA's and FSI's latest studies as it has in the past, including requesting the underlying data that supports their findings. Based on SIFMA's obfuscation in response to previous requests, however, and FSI's only slightly more forthcoming response, we expect a similar lack of cooperation this time around. Assuming SIFMA and FSI do not provide further data verifying their claims, the Department must disregard these "studies" as nothing more than advocacy pieces. Absent contradictory data, the Department should further assume that the "studies" were designed to highlight the views of those SIFMA and FSI members who are most antagonistic to the rule and most supportive of the trade associations' efforts to weaken the rule.

IRI and NAIFA also conducted surveys purporting to be representative samplings of their members views and practices relating to the rule. Similar to the other trade associations, neither group provided underlying data to substantiate their claims that the survey populations are representative of the groups' membership. It is impossible to tell from either survey, for example, how knowledgeable the respondents were regarding the rule's requirements or their firm's plans for implementation, the extent to which their views about the rule's impact were based on decisions firms had already made about how to implement the rule or speculation about steps they might take. (NAIFA frames its "findings" as reflecting changes respondents "have already experienced or expect to experience" or "have seen or expect to see.") Nor did these groups provide the survey questions or the raw data on survey responses that would allow the Department to verify their findings or distinguish between facts and speculation.

B. ICI continues to submit estimates of investor harm based on assumptions it knows to be false, ignores beneficial changes brought about by its member firms.

ICI's fund company members have been leaders in developing the innovations -- most notably mutual fund "clean shares" -- that can serve as the foundation of a broker-dealer business model that dramatically reduces harmful conflicts while preserving investors' ability to receive transaction-based recommendations paid for through commissions. Ironically, CFA and Morningstar have spent more time touting the benefits of clean shares than ICI has.
Instead of describing the beneficial effects of these innovations and how they can be used to ease compliance with the rule, ICI relies on a six-month-old *Wall Street Journal* article for evidence of how firms are responding to the rule. While the article claims to be "A Complete List of Brokers and Their Approach to the Fiduciary Rule," it provides on average a three sentence explanation of what just seven broker-dealers are doing.[25] The clear implication is that ICI is more interested in advancing its advocacy agenda than in providing useful evidence regarding how firms, including ICI's own members, are adapting to the rule.

This inference receives further support from the fact that ICI continues to offer "analysis" of the rule's harmful impact based on assumptions it knows to be false. Most prominently, it

[25] Michael Wursthorn, *A Complete List of Brokers and Their Approach to the Fiduciary Rule*, WALL STREET JOURNAL, February 6, 2017, http://on.wsj.com/2xZTUti.

continues to claim, "If implemented in its current form, and without accompanying changes to the retail market, the current fiduciary rulemaking will bring an estimated $109 billion in financial harm to retirement savers, according to ICI analysis."[26] ICI first rolled out this $109 billion figure in 2015.[27] As we discussed in our September 2015 comment,[28] that figure didn't reflect market realities then, and it certainly doesn't reflect the positive developments in the market since that time.

In analyzing the ICI estimate, we stated, "For example, ICI claims that fee-based accounts won't be available to investors with under $100,000 and as a result, 'this segment will get no advice at all.' First, this claim assumes that not one company will continue to charge transaction-based compensation and use the BIC exemption. While this is a popular industry talking point, it is not one that ICI supports with any data. Second, the claim assumes that not one company will provide advice pursuant to non-transaction-based compensation – including fee-based, hourly-based, or by engagement compensation – to retirement savers with under $100,000 in assets. ICI offers no explanation for its assumption that $100,000 is the magical cut-off for the availability of advice, nor for its assumption that every firm, regardless of its unique business model, will coincidentally make the same economic determination not to provide advice for those consumers with under $100,000 to invest. This is simply not logical. It is also belied by the facts. After all, there are many fee-based accounts that are available currently for well under $100,000, including one that is administered by one of ICI's largest members, Vanguard. In short, to believe ICI's claims, one has to believe their assumptions that everyone who is providing transaction-based advice will suddenly stop providing transaction-based advice to retirement investors, all of the firms already providing non-transaction based advice to the under $100,000 market will mysteriously stop providing non-transaction based advice, and no one will fill their shoes by providing either transaction-based or non-transaction based advice. These predictions can't be supported, are not credible, and are belied by existing market conditions. The Department should not accept them."[29]

The Department reached a similar conclusion, as did the outside consultant brought in by the Department to review comments related to its regulatory impact analysis. The RIA states, "The Department agrees with AACG's conclusions that 'ICI's estimates of the costs to investors of having to pay more for and/or losing financial advice are based on unsupported assumptions that are contradicted by information provided by other commenters."[30] Since that time, another of ICI's largest members, Schwab, has offered a fee-based advisory service for accounts of just $25,000. Most brokerage firms have announced that they plan to offer commission accounts under the rule in reliance on the BIC, many with account minimums well below the $100,000

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[26] Letter from Dorothy M. Donohue and David M. Abbey, ICI, to the SEC, August 7, 2017, at 4, http://bit.ly/2y1lzKA (included in the appendix of ICI's August 7, 2017 letter to the DOL); *See also* Letter from Donohue and Abbey, ICI, to the DOL, July 21, 2017, http://bit.ly/2lddcFQ.
[27] Letter from Brian Reid and David W. Blass, ICI, to the DOL, July 21, 2015, at 29-30, http://bit.ly/2p5qLrO; Statement of Sean Collins, ICI, to the DOL, Department of Labor Hearing: Proposed Fiduciary Rules—Regulatory Impact Analysis, August 11, 2015, http://bit.ly/2yJpKcs.
[28] Letter from Roper and Hauptman, CFA, to the DOL, August 24, 2015, http://bit.ly/2nK64ge.
[29] *Id*. at 31-32.
[30] DOL, Regulating Advice Markets, Definition of the Term "Fiduciary," Conflicts of Interest - Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions, April 2016, at 166, http://bit.ly/2mT9Gfq.

level arbitrarily chosen by ICI. And evidence too extensive to catalog here has made clear that every assumption behind ICI's estimate is categorically false. And yet, ICI continues to present those estimates as valid. Not only can the Department not reasonably rely on an estimate of harm that is entirely without legitimate foundation, it must consider this evidence of ICI's willingness to present information as valid that is verifiably false in weighing all other information presented by ICI.

In sum, the Department cannot rely on any of this or other unreliable "new evidence" that rule opponents have offered in seeking to undermine the fiduciary rule and exemptions. To do so would be arbitrary and capricious and expose the Department to legal challenge.

III. Industry groups deceptively equate sales and advice.

In claiming that the rule will deprive investors of access to advice, commenters continue to conflate arm's length commercial sales transactions with bona-fide advice. They do so despite insisting in court that these are entirely distinct and distinguishable services. Leading the charge in this endeavor is SIFMA. While SIFMA repeatedly has claimed to the 5th Circuit Court of Appeals that a bright-line distinction between "sales" and "advice" exists in the retirement investment market,[31] and that its members are not true advice providers but rather more like car dealers who merely sell products,[32] SIFMA has adopted a contrary position when interacting with the Department. As part of its most recent comment, SIFMA submitted a "study" that purports to show that the rule will have adverse impacts on "[a]ccess to investment advice" and "[c]osts of investment advice and products."[33] In the study, SIFMA describes the member firms who participated in the study as those, "whose businesses include providing individual investors with financial advice and related services." Nowhere in the study does SIFMA suggest that their member firms are engaged in providing arm's length commercial sales transactions, as it is claiming before the 5th Circuit.

Moreover, the SIFMA study consistently characterizes the services that brokers offer as "investment advice" and "brokerage advice." The study's primary findings state, for example, "Access to brokerage advice services has been eliminated or limited…" and "The shift of retirement assets to fee-based or advisory programs has accelerated as the result of the elimination or limitation of brokerage advice services."[34] In fact, the term "advice" appears 31 times in the text of the study. The phrase "sales recommendation" does not appear at all. SIFMA also repeatedly refers to brokers as "financial advisors." Only in a footnote does it clarify that it is using that term to encompass the people they have characterized to the 5th Circuit as mere salespeople engaging in arm's length sales transactions.[35] In fact, SIFMA uses the term "advisor"

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[31] *See also* SIFMA opening appellate brief ("The DOL seeks to…erase universally recognized distinctions between salespeople and fiduciary advisers…")
[32] *Id*. ("A broker, insurance agent, or other financial-sales professional may make "individualized solicitations much the same way a car dealer solicits particularized interest in its inventory.")
[33] Letter from Lisa Bleier, SIFMA, to the DOL, August 9, 2017, Appendix 1, http://bit.ly/2yJHYus.
[34] We dispute the veracity of these claims. We offer these quotes only as evidence of how SIFMA characterizes its members' services.
[35] FN 2 in the report states, "This study uses the term "advisor" to mean individuals registered with broker-dealers or dually registered broker-dealers/registered investment advisors, maintaining the securities licenses to conduct activities they engage in (e.g., Series 6, 7, 63, 65)."

19 times; it never refers to these "advisors" as salespeople, sellers, or registered representatives, and never describes them as engaged in activity "whose essence is sales" that is no different from other commercial sales relationships.

The characterization by SIFMA of brokerage services in this study is consistent with their members' marketing materials[36] and SIFMA's previous comment letters to the DOL that make clear advice, not product sales, is the essential service their members are offering. As such, these characterizations reinforce the DOL's reasonable finding that, "sales and advice go hand in hand" in the retirement investment advice market.[37] Accordingly, the DOL's decision to apply the fiduciary duty to sales recommendations was well-reasoned and entirely appropriate.

Other industry lobbyists engage in similar tactics. For example, when arguing that no fiduciary duty should apply, industry lobbyist Kent Mason goes to great lengths to characterize the services financial professionals provide as anything but "investment advice."[38] He refers, for example, to providing "casual suggestions...that are not intended to be relied upon as advice," "investment assistance," "helpful information," "helpful investment education," and "normal and informative commercial discussions." Only when raising the false specter of investors' losing access to these services does Mason describe these services as investment advice. To further his case, Mason then describes a number of benefits that "advisors" provide, and distinguishes between "advised" vs. "non-advised" individuals, in order to conclude that the rule will cause "lack of access to investment advice," that investors will "lose access to an advisor," and that "this loss will be devastating for low and middle-income individuals with small retirement accounts who are in need of financial advice." Look behind Mason's wordplay, however, and it should be clear that if financial professionals are not providing bona fide advice, if they are merely providing suggestions that are not intended to be relied on as advice, then investors who lose access to their services are not losing access to advice.

Similarly, in reporting on its member survey, NAIFA, the trade association whose acronym includes "Financial Advisors" in its title, states that "nearly 90% believe consumers will pay more for professional advice services."[39] This despite the fact that NAIFA is among the parties claiming in court that its members are professional salespeople, not professional advisors. In the only concrete example NAIFA offers that investors will lose access to advice, it refers to the decision by one of its members to no longer allow its 2,708 agents to sell mutual funds, variable annuities and other investment products directly to their customers out of concern that it could "trigger onerous compliance obligations under the Rule/PTEs." This appears to refer to State Farm, which continues to offer its investment products for purchase on the company website, but doesn't allow its sales agents to recommend them, ostensibly because the company realizes its products and compensation practices would fail to meet the protective conditions of the rule.

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[36] *See* Micah Hauptman and Barbara Roper, Financial Advisor or Investment Salesperson? Brokers and Insurers Want to Have it Both Ways, Consumer Federation of America, January 18, 2017 http://bit.ly/2jKUbFD.
[37] DOL, Regulating Advice Markets, Definition of the Term "Fiduciary," Conflicts of Interest - Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions, April 2016, at 63, http://bit.ly/2mT9Gfq.
[38] Letter from Kent Mason, Davis and Harman, to the DOL, August 3, 2017, http://bit.ly/2yHHsM3.
[39] Letter from Paul R. Dougherty, NAIFA, to the DOL, August 4, 2017, http://bit.ly/2laaL6S.

According to NAIFA, this means those agents "will no longer be able to provide personalized retirement investment advice to their clients." But these are precisely the sort of services that NAIFA has argued in court are nothing more than arm's length commercial sales transactions. If NAIFA's legal argument is to be believed, the firm's agents never offered personalized investment advice, and the firm's customers can't have lost access to something they never received. Deprived of a commission-compensated salesforce to push their sale, State Farm's investment products will be left to compete on their own merits against clearly superior options offered by other firms that make their products available to self-directed investors. This is not evidence of a problem with the rule, rather this is a sign the rule is serving its intended function.

In a related argument, ICI states that the rule is "severely reducing exchanges of information currently provided at no cost to millions of retirement savers through mutual call centers, walk-in centers, and websites."[40] ICI never describes what these "exchanges of information" consist of. It is therefore impossible to assess whether they would actually constitute fiduciary investment advice subject to the rule's requirements. Moreover, within the span of four paragraphs,[41] ICI describes the services financial professionals provide in a variety of ways, ranging from "exchanges of information" to "guidance" to "holistic investment advice and financial planning," reinforcing our view that ICI has blurred the distinction not only between sales recommendations and advice, but between advice and other information that clearly falls outside the rule's reach. The claim that the services in question are provided "at no cost" is particularly suspect. If these "exchanges of information" are truly provided "at no cost," meaning the providers are not charging a "fee, direct or indirect," these market participants would not trigger fiduciary status under ERISA or the Code. If, on the other hand, they are receiving direct or indirect fees, claiming the services are provided "at no cost" is highly misleading. Given the lack of supporting data and the inconsistency of the claim, the Department cannot reasonably rely on this unsubstantiated claim as providing credible evidence of investor harm.

If, as has been suggested, the Department is contemplating providing a carve-out from the rule for sales recommendations, it cannot disregard the stark contrast between how market participants and their trade associations and lobbyists continue to characterize their services to the Department and how they portray themselves to the investing public. Any such seller's carve-out would have to be so restricted that it would apply only to transactions that truly are arm's length commercial sales transactions, and that are clearly characterized as such, by sellers who are clearly identified as sellers and not "financial advisors." As we have discussed at greater length in previous comment letters, we are skeptical that a clear distinction between advisers and sellers could be created that would be readily understood by financially unsophisticated investors most at risk of relying on conflicted sales recommendations as if they constituted best interest advice. Nor would industry groups be likely to embrace a standard that required them to clearly portray themselves to customers in the same way that they describe themselves in court. If the Department were to adopt a seller's exemption that allowed this deception to continue, it should expect to be challenged in court.

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[40] Letter from Dorothy M. Donohue and David M. Abbey, ICI, to the DOL, August 7, 2017, at 2, 29, B-4, http://bit.ly/2y1lzKA.
[41] *Id*. at 2-3.

Conclusion

In light of the open and inclusive process the Department conducted in developing the rule and the rigorous analysis on which it is based, the burden of proof is on rule opponents to justify revisions to the rule. They have not met their burden. Instead of providing compelling, verifiable evidence to rebut the Department's findings and analysis in promulgating the rule, they have simply rewarmed their tired talking points predicting disastrous consequences for investors if financial firms are held to a fiduciary standard. In assessing these claims, the Department must ask itself why the industry has not provided real data that could be independently assessed for accuracy and reliability. The only logical answer is that no such evidence exists, forcing them to rely on opaque opinion surveys, rather than verifiable facts, to make their case. The Department has applied an appropriately high level of independent rigor in assessing such submissions thus far in the regulatory process, including requiring groups making such submissions to provide the data behind the conclusions and subjecting the studies to independent, third-party analysis. We expect the Department to continue to set a high standard for evaluating such submissions going forward. To do otherwise would be arbitrary and capricious and subject the Department to legal challenge.

Respectfully submitted,

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