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Via Electronic Mail to e-ORI@dol.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Fiduciary Rule Examination
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Reconsideration of DOL Regulation Defining the Term "Fiduciary" and Related Prohibited Transaction Exemptions (RIN 1210-AB79)

Ladies and Gentlemen:

PFS Investments Inc. ("PFSI" or "we"), a registered broker-dealer and an indirect wholly owned subsidiary of Primerica, Inc. ("Primerica"), appreciates the opportunity to comment on the questions raised in the President's Memorandum of February 3, 2017[1] directing that the U.S. Department of Labor ("Department") examine and reconsider its regulation defining the term "fiduciary," and the related prohibited transaction exemptions (the "Rule").

Since it became final, there has been ample new evidence that the Rule is impelling consequential structural changes that will limit access to services, products, and information needed for Americans to save for retirement in Individual Retirement Accounts ("IRAs"). With the experience of a year's intensive efforts to comply, we are convinced that the Rule will impede the ability of middle-income families to save and invest for retirement. **Imposition of the Rule's key components—the "Impartial Conduct Standards"-- on June 9, 2017 in accordance with the Final Rule Extending the Applicability Date[2] (the "Extension")** ***will have the same detrimental effect*****.** To prevent this harm, the Department should

[1] Memorandum of February 3, 2017 for the Secretary of Labor re: Fiduciary Duty Rule, 82 Fed. Reg. 9675.
[2] Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice; Best Interest Contract Exemption (Prohibited Transaction Exemption 2016–01); Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Prohibited Transaction Exemption 2016–02); Prohibited Transaction Exemptions 75–1, 77–4, 80–83, 83–1, 84–24 and 86– 128,; RIN 1210-AB79 Final rule; extension of applicability date, 82 Fed. Reg. 16,902.

rescind the Rule on or before June 9, 2017. In the alternative, we urge the Department to delay the applicability date of the Rule and *all* of its conditions until January 1, 2018. It is critical that a thoughtful analysis of the issues raised by the President's Memorandum occurs *before* any aspect of the Rule becomes applicable. We believe that to do anything less is to frustrate the Administration's intent to protect middle-income families from the effects of overregulation.

Primerica is a leading distributor of basic savings and investment products to middle-income households throughout the United States.[3] Our business model allows our representatives to accept the smaller-sized transactions typical of middle-income consumers and to provide clients with personal services that ordinarily would be out of reach to middle-income investors with smaller account balances. Our experience confirms that individuals with access to a financial representative accumulate greater and more balanced retirement assets than those without, a fact that is supported by numerous studies and by the Department itself.[4] We have spent many months and resources working to evolve compliant solutions to the Rule that would preserve our ability to serve these American households. Because of the Rule's many deficiencies, including its overreach, its lack of a sellers' type exception for IRAs as retail customer accounts, its subjective standards paired with strict liability, its reliance on the plaintiffs' trial bar as its primary enforcement mechanism, and its restrictions on providing investment education, we have determined that the necessary structural changes required under the Rule for broker-dealers will make it more difficult for representatives, including ours, to help and encourage families to save and invest for retirement in IRAs. Because of the concerns raised in the President's Memorandum, our desire to continue to provide optimal choice in service models to middle-income savers and uncertainty regarding the Rule and its implementation throughout the financial services industry, we have not yet put these changes into effect.

The Rule would burden the financial services industry with over 1,000 pages of new indiscernible regulations. Make no mistake; the Rule is the "Dodd-Frank" of retirement savings, an overwrought intrusion by government into every aspect of the provision of advice and assistance to investors. Disingenuously politicized by the former Administration as a "best interest standard," the Rule prioritizes control of the financial services industry and the empowerment of the Labor Department over ensuring that American households have access to mainstream investment products and sound advice. If allowed to become effective, the regulatory scheme will hinder the ability of middle income families to secure a better and brighter financial future for themselves and their children.

The premise underlying the regulatory approach is deeply flawed: that concepts underlying ERISA, a statute governing *employer-sponsored* retirement plans where assets are held by a corporation should be extended to *individual* retirement accounts ("IRAs") where assets are held by a person. The result of ERISAfying IRAs is to change the economics -- and risks – underlying the provision of personalized advice to modest savers. In short: person-to-person advice becomes more expensive and riskier to deliver. For that reason, financial services firms will choose, and already are choosing, to demur on helping lower balance clients. Left to their own devices, these abandoned households will do nothing, magnifying the retirement savings crisis already engulfing the middle-income segment of our country. This, indeed, is the major vice of the Rule. At a time when 1 in 3 Americans have saved nothing for retirement, and when the average household has less than $10,000 in assets put aside for the future, the

[3] Our clients earn, on average, between $30,000 and $100,000 in household income, a category that represents approximately 50% of all U.S. households. Approximately 70% of our accounts are Individual Retirement Accounts ("IRAs"). We will open an IRA for an individual with as little as $250 to invest, or for $50 per month.

[4] See, e.g., *The Role of Financial Advisors in the US Retirement Market*, at 17, OLIVER WYMAN (July 10, 2015), http://fsroundtable.org/wp-content/uploads/2015/07/The-role-of-financial-advisors-in-the-US-retirement-market-Oliver-Wyman.pdf. Oliver Wyman found that, on average, individuals that use a financial representative have more assets than nonadvised individuals across all the age and income levels examined and that the differences are meaningful.

Department is focused on lawyer-crafted legal definitions that create new obstacles to getting investors the help they need to confidently invest. Studies show that the presence of a financial professional in the lives of a family increases by threefold the amount saved for retirement.[5] Yet, this Rule erects new barriers to such assistance. The clear result will be decreased savings. While the Regulatory Impact Analysis ("RIA) touted the so-called "benefit" of eliminating conflicted advice, it ignored the substantially greater cost of lost savings. Analyses indicate that American's lost savings could reach close to $80 billion during a future market downturn, outweighing the Department's claimed ten-year benefits of the Rule.[6] The speculation of lower fees is meaningless when access to advice is impaired. The fee will be zero because the help will be zero.

Given the severity of the Rule's outcome and that the Extension will not abate its harm, we hope the Department will consider the issues raised by the Administration and carefully consider the comments it receives on the matters raised by the Department in its Notice of Proposed Rulemaking that was published on March 2, 2017 ("NPRM"). Our comments are intended to address the questions raised in the NPRM and the President's Memorandum, including (i) the impact the Rule will have on access to financial assistance, (ii) the disruption the Rule will cause by increasing costs and limiting choice, (iii) the detrimental impact of increased litigation and regulatory risk, and (iv) the flawed RIA. In our comment letter of March 10, 2017, we urged the Department to delay the applicability date of the Rule until a new Secretary of Labor and his staff review the record, and the analysis requested by the President is complete. In this letter, we reiterate that request and additionally recommend that the flawed Rule be withdrawn before it is permitted to become applicable, or at a minimum, be substantially revised.

I. The Rule Will Reduce Access to Financial Assistance

In our comments to the Department on July 21, 2015 and September 24, 2015 ("Comment Letters"), we accurately anticipated the overwhelmingly negative impact that the Rule would have on middle-income individuals' and families' ability to save for retirement through IRAs.[7] We expressed concern that the Department's expansion of the definition of fiduciary subjected nearly every transaction effected with a financial professional's assistance to reversal and penalties under the Internal Revenue Code's prohibited transaction rules. We warned that firms would not use the Department's Best Interest Contract Exemption ("BIC Exemption"), proffered by the Department as the means to preserve commission-based transactions. We anticipated that broker-dealers instead would fundamentally restructure their IRA businesses to avoid the BIC Exemption, and that this restructuring would result in requirements for higher minimum account balances that would be beyond the reach of millions of middle-income households, reduced access to financial professionals, reduced investor choices, and ultimately, lost opportunities to accumulate meaningful retirement savings on a tax-deferred basis for millions of hard-working Americans in the middle-income market.[8] This prediction, though supported by independent economic analyses, was given short shrift by the RIA and by the Department in its final rulemaking.

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[5] *Id.*

[6] *Good Intentions Gone Wrong: The Yet-To-Be Recognized Costs of the Department of Labor's Proposed Fiduciary Rule*, at 19 Robert Litan and Hal Singer, (July 2015), https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/00517.pdf.

[7] We incorporate by reference our Comment Letters. Our Comment Letters are supported by independent economic studies predictive of adverse impacts should the Rule go into effect. We respectfully request the Department further consider this work.

[8] PFS Investment Inc. Primerica, Inc., Comment Letter, July 21, 2015, at 9: "Based on our vast experience with working with middle-income American families and the research cited above, we are deeply concerned that the Proposed Rule will have the unintended effect of depriving middle-income consumers of desperately-needed retirement guidance from SEC- and FINRA-regulated financial professionals. We anticipate the result will be an industry-wide movement to further abandon the middle-market and focus on affluent clients. The "haves" will be afforded personal services, while the "have-nots" will be left without personal assistance to fend for themselves online, or will be steered away from tax-advantaged IRAs entirely."

Regrettably, our concerns about the Rule's middle-market impact have been substantiated by the public statements of independent broker-dealers and wirehouses. In response to the Rule, firms have announced plans to fundamentally restructure their IRA businesses in a manner that will shield higher-wealth individuals while abandoning more moderate savers and families and small independent businesses. Public statements from companies in response to the Rule have included notices of the following: elimination of commission brokerage for IRAs (Merrill Lynch,[9] JP Morgan Chase & Co.,[10] Capital One,[11] Commonwealth Financial[12]); limitation of small accounts to robo-advice only or no face-to-face service (Merrill Lynch[13], State Farm[14]); establishment of higher minimums for brokerage accounts (Edward Jones,[15] Stifel[16]); sales of brokerage businesses (Met Life, AIG, Barclays, Stifel).[17] As predicted, this restructuring reflects a movement toward fee-based advisory accounts for the wealthy and abandons those who cannot meet higher minimum account balances and fees to fend for themselves online.

For those firms choosing to use the BIC Exemption to continue commission-based brokerage services, we expect this to be transitory in nature to a more expensive and lucrative advisory model. The BIC Exemption's reliance on the trial bar as its primary enforcement mechanism ultimately will result in increased costs to brokerage-based retirement investors reflective of the risk and expense of increased litigation and class action lawsuits. Again, the result will be harm to middle-income savers and small businesses.

A. The RIA Erroneously Presumes Investors Will Gain From the Rule Without Properly Weighing the Costs of Layering a Complex ERISA Regime on Top of a Securities Regulation-Based System that Protects Middle-Income Savers

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[9] Michael Wursthorn, *Merrill Lynch to End Commission-Based Options for Retirement Savers*, The Wall Street Journal, October 6, 2016, available at https://www.wsj.com/articles/merrill-lynch-to-end-commission-based-options-for-retirement-savers-1475784928; *See also,* Michael Wursthorn, *Merrill's Fiduciary Alternative Would Affect Limited Number of Clients*, The Wall Street Journal, March 10, 2017 (While Merrill Lynch is *considering* offering an alternative product, such a product would "carry heavy restrictions. … The people familiar added that there is no guarantee an alternative product will be created.")

[10] Michael Wursthorn, *J.P. Morgan Moves Ahead With Plan to Drop Commissions in IRAs*, The Wall Street Journal, March 13, 2017, available at https://www.wsj.com/articles/j-p-morgan-moves-ahead-with-plan-to-drop-commissions-in-iras-1489420979

[11] Grete Suarez, *Capital One will eliminate commissions on IRAs*, Investment News, November 16, 2016, available at http://www.investmentnews.com/article/20161116/FREE/161119951/capital-one-will-eliminate-commissions-on-iras

[12] InvestmentNews Staff, *Commonwealth Financial eliminates commission-based retirement products in wake of DOL rule*, Investment News, October 24, 2016, available at http://www.investmentnews.com/article/20161024/FREE/161029956/commonwealth-financial-eliminates-commission-based-retirement.

[13] Supra, note 9.

[14] Greg Iacurci, *State Farm, citing DOL fiduciary rule, cuts agents from mutual fund and variable annuity sales*, Investment News, September 12, 2016, available at http://www.investmentnews.com/article/20160912/FREE/160919992/state-farm-citing-dol-fiduciary-rule-cuts-agents-from-mutual-fund?AID=%2F20160912%2FFREE%2F160919992

[15] Michael Wursthorn, *Edward Jones Shakes Up Retirement Offerings Ahead of Fiduciary Rule*, The Wall Street Journal, August 17, 2016, available at http://www.wsj.com/articles/edward-jones-shakes-up-retirement-offerings-ahead-of-fiduciary-rule-1471469692

[16] Kenneth Corbin, *Stifel's fiduciary solution for commissions*, OnWallStreet, November 3, 2016, available at https://www.onwallstreet.com/news/stifels-fiduciary-solution-for-commissions.

[17] *See* Katherine Chiglinsky and Margaret Collins, *AIG Advisor Group Sale Fueled by DOL Fiduciary Rule, CEO Says,* ThinkAdvisor, January 28, 2016, available at http://www.thinkadvisor.com/2016/01/28/aig-advisor-group-sale-fueled-by-dol-fiduciary-rul?slreturn=1492280745; *See* Christine Idzelis, *MetLife is second major insurer to exit the brokerage business, in the sale of adviser unit to MassMutual*, February 29, 2016, available at http://www.investmentnews.com/article/20160229/FREE/160229937/metlife-is-second-major-insurer-to-exit-the-brokerage-business-in; *See* Andrew Welsch, *Fiduciary rule forced Stifel's hand to sell IBD, CEO says*, OnWallStreet, August 3, 2016, available at https://www.onwallstreet.com/news/fiduciary-rule-forced-stifels-hand-to-sell-ibd-ceo-says.

In its NPRM, the Department invited comments on whether the investor gains projected by the RIA may be offset by a reduction in consumer investment as a result of reduced access to retirement savings advice caused by the final rule. The Department additionally invited comments on the how innovations in self-help advice may offset this reduced access to personal assistance.

First, the Department's premise that investors will gain from the Rule is incorrect.[18] Instead, investors will incur substantial quantitative and qualitative losses. The Rule has the potential to increase consumer costs by $46.6 billion, or $813 annually per account, in addition to the $1,500 in duplicative fees for retirement savers that have already paid a fee on their commission-based accounts.[19] The RIA's assessment of the "Small Saver Market" is woefully inadequate. For example, the RIA spends a mere 14 pages of 376 assessing the very market segment the Rule purports to protect.[20] Our 40 year commitment to this specific market segment provides us unique perspective based on expertise and experience, a perspective that the RIA fails to grasp in its dearth of data on the middle-income saver market.

The Rule rests on the RIA's flawed premise that, "the final rule and exemptions will benefit small plan and IRA investors" because the Rule will replace "conflicted investment advice" with "impartial investment advice" through the BIC Exemption.[21] Without support, the RIA adopts the view that "smaller investors are more vulnerable to advisory conflicts and therefore likely to benefit more from the proposed reform, and that impartial advice compliant with the proposal can be supplied affordably to small plan and IRA investors."[22] The RIA presumptively states, "Under the new rule and exemptions, IRA investors will expect and *get impartial advice* and the price will be more transparent, so the market will be more efficient" (emphasis added).[23]

In short, the RIA incorrectly presumes "impartial" or "conflict-free advice" exists. It ignores that,

> All financial advisers – like all people who perform a service for anyone else, including journalists – have conflicts of interests. That is true regardless of whether they work for someone else or for themselves, whether they earn fees or commissions, or whether they call themselves 'fiduciaries' who put clients' interests ahead of their own.[24]

In fact, ERISA's entire Prohibited Transaction Exemption regime, which includes the BIC Exemption and its Impartial Conduct Standards, directly supports the existence of conflicts. By virtue of being an "exemption" from prohibited transactions triggered by the Rule, the BIC Exemption and its Impartial Conduct Standards are prima facie evidence of "conflicted investment advice."

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[18] Investment Company Institute Comment Letter, RIN 1210-AB79; Proposed Rule, Extension of Applicability Date (March 17, 2017), available at https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/01073.pdf.

[19] The Rule has the potential to increase consumer costs by $46.6 billion, or $813 annually per account, in addition to the $1,500 in duplicative fees for retirement savers that have already paid a fee on their commission-based accounts; *See* Meghan Milloy, *The Consequences of the Fiduciary Rule for Consumers*, American Action Forum, available at https://www.americanactionforum.org/research/consequences-fiduciary-rule-consumers/.https://www.americanactionforum.org/research/consequences-fiduciary-rule-consumers/.

[20] Definition of the Term "Fiduciary" Conflicts of Interest-Retirement Investment Advice, *Regulatory Impact Analysis for Final Rule and Exemptions*, at 312-318; 366-374 (April 2016).

[21] *Id* at 312.

[22] *Id*.

[23] *Id* at 319.

[24] Jason Zweig, *Why Your Financial Adviser Can't Be Conflict Free*, WALL ST. J. (Apr. 7, 2017, 1:46 PM), https://blogs.wsj.com/moneybeat/2017/04/07/why-your-financial-adviser-cant-be-conflict-free/.

Recognizing that conflicts cannot be entirely eliminated, Congress designed two very different statutory approaches to managing conflicts of interest. The Department's approach under Title I of ERISA, which this Rule follows, was never designed for IRAs. ERISA assumes there is a trustee or plan sponsor controlling plan members' investment assets, acting in a fiduciary capacity on their behalf and therefore regulated as fiduciaries, subject to Title I's fiduciary responsibility regime. Unlike plan members, IRA holders have full freedom to choose the investments held in their account and the service provider that service the account. These are choices made by the account holder/owner, not a third-party or unrelated trustee or plan sponsor acting on their behalf. This simple difference makes IRAs fundamentally different from ERISA plans.

Applying ERISA, under the Rule, to IRAs destroys individual freedom and limits choice by subjecting IRAs to ERISA's blunt and one-size-fits-all fiduciary responsibility regime. Congress intended for IRAs, like all individual accounts, to be regulated by the SEC under the Securities and Exchange Act of 1934 and the Investment Advisers Act of 1940. This approach is surgical and tailored to empower Americans to make their own financial decisions while protecting investors through rules that identify and mitigate conflicts, increase transparency, and provide enforcement against bad actors.

The RIA rightly notes that Congress also subjected IRAs to the prohibited transaction provisions of the Internal Revenue Code.[25] It even correctly points out that, unlike ERISA and this Rule, the Code does not attach a duty of loyalty or a duty of prudence to IRAs.[26] However, the RIA misinterprets Congressional intent with respect to the Code's provisions that cover IRAs. Rather than using the Code to regulate professional standards of conduct for IRAs, as our securities laws already do, Congress limited the Code's IRA provisions to prohibit investors from gaming tax-advantages for purposes beyond retirement savings. The Department's failure to understand this limitation has led to a Rule that is overly broad by producing conflicting and overlapping regulation of retail brokerage accounts held in the form of an IRA, which Congress intentionally and wisely avoided when carefully designing the intersection of authorities as it relates to ERISA, the Code, and our securities laws. Congress intended for management of conflicts in dealing with retirement *plans* to be led by the Department under ERISA and the management of conflicts for *individual* (or retail) accounts to be led by the SEC under our securities laws.

The differences between these approaches are vast but a distinguishing characteristic between the statutes is that ERISA produces investor conformity; whereas, the securities statutes produce investor diversity/choice. While it may make sense to require similarly situated trustees and plan sponsors to adhere to ERISA's strict demands, individual investor preferences demand a different approach altogether, an approach that is found under our securities laws. Subjecting IRA holders to ERISA type limitations and restrictions under this Rule sacrifices individual diversity for collective conformance by completely ignoring the protections and freedoms individual investors have enjoyed for over eight decades.[27] Such an approach is ill advised as a matter of law and policy and has never been tested on American consumers.[28]

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[25] Supra note 1820, at 21.
[26] *Id* at 21.
[27] *See* Commissioner Daniel M. Gallagher (Retired), *Remarks at The SEC Speaks in 2015,* February 20, 2015, *available at https://www.sec.gov/news/speech/022015-spchcdmg.html.*
[28] *See* Dave Michaels, *SEC's Piwowar: Obama-Era Retirement-Savings Rule Boon for Trial Lawyers; Acting SEC head calls the rule "highly political" and was "never about investor protection,"* The Wall Street Journal, March 2, 2017, available at https://www.wsj.com/articles/secs-piwowar-obama-era-retirement-savings-rule-boon-for-trial-lawyers-1488468477; *See* Attracta Mooney, *Obama's fiduciary rule is a disaster, warns former SEC regulator*, Financial Times, March 26, 2017, available at https://www.ft.com/content/58d0e884-0b11-11e7-97d1-5e720a26771b.

Nevertheless, the Rule and the RIA favor this approach. The RIA measures managing conflicts for middle-income savers under the BIC Exemption as a "benefit" gained without properly weighing the added "costs" of layering the BIC Exemption's complex conflict management regime on top of the securities regulation-based system that currently protects middle-income savers when working with a commission-based representative.[29]

B. The Rule Will Limit Choice and Reduce Access to One-on-One Assistance with Retirement Savings

i. *New Evidence Shows That the Rule is Causing Firms to Abandon Brokerage for Middle-Income IRAs*

The costs are made apparent by new evidence. Since the Rule became effective, Merrill Lynch,[30] JPMorgan,[31] Capital One,[32] and Commonwealth Financial[33] have announced they will entirely eliminate commission-brokerage for IRAs. Edward Jones, while lowering account minimums on fee-based advisory accounts, is increasing account minimums on brokerage accounts to $100,000.[34] Stifel is also increasing account minimums on brokerage accounts.[35] These changes demonstrate what we have long known – companies are resilient and will do what is necessary to follow the law. The unfortunate result in the Rule's circumstance is that following the law means savers, especially small savers, are being unfairly punished by the conformance the Rule demands.

These announcements should be deeply disturbing to even the staunchest supporters of the Rule. It is well-established by independent research that middle-income savers typically benefit most from brokerage type accounts over fee-based advisory accounts because they often are "buy and hold" investors who trade infrequently.[36] According to a recent Brookings study,

> [Fee-based advisory] may seem to take less of the investor's fund, but that is not usually the case. … Regulations that push savers into [fee-based] accounts with wrap fees instead of [brokerage] loads may not be in their best interests. … High net worth clients can afford to pay for advice but a low-income family does not have a lot of money to put to work even though teaching them about investment options and good investment decisions may be quite time consuming.[37]

These announcements demonstrate that the Rule is putting upward pressure on account minimums for brokerage accounts, so much so that some firms are taking away the choice investors enjoy today between

[29] Supra, note 20, at 3-4, stating, "Indeed, because the 2016 RIA's benefit calculation is not supported by the very studies on which it is based, estimates based on the 2016 RIA are also unreliable and of little relevance to assessing the potential impact…."
[30] Supra, note 9.
[31] Supra, note 10.
[32] Supra, note 11.
[33] Supra, note 12.
[34] Supra, note 15.
[35] Supra, note 16.
[36] *See*, Staff of the U.S. Securities and Exchange Commission, Study on Investment Advisers and Broker-Dealers, at 162 (Jan. 2011), available at https://www.sec.gov/news/studies/2011/913studyfinal.pdf (stating, "In sum, to the extent that broker-dealers respond to a new standard by choosing from a range of business models, such as converting brokerage accounts to advisory accounts, or converting them from commission-based to fee-based accounts, certain costs might be incurred and ultimately passed on to retail investors in the form of higher fees or lost access to services and products. Any increase in costs to retail investors detracts from the [returns] on their investments.").
[37] Martin Neil Baily and Sarah E. Holmes, *Serving the Best Interest of Retirement Savers: Framing the Issues*, Economic Studies at Brookings, July 2015, available at https://www.brookings.edu/wp-content/uploads/2016/06/Download-the-full-paper-1.pdf.

paying for a single transaction versus paying ongoing advisory fees. This is a change that may ultimately benefit the firms, not customers.

A recent J.D. Power survey found that commission clients do not favor switching to fees.[38] For example, it was recently reported that "Judith Friedlander, an 80-year old retiree from Murieta, Calif., doesn't appreciate the government trying to regulate how she manages her roughly $400,000 individual retirement account." The report adds that "Ms. Friedlander isn't interested in a switch. She trades only a few times a year and says moving to a fee-only account that charges a percentage of her assets would be far pricier than the periodic commissions she currently pays."[39]

Other firms are selling their brokerage business entirely,[40] which means there will be less competition, putting upward pressure on prices and downward pressures on jobs and wages. Recent research from Cerulli Associates warns the Rule, "will have an enormous impact," adding that "small broker-dealers without scale are at high risk under the DOL Rule."[41] An associate director at Cerulli stated that, "It is likely that some of these boutique firms will be unable to support new regulatory costs, resulting in an increase in firm consolidations."[42] The RIA did not consider this research, but the market reaction and recent comments to the Department are indeed proving it true.[43]

One small firm that commented to the Department last month aptly wrote, "The costs that will be incurred to comply will most likely force our smaller firm to consolidate or close our doors.[44] In other words, lost jobs."[45] It added:

> Morningstar gave us a quote for their technology solution which would assist with compliant procedures. ***Price tag was $1,014,540! Annually!*** We don't have $1,000,000 of net income annually. How would we pay for this? Other solutions quoted in the several hundred thousand dollar range, again annually. We have already spent over $300,000 in legal costs and staff hours to develop our compliance procedures. We won't survive.[46]

As the Department recognized in its proposed rule, "[o]ver 90 percent of broker-dealers (BDs), registered investment advisers (RIAs), insurance companies, agents, and consultants are small businesses according to SBA size standards …".[47] One trade association representing independent financial advisors estimated that its member firms have created 482,000 jobs and contribute $48 billion to the U.S. Gross Domestic Product.[48] These independent firms provide the largest economic benefit to California, New York, and

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[38] Janet Levaux, *Commission Clients Don't Favor Switch to Fees: J.D. Power*, ThinkAdvisor, March 16, 2017, available at www.thinkadvisor.com/2017/03/16/commission-clients-dont-favor-switch-to-fees-jd-po.

[39] Daisy Maxey and Veronica Dagher, *Meet the Retirement Savers Who Oppose the Fiduciary Rule*, The Wall Street Journal, February 15, 2017, available at https://www.wsj.com/articles/meet-the-retirement-savers-who-oppose-the-fiduciary-rule-1487168986

[40] Supra, note 17.

[41] John Manganaro, *Broker/Dealer Evolution Ahead of Fiduciary Rule*, planadvisor, December 12, 2016, available at http://www.planadviser.com/Broker-Dealer-Evolution-Ahead-of-Fiduciary-Rule/.

[42] *Id.*

[43] Definition of the Term "Fiduciary" Conflicts of Interest-Retirement Investment Advice, *Regulatory Impact Analysis for Final Rule and Exemptions*, pp. 312-318; 366-374 (April 2016).

[44] Securities Management & Research, Inc. Comment Letter, RIN 1210-AB79; Proposed Rule, Extension of Applicability Date (March 17, 2017), available at https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/00401.pdf.

[45] *Id.*

[46] *Id.*

[47] RIN 1210-AB79; Proposed Rule, Extension of Applicability Date, 82 Federal Register 12322 (March 2, 2017).

[48] Financial Services Institute and Oxford Economics, *The Economic Impact of FSI's Members*, July 2016, available at http://www.financialservices.org/economicimpact/.

Texas.[49] By placing the greatest burden on the smallest firms, the Rule is putting these jobs and their economic benefit in jeopardy.

New research summarizes the Rule's costs – real-world market reactions to the Rule that will occur should the Department's fiduciary standard and Impartial Conduct Standards become applicable on June 9 – based on public reports.[50]

IMPACT OF FIDUCIARY RULE[51]

Company	Impact
Metlife	**Out of market**; sold business; affects 4,000 advisers
AIG	**Out of market**; affects 6,000 employees and $40 million in revenue
Merrill Lynch	**Out of market**; affects 14,000 advisers and $180 billion in assets
State Farm	Drawing down; 12,000 agents and $11.3 billion in assets affected
Morgan Stanley	Drawing down; 16,000 brokers affected
Edward Jones	Drawing down; stopped offering mutual and exchange traded funds
LPL	Switching to fees; 14,000 advisers affected
Raymond James	Switching to fees; $28 million in costs; 7,100 affected advisers
Commonwealth	Switching to fees; stopped offering commission products
Ameriprise	$19 million in compliance costs in 2016
Advisor Group	$11 million in Q4 2016 costs; 9,000 affected advisers

ii. ***"Fee-based" and "Fee Only" Advice Will Not Fill the Gap For Middle Income Savers***

The RIA defends the removal of access to brokerage services for small clients, by adducing the view of some of the Rule's most vocal "fee-based or fee-only" advisers who say they can serve the "little guy" just as well. Unfortunately, the RIA appears not to have fully examined these firms' record. Below is a summary of our findings from examining these firms' Form ADV Part 2A brochures on file with the SEC with respect to the services they are offering.[52]

Firm	Account Minimum	Fees
Firm 1	$250,000 generally	– 0.25%-1.5% depending on account size – $125 quarterly fee
Firm 2	None	– $120-$540 per hour for a Financial Planner
Firm 3	$1,000,000	– $2,000 initial fee;

[49] *Id.*
[50] Sam Batkins, *Fiduciary Rule Has Already Taken Its Toll: $100 Million in Costs, Fewer Options*, American Action Forum, February 22, 2017, available at https://www.americanactionforum.org/insight/fiduciary-rule-already-taken-toll-100-million-costs-fewer-options/.
[51] *Id.*
[52] See Investment Adviser Public Disclosure, Part 2 Brochures, U.S. Securities and Exchange Commission, available at https://www.adviserinfo.sec.gov/.

		– $2,000 for delivery of Investment Policy – Management fees vary based on asset size
Firm 4	None	– $130 per hour
Firm 5	$500,000 household wealth	– $5,000 fixed fee for clients not seeking investment mgmt. services; – or $300 per hour
Firm 6	$500,000	– $4,950 annual fee; at least .99% on the first $500,000.

Recent research reveals these firms are in line with other "fee-based" or "fee-only" account minimums and fees.[53] The Federal Reserve Board conducts a survey to "monitor the financial and economic status of American consumers."[54] It recently found that "nearly half of Americans would have trouble finding $400 to pay for an emergency."[55] The RIA failed to take the Federal Reserve Board's survey into account. Nor does it recognize that in order to acquire the minimum assets these firms set, the vast majority of savers simply do not have enough saved.

Below are the average financial advisor fees for fiduciary accounts. These fees are exclusive of other "hidden" expenses for investments held in the account, such as fees charged by mutual funds, index funds, or ETFs.

Average Financial Advisor Fees | 2017 Report[56]

Investment Amounts	Average Advisor Fees (%)	Annual Advisor Averages
$50,000	1.18%	$590
$100,000	1.12%	$1,120
$150,000	1.09%	$1,635
$250,000	1.07%	$2,675
$500,000	1.05%	$5,250
$1,000,000	**1.02%**	**$10,200**
$1,500,000	0.94%	$14,100
$2,000,000	0.91%	$18,200
$2,500,000	0.88%	$22,000
$5,000,000	0.84%	$42,000
$7,500,000	0.77%	$57,750
$10,000,000	0.69%	$69,000
$20,000,000	0.65%	$130,000
$30,000,000	0.59%	$177,000

[53] *Average Financial Advisor Fees & Costs | 2017 Report | Understanding Advisory & Investment Management Fees,* AdvisoryHG, available at http://www.advisoryhq.com/articles/financial-advisor-fees-wealth-managers-planners-and-fee-only-advisors/.
[54] Neal Gabler, *The Secret Shame of Middle-Class Americans*, The Atlantic, May 2016, available at https://www.theatlantic.com/magazine/archive/2016/05/my-secret-shame/476415/.
[55] *Id.*
[56] Supra, note 53.

% of Assets Under Management

The average fees for fixed-fee fiduciary advisers is as follows:

Average Fixed Fees (Annual Fees Per AUM)[57]

Investment Amounts	Average Fees (Annual)
$1 - $499,999	$7,500
$500,000 - $999,999	$11,000
$1,000,000 - $1,999,999	$12,500
$2,000,000 - $7,499,999	$37,500
Over $7,500,000	$55,000

The average hourly rates for fee-for services are as follows:[58]

HOURLY FEES (NON-MANAGEMENT CLIENTS)	
Services	**Hourly Rate**
Hourly Financial Planning	$200.00
Hourly Divorce Planning	$150.00

Hourly fees are billed for clients who do not seek an ongoing relationship, and who require assistance in a defined area of need.

In addition to charging hourly fees, some firms charge an additional annual retainer ranging from $6,000-$11,000 per year depending on location.[59]

If the Rule is made effective, how is the average American household, struggling to save $100 each month for retirement, to access help? Moreover, how will these savers find a financial representative interested in helping them with their low-balance accounts? It is well-understood that brokers who charge fees for services are only able to service a limited number of clients. Recognizing this, most fee-based financial representatives exclusively seek out and prefer affluent individuals who are likely to be more worth their limited time.

[57] *Id.*
[58] *Id.*
[59] *Id.*

The Department asked whether the Rule will result in a reduction in retirement savings, particularly for middle-income Americans. ***It will. Individuals with small amounts to invest cannot, and will not, pay these hourly fees for assistance.*** Yet it is these middle-income individuals who are most in need of a personal nudge from a financial professional to start (and stay on) the hard, long path to saving for retirement. The brokerage channel works for the average middle-class family because the small one-time up-front fee for financial advice fits their budget and expectations. An hourly fee that exceeds their abilities, or a percentage-of-assets fee that is more appropriate for active traders, does not. Without a sincere effort to understand this dynamic, the Rule wrongly favors fee-based and hourly fee advisory business models that do not typically target or offer their services to the mass middle-income household market. As a result, the Rule will result in a reduction in consumer savings because it simply drives firms away from serving the Small Saver Market.

iii. "Innovation" Will Not Fill the Gap For Middle Income Savers

The RIA incorrectly claims that small investors nonetheless will be served by "robo-advice providers" that "reduce the need for complex advice."[60] In fact, a recent proliferation of robo-advisors is undoubtedly being spurred by the Rule. Some firms that are eliminating brokerage services for small accounts are attempting to fill the void by offering robo-advice in lieu of personal service.[61] However, the RIA failed to understand that robo-advisers are not, and will not be, effective at reaching the Small Saver Market. Our experience validates the "theory" that the RIA discusses: "People with little or no savings have few reasons to seek advice about how to invest those savings."[62] A recent study confirmed low numbers for retirement planning: only 34% of workers have tried to estimate their expenses in retirement.[63] ***Robo-advisers require customers to seek them out, which is precisely what most middle class families will not do***.

New data supports that it is unlikely that robo-advice will fill the savings gap created by the Rule's obstacles and disincentives for representatives to serve middle-income households. The likelihood of seeking the services of an independent advice provider that provides advice solely online was found to be among the lowest preferred sources of advice in the Employee Benefit Research Institute's 2017 Retirement Confidence Survey.[64] According to the survey, "a human connection is important."[65] Another recent report by Cerulli Associates found that "about 73% of those under 30 said they were willing to pay for advice."[66] According to a representative from Cerulli, "Digital options have become part of the landscape but consumers facing complex decision processes repeatedly choose to include humans in their service selections."[67] We find it striking that the RIA and the Rule favor a national policy that empowers robo-advisers over human advisers who are more preferred and better equipped to help correct the real conflict confronting America's middle class – spending versus saving.

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[60] Supra, note 20, at 319.
[61] Paul Katzeff, *Are You One Of the Small Investors that 37% of Financial Advisors Are Planning to Dump?*, Investor's Business Daily, available at http://www.investors.com/etfs-and-funds/personal-finance/are-you-one-of-the-small-investors-that-37-of-financial-advisors-are-planning-to-dump/ (stating, "Prof. Jamie Hopkins of the American College, which focuses on financial-advisor education, predicts that other firms will be forced to follow Merrill Lynch's example." Merrill Lynch "says it will no longer provide human advice for new commission-based IRAs" once the rule applies.).
[62] Supra, note 20, at 319.
[63] *The 2017 Retirement Confidence Survey: Many Workers Lack Retirement Confidence and Feel Stressed About Retirement Preparations*, Employee Benefit Research Institute (2017), available at https://www.ebri.org/pdf/briefspdf/EBRI_IB_431_RCS.21Mar17.pdf.
[64] *Id.*
[65] *Id. at 17.*
[66] Liz Skinner, *Younger Investors Most Willing to Pay For Financial Advice: Cerulli*, InvestmentNews (Jan. 4, 2017, 12:24 PM), http://www.investmentnews.com/article/20170104/FREE/170109984/younger-investors-most-willing-to-pay-for-financial-advice-cerulli.
[67] *Id.*

Unfortunately, the data reveals that the Rule will allow this most pernicious retirement savings conflict to persist and even grow, resulting in harm to middle-income households.

C. New Data Supports that the Rule's Outcome Will Be the Dropping of Undersized Accounts and the Abandonment of the Middle-Income Market

The Department invited comments on whether firms are moving to abandon or "deemphasize" the small IRA investor or small plan segment.

The structural changes already announced are the "tip of the iceberg" as to the sea change the Rule causes across the market. A recent study from A.T. Kearney reveals "a $20 billion revenue impact for the industry through 2020, along with significant asset shifts across players and formats within the wealth management value chain. Industry players will be impacted at *all levels*. To remain competitive and viable, *all must aggressively address these changes*"[68] (emphasis added). Among the most significant shifts is the "dropping of undersized accounts."[69] The report states, "As firms move toward fee-based advisory, many low-balance accounts will no longer be served, shifting many assets to formats such as robo-advisory and self-directed."[70] At the very least, the new data provided by A.T. Kearney's study demonstrates that the Rule "deemphasizes" the small IRA investor or small plan segment.

Based on an independent survey performed by CoreData Research ("CoreData"), the Rule will force a majority of firms to abandon the U.S. middle-income market.[71] CoreData found in part, the following:

- *Seven out of ten (71%) financial advisors will look to disengage from at least some mass-market investors due to the fiduciary rule. On average, these advisors estimate they will disengage from a quarter (25%) of their mass-market clients.*

- *Two-thirds (64%) of advisors view the impact of the fiduciary rule on mass-market investors as largely negative. And 60% believe the fiduciary rule will have a negative impact on at-retirement clients.*[72]

While our commitment to the middle-income market remains, it is clear from the initial research performed in the Rule's wake that the Rule will impose a policy that delivers the highest cost to the small IRA investor in the form of being "deemphasized" or abandoned.

This is exactly what happened in the United Kingdom with its Retail Distribution Review ("RDR"), which banned commissions. While the Rule is accompanied by an exemption (the BIC Exemption) technically structured to permit the continuation of commission-based brokerage business, the evidence is clear that commissions are severely constrained under the Rule's and BIC Exemption's ERISA-based

[68] *A.T. Kearney study: The $20 billion impact of the new fiduciary rule on the U.S. wealth management industry*, A. T. KEARNEY (Oct. 2016), https://www.atkearney.com/documents/10192/7041991/DOL+Perspective+-+August+2016.pdf/b2a2176b-c821-41d9-b12e-d3d2b0807d69
[69] *Id.*
[70] *Id.*
[71] *Fiduciary Rule To Leave Us Mass-market Investors Stranded, Study Shows*, CoreData Research, November 2016, available at http://www.valuewalk.com/wp-content/uploads/2016/11/Fiduciary-rule-Press-Release-%E2%80%93-CoreData-Research.pdf ; See also, Supra, note 61.
[72] *Id.*

conflict management regime for the reasons discussed above. These clear similarities between the RDR and the Rule obliged the Department to assess the RDR's impact in its RIA. The RIA concluded its analysis of the RDR by stating, "[B]ased on the available data from post-RDR reports since 2013, the Department believes that the RDR has not significantly reduced availability of advice, and any RDR-related advice gap is likely minor and temporary."[73] This conclusion is wrong. The availability of advice is not the issue.

The issue is whether supply is meeting demand by market segment. One of the reports the RIA relies on to support its erroneous conclusion was conducted by Towers Watson, which studied the RDR's impact on small savers for the U.K.'s Financial Conduct Authority.[74] The RIA fails to even mention that Towers Watson concluded, "…it has not been possible to analyse (sic) supply by segment. This is because data on customer segment focus and other key business model attributes (eg what types of consumer specific firms sell to) is not available and *cannot be surmised from other data sources*"[75] (emphasis added). In light of the RIA's omission, this conclusion, buried among the last pages of the report, should be reconsidered and included in the Department's updated economic analysis. The Towers Watson report further adds,

> Based on our modeling, we estimate that over 60% of demand for retail investment advice is likely to be transactional rather than holistic in nature. It is therefore quite possible that the initial strategic response of advisory businesses to the RDR to move towards holistic financial advice would lend itself to a capacity application mis-match and a shortage of advice capacity – especially at the lower end of the mass market. There may therefore be a gap for other forms of financial guidance to less affluent segments.[76]

As previously discussed, the "initial strategic response" to the Rule, as supported by public statements and research, demonstrates that the United States market is similarly reacting by moving away from transaction-based distribution towards "more holistic," or fee-based financial advice. Unlike the U.K., the United States still has a chance to prevent prospectively what the U.K. Government found retrospectively in 2016 – the RDR contributed to an advice gap. We welcome the review directed by the President's Memorandum because it provides an opportunity for the Department to avoid importing bad ideas based on identical policy justifications that have proven to "deemphasize" or abandon small savers.

Moreover, we would be remiss not to consider and recognize the immediate effects the imposition of the Rule's expansive "fiduciary" definition and "Impartial Conduct Standards" as of June 9, 2017 will have on the middle-income market. The sad reality is we have long proclaimed the middle-market to be underserved, and it is for this reason alone that we believe that a rule that forces, or otherwise results in, any firm to consider abandoning the middle segment is completely misguided as a matter of law and policy. The middle class deserves the best of America's policy-making decisions instead of inheriting the costs of a Rule that causes the underserved to be "deemphasized" or abandoned.

II. The Rule Will Increase Costs and Limit Investment Options for Middle-Income Savers

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[73] Supra, note 20, at 87.

[74] Towers Watson, *Advice Gap Analysis: Report to the FECA*, December 2014, available at https://www.fca.org.uk/publication/research/advice-gap-analysis-report.pdf.

[75] *Id.* at 42.

[76] *Id.*

A. The Rule Will Hasten Changes in Investment Products, Pricing and Services That Are Not in the "Best Interests" of Middle Income Retirement Investors

The Department invited comments as to whether firms intend to make changes to the investment products they offer or product pricing, and requested information about the motivation behind those changes and their impact on firms' abilities to serve their customers' needs.

Since the Rule became final, there has been much discussion in the media and elsewhere about alternative mutual fund share classes that may arise in response to the Rule, or that may be hastened by the Rule, such as so-called "T-shares" and "clean" share classes. Likewise, there has been speculation that these mutual fund share classes may result in lower fees to consumers. This speculation represents a shallow understanding of the financial marketplace and adopts, without study, the prior Administration's political and marketing spin on the consequences of the Rule.

A handful of mutual fund manufacturers have developed and approved T-shares, though it is not likely that any company will be prepared to distribute T-shares to the public until later in 2017, and certainly not as early as June 9, 2017. T-shares are a transactional mutual fund share class designed to emulate the way equities and ETFs trade. In other words, every time an investor buys or sells a T-share mutual fund, a commission, or transaction fee, is charged. No rights of accumulation inure to the investor. No rights of exchange within a fund family inure. Breakpoints for larger investment amounts are fewer and less substantial. An investor who desires to rebalance his or her mutual fund portfolio will pay the transaction fee upon each investment, sale or exchange.

T- shares are being created in an attempt to "mitigate conflicts" by reducing differences in the way commissions typically are charged among equities, mutual funds and ETFs so that, post-Rule, these three product sets can be sold to the same IRA customer while the necessary fiduciary exemptions can be met. The Department seems to believe (or hope) that the T-share will result in reduced costs to the investor because the stated commission likely will be lower. However, in many cases, consumers will end up paying more than they would have if they had purchased common A shares – particularly those who would have benefitted from rights of accumulation, exchange privileges, or breakpoints. In fact, T-share pricing matches or exceeds the fee earned from an A-share, on average across all investors and account sizes, after taking into account all the investors' rights on an A share that are not available on T-shares. It is a fallacy to believe that costs will be lowered.

So-called "clean" mutual fund shares work differently. They are expected to be "stripped clean" by the manufacturer of distributor fees other than a standard 12b-1 fee. The distributor is meant to add its own fees on top of the product created by the manufacturer. As a result, commissions and other fees will vary by distributor, likely resulting in customer confusion. Confusion breeds inaction. Moreover, clean shares will not be available for distribution to the public likely until the end of 2017, at the earliest, or more likely some time in 2018.

Another structural change driven by the Rule is often missed. That is, nearly every distributor of mutual funds is intending to eliminate or reduce the number of fund products it offers to retail retirement investors. The reason for this narrowing is simple: it is nearly impossible or prohibitively expensive to "mitigate conflicts" among products in the manner demanded by the Rule, and the Department's guidance to date, across multiple fund companies and share-class offerings. The result will be elimination of choice, and with it a significant reduction of competition. It is short-sighted and dangerous to believe that the ultimate effect will benefit consumers without empirical data to support the theory.

It is interesting, and disappointing, to see firms that stand to benefit from potential structural changes such as these become reluctant proponents of the Rule. For example, in its comment letter, Morningstar suggests that a "'big data system' provided by a neutral third party could review individual portfolios for a best interest standard of advice, identifying problems and fixes. Every investor's account would be scored to identify those that don't conform to an investor's needs for investment quality, portfolio fit and planning value." Morningstar obviously envisions itself as the beneficiary of this ephemeral system, that most certainly would take years to materialize, and more for firms to gain confidence that they can rely on it to avoid litigation and penalties.

In addition to its questions about changes to products and pricing, the Department invited comments regarding whether firms are intending to increase their use of asset-based fee arrangements or other arrangements in response to the Rule, and the resultant impact on firms' abilities to serve customers' needs. Earlier in this letter we commented on post-Rule public announcements of large firms which confirm a market shift away from transactional-based brokerage and towards fee-based advisory services. Likewise, we discussed the very negative impact that such a shift will have on what is best for retirement investors, particularly middle-income savers.

Though previously ignored, it is also important to note the impact that this type of shift will have on US jobs. As we noted in our prior Comment Letters, representatives are required to hold a FINRA Series 65 license in order to receive hourly and asset-based compensation charged specially in exchange for investment advice, as opposed to sales-based compensation. Approximately 370,000 representatives in the United States are licensed only as Series 6 registered representatives, and not as Series 65 investment adviser representatives. Series 6 representatives are allowed to give "investment advice" ***only*** pursuant to the broker-dealer exemption in the Investment Advisers Act of 1940. That exemption excludes from the definition of "investment adviser" any broker or dealer: (i) whose performance of its investment advisory services is "solely incidental to" the conduct of its business as a broker or dealer; and (ii) who receives no "special compensation" for its advisory services. The broker-dealer exemption was interpreted by the U.S. Tenth Circuit Court of Appeals in *Thomas v.Metropolitan Life Insurance Company and MetLife Securities, Inc.*, 631 F.3d 1153 (February 2, 2011). In that case, the Tenth Circuit confirmed that compensation received by a broker-dealer is "special" when it is received specifically in exchange for giving investment advice and takes a form other than commission-based compensation resulting from the sale of a product.[77] Accordingly, it is understood that Series 6 representatives are not permitted to accept a check from a client for an hourly fee as the advice would not be rendered "solely incidental to" the sale of a product, and the fee would not be commission-based compensation, but "special compensation" received specifically for giving investment advice.

The substantial compliance costs, legal risks, and uncertainties attendant to the Rule have already put unnecessary pressures and strain on financial firms. The Department itself has acknowledged that 90% of broker-dealers, registered investment advisers, insurance companies, agents, and consultants are small businesses.[78] The compliance burdens on independent agents and small and mid-size firms are enormous, and many are likely to be unable to survive the costs.[79] Thus, the Rule's implementation and bias towards fee-based advisers will undoubtedly force many financial representation and small businesses out of the field, both resulting in further consolidation in favor of larger advisory firms and limiting representatives available to personally service middle-income households.

[77] *Id.* at 1165.
[78] RIN 1210-AB79, Proposed Rule; extension of applicability date, 82 Federal Register 12322 (March 2, 2017).
[79] Supra, note 41.

III. The Rule Is A Boon To Plaintiff's Lawyers and the Increased Costs of Litigation Will Have a Detrimental Impact on Retirement Savings

A. The Rule Provides Encouragement for the Trial Bar With High Litigation Costs Ultimately Hurting Retirement Savers

As discussed above and our Comment Letters, the Rule broadly expands the scope of activities and communications that result in fiduciary status, subject to narrow exceptions. Fiduciary status will trigger the application of the strict liability prohibited transaction rules. As such, the Rule wholesale prohibits transaction-based, variable compensation commonly paid in connection with advised brokerage arrangements and other business models, absent compliance with a prohibited transaction exemption. With its stated intention being to preserve brokerage and other impacted models for smaller plans, plan participants and beneficiaries, and IRAs and other non-ERISA plans, the Department promulgated the BIC Exemption, which would arguably permit investment advice fiduciaries (which include broker-dealer registered representatives) to continue to receive transaction based, variable compensation in connection with their investment advice if its conditions are adhered to.

However, compliance with the BIC Exemption's conditions, including the detailed disclosures, contracts, and warranties, is expected to lead to, and facilitate, claims being brought in litigation, as these conditions provide a "roadmap" for potential litigants in asserting claims against fiduciaries. *This result was the specific intent of the Department* because the Department does not have jurisdiction to initiate enforcement actions involving IRAs and other non-ERISA plans, and such investors—by specific Congressional intent expressed in the enactment of ERISA—do not currently have a statutory standard of care under, or private rights of action to enforce the prohibited transaction rules under the Code. Rather, the Internal Revenue Service (and not the Department) has the Congressionally-granted authority and jurisdiction to investigate possible prohibited transactions with respect to IRAs and non-ERISA plans, and the SEC, FINRA, and other regulators have jurisdiction to enforce the federal securities laws and applicable state laws with respect to services to these accounts. Given this historical enforcement model, the BIC Exemption – which will create new legal rights enforceable through private rights of action – is a major change and is specifically intended to result in additional litigation against the financial services industry.

Potential new breach of contract claims relating to the BIC Exemption's "Impartial Conduct Standards" will likely be brought in state court or in individual arbitrations under agreements with clients which provide for arbitration, although claims may also be brought in or removed to federal court if diversity or federal question jurisdiction exists. These breach of contract claims may be based on allegations that the financial institution failed to meet the highly subjective "best interest" standard of care, or received compensation deemed to be in excess of reasonable compensation in connection with services to the client. Misrepresentation-based claims may also be brought as a result of parties seeking to rely on the BIC Exemption, in addition to possible state law breach of fiduciary duty claims and state securities act claims. These claims in many jurisdictions do not require scienter, reliance, or loss causation. Rather, a material misrepresentation of fact or omission may alone be sufficient to state a claim.

Unlike IRAs and non-ERISA plans, ERISA plan clients currently have a statutory private right of action to enforce ERISA's standards. Questions regarding whether advice related to rollovers from an ERISA plan has been given could give rise to these claims, and offer potential claimants the chance to use the leverage of a lawsuit. This litigation threat is harmful not just to firms, but also to moderate investors. Firms could shy away from giving guidance on how to handle a 401(k) because of the litigation risk, making "leakage" from premature distributions more likely.

A significant concern is that both claims based on the new private right of action for IRA clients and claims based on the expanded definition of "fiduciary" more generally may be brought as class actions. This is because the Department expressly forbade firms relying on the BIC Exemption from including contractual provisions under which investors are prohibited from bringing class action claims. Lawyers may also seek to bring class actions that potentially focus on financial institutions' fees, policies, training, and management of its financial professionals. It is anticipated that many of the class actions to be filed relating to the Rule and the BIC Exemption will be initiated in state court, which presents particular challenges and increased expenses for defendants.[80]

Class action risk has a history of being disruptive. A recent example is the "excessive fee" litigation targeted at the 403(b) space. The wave of litigation there is expected to result in reduced investment options available to teachers and non-profit workers.[81] This is a cautionary tale about what is likely to happen in the aftermath of the Department's enactment of the Rule.

Though quantifying litigation risk related to legislative or regulatory changes that have yet to take effect is challenging, the types of claims likely to be alleged based on the new fiduciary definition or the BIC Exemption will likely correlate to high litigation costs. One reason is the risk of class actions, which by their nature raise the stakes. Another reason is the nature of the anticipated claims, summarized above, and the fact that the Department is encouraging such increased litigation, which will be based primarily on applying yet to be defined subjective standards. Many of those claims, such as claims about whether a communication was in fact a recommendation or whether such recommendation was in the client's best interest, are likely to be fact-intensive and require subjective determinations, and may therefore not be well-suited to resolution early in the process of litigation through a motion to dismiss. Such motions allow defendants to dispose of claims that fail as a matter of law – *i.e.*, claims that fail, even assuming that all factual allegations are true. As a consequence, cases involving these types of claims may require substantial discovery before resolution, driving up defense costs and putting pressure on financial services firms to settle even cases that plainly lack merit just to avoid the costs associated with defending the litigation, including extensive discovery. This will give plaintiffs considerable leverage over firms, which could also be viewed as an intended consequence of the Rule.

In addition, for cases initiated as FINRA arbitrations, there is no mechanism for early dismissal of claims that are deficient as a matter of law.[82] Finally, the BIC Exemption does not permit financial institutions to disclaim or otherwise seek to limit liability. Claims that are ill-suited to being disposed of early in a case *via* a motion to dismiss, when coupled with the inability to disclaim or limit liability and the possibility of class action litigation, substantially increases litigation risk and defense costs for persons and firms seeking to rely on the BIC Exemption for recommendations that are now considered to be fiduciary investment advice.

There is no dispute regarding the potential for the plaintiffs' securities bar to abuse the system with attorney-driven litigation. Congress acknowledged this when it enacted the Private Securities Litigation Reform Act in order to deter "baseless and extortionate securities lawsuits."[83] The legislation was:

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[80] Certain actions may also be brought in federal court if there is jurisdiction under the Class Action Fairness Act.

[81] Investment News, *Attorney Jerry Schlicter opens up about 403(b), 401(k) suits*, (Aug 18, 2016), available at http://www.investmentnews.com/article/20160818/FREE/160819927/attorney-jerry-schlichter-opens-up-about-403-b-401-k-suitshttp://www.investmentnews.com/article/20160818/FREE/160819927/attorney-jerry-schlichter-opens-up-about-403-b-401-k-suits

[82] FINRA Rule 12504 provides that motions to dismiss in customer disputes may only be granted if it is shown that the non-moving party previously released the claim, the moving party was not associated with the alleged wrongdoing, or the non-moving party previously had a final adjudication of the same dispute.

[83] H.R. Rep. No. 104-369, at 32 (1995) (Conf. Rep.), as reprinted in 1995 U.S.C.C.A.N. 730, 731.

> prompted by significant evidence of abuse in private securities lawsuits . . . [which] include . . . *the routine filing of lawsuits against issuers of securities and others whenever there is a significant change in the issuer's stock price, without regard to any underlying culpability of the issuer*, and with only faint hope that the discovery process might lead eventually to some plausible cause of action[.][84]

Here, where the regulatory changes associated with a new "fiduciary" definition and the BIC Exemption are redefining the legal landscape, and trillions of dollars of investors' IRA, non-ERISA plan, and ERISA plan assets are at issue, there is *no doubt* that the plaintiffs' securities bar will be very active. While the Department's estimates of compliance costs related to this Rule – $16 billion in compliance costs over the first 10 years, $5 billion in first-year costs[85] – excluded costs associated with litigation settlements altogether,[86] a recent Morningstar report predicted that class-action settlements would cost between $70 million and $150 million annually industry-wide, though the number would likely be higher in the near term. Even that number is likely understated, given that it does not account for attorneys' fees.[87]

The plaintiffs' securities bar is poised to exploit the "litigation floodgates" that will be flung open by the Rule. For example, the Public Investors Arbitration Bar Association ("PIABA"), a bar association of lawyers who represent claimants in securities and commodities arbitration proceedings and securities litigation, has a "long record of speaking out in favor of the DOL rule on conflicted advice."[88] PIABA's president-elect has been quoted as saying that "there will be multiple lawsuits along with new FINRA arbitration cases when the Department of Labor's fiduciary rule takes effect."[89] There is also a proven record of the plaintiffs' securities arbitration bar flocking to case opportunities. For example, approximately 1,900 arbitrations have been filed since late October 2013 relating to Puerto Rico tax exempt bonds.[90]

Recent history provides numerous examples of how legal or regulatory changes trigger waves of opportunistic litigation. One example, from October, 2014, relates to a decision of the Delaware Court of Chancery in *Pontiac General Employees Retirement System v. Ballantine.*[91] There, the court denied a motion to dismiss relating to a novel legal theory that challenged a provision in a company's revolving credit and term loan agreement, which provided for immediate acceleration of the company's debt upon a change in control of the company – colloquially known as a "Dead Hand Proxy Put." The court's decision did not find that the provision was per se a breach of fiduciary duty on its own, but rather, deemed the provision a "highly suspect" entrenchment device under the particular facts of the case. *See id*. Almost immediately, the plaintiffs' bar began scouring credit agreements of public companies for

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[84] *Id.* at 31 (emphasis added).
[85] *See* 82 Fed. Reg. at 16,910.
[86] *For Fiduciary Rule, Morningstar Sees Up to $150M in Annual Class Action Settlements*, THINKADVISOR (Mar. 16, 2017), http://www.thinkadvisor.com/2017/03/16/for-fiduciary-rule-morningstar-sees-up-to-150m-in?page_all=1&slreturn=1491589989.
[86] *Id.*
[87] *Id.*
[88] PIABA Press Release, *PIABA Lauds Court Ruling in Favor of Fiduciary Rule, Urges End to Challenges and Multi-Billion-Dollar "Victimization of Investors,"* (Feb. 9, 2017), https://piaba.org/piaba-newsroom/piaba-press-release-piaba-lauds-court-ruling-favor-fiduciary-rule-urges-end-challenge. In March 2017, PIABA opposed the DOL's proposal to delay the applicability date of the fiduciary rule and the related exemptions. *See* PIABA Comment Letter on RIN 1210-AB79; *Definition of the Term "Fiduciary"; Delay of Applicability Date* (Mar. 17, 2017), https://piaba.org/piaba-newsroom/piaba-comment-letter-rin-1210%E2%80%90ab79-definition-term-%E2%80%9Cfiduciary%E2%80%9D-delay-applicability-da
[89] Ted Knutson, *Fiduciary Rule Day 1: Lawsuits, Arbitration Filings Predicted*, Financial Advisor (FA Online), Dec. 6, 2016, available at http://www.fa-mag.com/news/fiduciary-rule-day-1--lawsuits--arbitration-filings-predicted-30322.html (last accessed: April 8, 2017).
[90] Craig McCann, Chuan Qin, and Mike Yan, *Puerto Rico Securities Arbitration Report*, SECURITIES LITIGATION & CONSULTING GROUP (Feb. 21, 2017), http://www.slcg.com/pdf/workingpapers/PRSecuritiesArbitration.
[91] C.A. No. 9789-VCL (Del. Ch. Oct. 14, 2014).

Dead Hand Proxy Puts, which until that time were fairly standard and uncontroversial. As was widely reported, companies whose credit agreements contained these provisions became the "target du jour for entrepreneurial plaintiffs' counsel," and resulted in an "explosion in litigation activity."[92]

B. The June 9, 2017 Transitional Fiduciary Rule and BIC Exemption Carry a Litigation Risk that will Obstruct the President's Review

The Department's recent determination that fiduciaries relying on the BIC Exemption need adhere only to the Impartial Conduct Standards as conditions of the exemption during the transition period from June 9, 2017, through January 1, 2018 will not accomplish what the Administration wants: an opportunity to review the Rule without its detrimental impact occurring. While it is generally true that there is no private right of action for violations of agency or SRO rules, that is unlikely to deter the plaintiffs' bar from pursuing novel theories of liability, especially in arbitrations where no mechanism exists to dispose of claims early in the litigation. And in any event, the plaintiffs' bar has long relied upon violations of agency or SRO rules as evidence of duties owed or standards of care imposed under state common law theories.[93] Thus, the Impartial Conduct Standards themselves will likely be relied upon by the plaintiffs' bar to seek to expand liability. Moreover, because ERISA plan participants have a private right of action to enforce ERISA's fiduciary standards, claims may be brought during the transition period relating to rollover and investment advice to plan accounts, regardless of the lack of specific disclosure requirements during this time.

C. Litigation Risks Will Lead to Abandonment of Middle-Income Savers

Having set out a clear path for costly litigation, the Rule's broad expansion of the scope of fiduciary status, and uncertainty about how to comply with the subjective Impartial Conduct Standards, make it impossible to adopt a compliance strategy that contains and limits litigation and regulatory risks with any degree of certainty.

In particular, the Rule's new definition of fiduciary investment advice introduces vague and novel terminology that could have the result of almost every conversation that a representative may have with a potential client being deemed or alleged to be fiduciary investment advice. This is in large part (though not exclusively) because the Rule purports to remove mutuality and other elements as necessary conditions to establish a fiduciary relationship, and without these elements there is risk that fiduciary status can be unilaterally asserted after the fact, leaving no way for a representative to prove the contrary. Further, the Department failed to extend a seller's exception to IRAs or otherwise provide an ability to address conflicts by clear disclosures. As such, the Rule makes it nearly impossible with any degree of certainty to circumscribe and confine fiduciary status, and related liability, through agreements and understandings with customers. The combination of these elements of the Rule with the Department's stated intent to encourage private litigation tips the scales in favor of plaintiffs, against the financial services industry.

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[92] *Dead Hand Proxy Puts Face Continued Scrutiny From Plaintiffs Bar,* Bloomberg BNA (June 12, 2015), https://www.bna.com/dead-hand-proxy-n17179927613/.

[93] *See, e.g., Ives v. Ramsden*, 174 P.3d 1231, 1242 (Wash. App. Div. 2, 2008) ("it was proper for the trial court to consider compliance of the [National Association of Securities Dealers ("NASD") (predecessor to FINRA)] suitability rule as evidence of a duty that Ramsden owed his customers"); *Scott v. Dime Sav. Bank of New York, FSB*, 886 F. Supp. 1073, 1081 (S.D.N.Y. 1995) (negligence verdict upheld where broker failed to evaluate client's financial situation before opening margin account, in violation of "suitability rule" of the NASD); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cheng,* 697 F. Supp. 1224, 1227 (D.D.C. 1988) (violation by a broker of NASD "suitability rule," which requires evaluation of customer's financial situation and suitability to invest, was a factor that jury could weigh in considering negligence claim against the broker).

Specifically, firms and their representatives who become fiduciaries under the Rule and who seek to rely upon the proposed BIC Exemption would face even broader uncertainty and liability. They would be required to adhere to the BIC Exemption's contractual best interest standard of care that includes a novel expression of the duty of loyalty with little guidance as to how it may be met in a transaction-based brokerage model.

Moreover, as a condition of the BIC Exemption, firms must contractually agree to provide investment recommendations without regard to the financial or other interests of the adviser, financial institution or any of their affiliates or any other party. While the Department has stated that firms and their financial professionals are permitted to continue to receive differential compensation under this standard, it has offered limited (and somewhat contradictory) guidance, with no clear path as to how this can be operationalized for a financial services firm operating a transactional, commission-based business with hundreds if not thousands of individual registered representatives. Importantly, its so-called "neutral factors" for substantiating that a compensation differential does not impact best interest recommendations are entirely subjective and susceptible to challenge by any litigant wishing to do so. This construct has never before been applied to a brokerage or transactional based business model. The modern securities brokerage industry currently addresses conflicts that result from the payment of differential compensation through disclosure, supervision, and strict prohibitions against certain activities. As such, there is no guidance or precedent on how the Department's new standard of care can successfully be applied to such business models. Thus, in adopting the BIC Exemption (or the Department's Impartial Conduct Standards), a firm will not know with any degree of certainty whether it has satisfied the exemption, absent a final adjudication of the issue by a court or the Internal Revenue Service years later.

Adding to the litigation risks discussed above, the Rule and BIC Exemption create significant regulatory risk under the prohibited transaction rules as well. Specifically, requiring actual compliance with a subjective standard as a condition of the BIC Exemption exposes the firm to strict liability for a prohibited transaction regardless of whether there was even a loss. Penalties for engaging in a non-exempt prohibited transaction are severe, and may include undoing the transaction (even if it may be beneficial to the client), forfeiture of all compensation, disgorgement of any profits and payment of excise taxes of 15% to 100% of the amount "involved" in the transaction. In our comment letter on the proposed rule, we requested that the Department require that the firm contractually agree to provide its services pursuant to the Impartial Conduct Standards, but not require actual adherence to the Impartial Conduct Standards as the condition of the BIC Exemption. The Department has not addressed this request so this potential for strict liability remains. As such, amending the BIC Exemption to limit or eliminate private rights of action and class action risk is not enough to address the exemption's flaws. Rather, compliance with the Department's Impartial Conduct Standards cannot remain as a condition of the BIC Exemption.

D. The Fiduciary Rule and Its Exemptions Are Flawed

Because of the concerns expressed in this letter, and our Comment Letters, it is our sincere recommendation that the Rule is critically flawed and should be withdrawn. However, should the Rule instead be revised, we continue to recommend that changes discussed in detail in our previous Comment Letters be made in order for commission-based brokerage to be viable for consumers with small amounts to invest. The matters that must be addressed include the following:

- The definition of "fiduciary investment advice" should be narrowed to make it clear that fiduciary status is based upon a mutual understanding or agreement that advice is individualized to the advice recipient, and is intended for the recipient's material consideration.

- A meaningful seller's carve-out for retail investors should be added that preserves their access to non-fiduciary investment assistance and the commission-based brokerage model.

- An investment education carve-out should be added that:

    - Permits specific products to be identified so that useable and meaningful education and assistance can be provided to retail investors.
    - Incorporates FINRA guidance distinguishing recommendations from investment education within the context of rollovers and distributions.

- The BIC Exemption should be revised to preserve investor access to traditional commission-based brokerage services:

    - The "best interest" standard should be revised to adhere to the FINRA formulation: the financial professional should provide recommendations that are in the "best interests" of the client and put the client's interest before his or her own – the duty of loyalty and the "without regard to" language should be removed or exclusively addressed by clear disclosure.
    - No private right of action should be compelled; no contract should be required.
    - Actual adherence to the Impartial Conduct Standards as a condition of the exemption should not be required.
    - The contractual warranty requirements should be eliminated.
    - Differential compensation among products and asset classes should be expressly permitted; the Department should recognize that different products and asset classes can be priced differently provided clear and conspicuous disclosures are made.
    - Revenue sharing and other forms of third-party compensation should be permissible provided conflicts are mitigated and adequate disclosures are made: clear and objective guidance should be issued.
    - Existing accounts and all prospective transactions within them should be grandfathered under the current definition of "fiduciary investment advice" rather than transitioning them to the exemption.
    - Disclosures should be presented in a standardized rather than individualized format, requiring solely the information required in a summary prospectus.
    - The website and data record keeping requirements should be eliminated.
    - Parties should be permitted to waive class actions in connection with arbitration agreements.

IV. The RIA Is Flawed

A. Serious Economic Studies That Were Dismissed or Overlooked Are Now Supported by the Real-World Market Reaction to the Rule

It is indisputable that numerous studies submitted by thoughtful and well-respected economists were dismissed by the RIA without serious consideration. These studies addressed the apparent flaws in the RIA and overwhelmingly concluded that the RIA overstated the benefits of the Rule and that the costs of the Rule exceed its benefits. For example, one respected study by Oliver Wyman, drawn on a survey of more than 4,300 retail investors and 1,200 small businesses, determined that if the Rule is implemented,

"millions of existing small balance IRA owners are likely to lose access to their financial advisor of their choice or access to any financial advisory at all."[94]

> "The majority of others will face higher costs when providers shift brokerage accounts to advisory accounts. Individuals without the help and support of advisors are less likely to open an IRA, leading to increased cash-outs when changing jobs. Unadvised individuals are likely to carry excess portfolio risk due to less diversification and less frequent rebalancing."[95]

The Department dismissed the theory that a shift to advisory would take place, or, that if it did, small accounts would be abandoned. New evidence of announced structural changes has proven the Department's assumption to be in error. As a result, this study deserves another look.

Similarly, a scholarly report by Robert Litan and Hal Singer predicted that if brokers leave the small-saver segment, as many firms have announced they will, middle-income savers will incur significant costs from the loss of human advisors. Litan and Singer concluded that the cost to consumers resulting from just two factors – the loss of coaching to stay invested through market downturns, and the loss of assistance in portfolio rebalancing – conservatively total an investment loss of 44.5 basis points annually, "enough to outweigh the DOL's claimed 25 basis point benefit for its rule, and to even more substantially outweigh a more accurate, lower accounting of the rule's claimed benefits."[96] Litan and Singer further concluded,

> "Advocates of the proposed rule assume naively that 'robo advisors' will over time fill the gap so small savers will continue to be advised; but as this report shows, emails and tweets from a robot will not prevent an investor from selling in a panic, and the value of that human interaction during periods of market stress will swamp anything else a small saver does with respect to outcomes and retirement security."[97]

Yet the Department rejected this analysis. To this day, it continues to assert that robo-advice will be sufficient for most American families. Given what we now know about the real-world impact of the Rule, the study certainly deserves reconsideration.

Because the market response to the Rule aligns with the forecasts made in many of the economic analyses dismissed by the Department, rather than with those assumptions made in the RIA, we respectfully request that these studies, each submitted to the Department as a comment letter in July of 2015, be given new attention. These include, without limitation:

- ICI, "Supplemental Comment of December 1, 2015," (July 2015)
- Robert Litan and Hal Singer, "Good Intentions Gone Wrong: The Yet-To-Be Recognized Costs of the Department of Labor's Proposed Fiduciary Rule" (July 2015)
- Oliver Wyman, The Role of Financial Advisors in the US Retirement Market (July 10, 2015)
- Deloitte & Touche LLP, Report on the Anticipated Operational Impacts to Broker-Dealers of the Department of Labor's Proposed Conflicts of Interest Rule (July 17, 2015)
- Compass Lexecon, An Evaluation of the Department' Impact Analysis of Proposed Rules Relating to Financial Representative Fiduciary Status (July 20, 2015)

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[94] Supra, note 4.
[95] *Id*,.
[96] Supra, note 6.
[97] *Id.*

- NERA Economic Consulting, Comment on the Department of Labor Proposal and Regulatory Impact Analysis (July 17, 2015)
  Compass Lexecon, Tax Consequences to Investors Resulting from Proposed Rules Relating to Financial Representative Fiduciary Status (July 20, 2015)

V. The Department's Transitional Fiduciary Rule as Modified in the Extension Will Not Mitigate the Harm

A. The Department's Expanded Definition of Fiduciary and Imposition of the Impartial Conduct Standards Is Obstructive of the Goals of the President's Memorandum and Its Characterization as "Noncontroversial" Is Wrong

The Extension prejudges the outcome of the President's directive to study the Rule by putting the core elements of the Rule —namely, the amended definition of fiduciary and the Impartial Conduct Standards of the related exemptions—into effect *before* the Department reviews their potential impact on investors. The Department's actions here brazenly disregard the President's concerns and directive to study the Rule by imposing a new sweeping definition of fiduciary upon representatives of financial services firms beginning on June 9, 2017 and suggesting a post-Rule analysis will be sufficient to address the questions raised in the President's Memorandum. This completely ignores (or brushes under the rug) the very real fact that the Department's expanded definition of fiduciary is an unbounded expansion of who is a fiduciary that departs widely from the accustomed fiduciary construct under state and federal law.

The broadened fiduciary definition imposed by the Rule is much more than a "best interest" requirement. Rather, it suffers from a multitude of flaws that have been raised to the Department but that the Department has chosen to disregard: lack of a requirement for a meeting of the minds as to whether a fiduciary engagement has occurred, lack of a sellers' exception for IRAs (which are inherently retail accounts), narrowing of the definition of investment education, and an exemption whose stated intention is to preserve brokerage models, but that will add such significant litigation risk and compliance uncertainty to these models that they will almost certainly be extinguished over time.

The Department bolsters its Rule by ensuring that, beginning on June 9, 2017, broker-dealers who intend to continue providing brokerage-based services will have few options but to (attempt to) comply with the Department's "Impartial Conduct Standards". While the Department may argue that compliance with these fiduciary obligations will be easier during the transition period, we believe that is a fallacy. The Impartial Conduct Standards create oblique standards that, as discussed above, are not consistent with SEC and ERISA fiduciary duties in significant ways that make them incompatible with transaction-based brokerage. Firms will not be able to know or control the commitments they are undertaking, and therefore many will reject the risk. Rather than face the uncertainty of the Impartial Conduct Standards, these firms will transition away from serving clients with smaller amounts to invest and will serve wealthier retirement clients only on an advisory basis. This is confirmed by the announcements of some of the largest firms in the country, as discussed above.

B. The Department Must Delay the June 9, 2017 Applicability Date of the Amended Definition of Fiduciary and the Impartial Conduct Standards of the Related Prohibited Transaction Exemptions

To mitigate the harms and costs to retirement investors and increased litigation risk to firms described in this letter, the Department must further delay the applicability date of the amended definition of fiduciary

under the Rule and the Impartial Conduct Standards of the related prohibited transaction exemptions, to permit the time for a full study of the Rule in accordance with the President's directive.

As the Department is well aware, one avenue for such further delay is an interim final rule, subject to post-promulgation comment. Interim final rules may be issued when an agency finds that it has "good cause" to issue a final rule without a preceding period for notice and comment.[98] Good cause exists where a notice and comment period would be "impracticable, unnecessary, or contrary to the public interest."[99]

Indeed, the Department has issued several interim final rules[100] and final rules without preceding notice and comment periods.[101] Moreover, the Department has delayed the applicability and effective dates of certain of its regulations,[102] in some cases without preceding notice and comment periods.[103]

In the case of the regulations promulgated under ERISA section 408(b)(2), the Department delayed the original July 16, 2011, effective date to April 1, 2012, in response to public comments "[p]ointing out that the Department had not yet published a final rule, . . . [and] if the Department modifie[d] the [] interim final rule, service providers w[ould] need additional time to make further changes to their systems and procedures . . ."[104] As described in the notice, "Based on these concerns, the Department believed that an extension of the rule's effective date would allow time for improved compliance by plans and service providers, and thus would be in the interests of participants and beneficiaries."[105]

The Department delayed three times the effective and applicability dates of the regulations promulgated under ERISA sections 408(b)(14) and 408(g). Following a memorandum from then-President Barack H. Obama's Chief of Staff directing agency heads to consider extending by 60 days the effective dates of regulations that had been published in the Federal Register but had not gone effective and allowing 30 days for interested persons to comment on issues of law and policy raised by such rules, the Department proposed to delay (and ultimately did delay) the effective date and applicability date of these regulations.[106] The Department subsequently further delayed the effective and applicability dates of the rules from March 23, 2009, to May 22, 2009, to "allow additional time for the Department to evaluate questions of law and policy concerning the rules."[107] The Department stated that upon completion of its review, it might allow the rules to take effect, issue a further extension, withdraw the rules, or propose amendments.

Having received a total of 27 comment letters regarding the rules, a number of which "expressed the view that the final rules raise significant issues of law and policy . . . [and] expressed disagreement with the final rules' interpretation of the statutory exemption, and further questioned the adequacy of the class

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[98] 5 U.S.C. § 553(b)(3)(B); (d).
[99] 5 U.S.C. § 553(b)(B).
[100] *See, e.g.,* 75 Fed. Reg. 41,599 (Jul. 16, 2010) (Interim Final Rule Relating to Reasonable Contract or Arrangement Under Section 408(b)(2)-Fee Disclosure); 74 Fed. Reg. 51,663 (Oct. 7, 2009) (Interim Final Rules Prohibiting Discrimination Based on Genetic Information in Health Insurance Coverage and Group Health Plans); 72 Fed. Reg. 10,070 (Mar. 7, 2007) (Interim Final Rule Relating to Time and Order of Issuance of Domestic Relations Orders).
[101] 74 Fed. Reg. 59,092 (Nov. 17, 2009); 74 Fed. Reg. 23,951 (May 22, 2009).
[102] *See, e.g.,* 74 Fed. Reg. 59,092 (Nov. 17, 2009); 74 Fed. Reg. 23,951 (May 22, 2009); 74 Fed. Reg. 11,847 (Mar. 20, 2009); 76 Fed. Reg. 42,539 (Jul. 19, 2011).
[103] 74 Fed. Reg. 59,092 (Nov. 17, 2009); 74 Fed. Reg. 23,951 (May 22, 2009); 66 Fed. Reg. 45,167 (Aug. 28, 2001)(MSHA interim final rule delaying effective date based on good cause as impracticable and contrary to the public interest).
[104] 76 Fed. Reg. 42,539 (Jul. 19, 2011).
[105] *Id.* The Department further delayed the effective date of the regulation until July 1, 2012, to "ensure that covered service providers and other parties have sufficient time to prepare for compliance with the final rule," due to delays in the publication of the final rule. 77 Fed. Reg. 5,632 (Feb. 3, 2012).
[106] 74 Fed. Reg. 6007 (proposed Feb. 4, 2009).
[107] 74 Fed. Reg. 11,847 (Mar. 20, 2009).

exemption's conditions in mitigating against the potential for investment adviser self-dealing," the Department, without a preceding notice and comment period, once more delayed by 180 days the effective and applicability dates of the final rules from May 22, 2009, to November 18, 2009 due to the "complexity and significance of the issues involved."[108]

For those same reasons, the Department, again without preceding notice and comment periods, further delayed the November 18, 2009, date by 180 days, stating that "This additional time will allow the Department to complete its analysis of the issues of law and policy and determine the appropriate steps to be taken."[109]

In delaying its regulations under ERISA sections 408(b)(2), 408(b)(14), and 408(g), the Department notably did not make any conditions or requirements of the regulations effective or applicable. As noted above, because the section 408(b)(2) rules were not finalized and given the potential for revisions, the Department delayed the effective and applicability dates in their entirety. The Department took the same steps with regard to the sections 408(b)(14) and 408(g) regulations—delaying the effective and applicability dates of the rules in their entirety—while the Department reviewed and analyzed the public comments that it solicited. Remarkably, faced with considering only 27 public comments, the Department delayed these rules for over a year.

With respect to the Rule, the Department has acknowledged that it has received and continues to receive a "very high volume of comment and petition letters on a daily basis," on the issues on which it has solicited comment.[110] Unless the Department has prejudged the outcome of the examination, the Department undoubtedly will need ample time to review and analyze the high volume of comments that it acknowledges it has and will receive. Indeed, the Department indicated that it intends to perform the examination of the Rule required by the President's Memorandum between April 7, 2017, and January 1, 2018.[111] And, upon completion of the examination, the Department has stated that it may revise or rescind some or all of the Rule, "*including the provisions scheduled to become applicable on June 9, 2017*."[112]

In stark contrast to actions previously taken by the agency (as described above), the Department would allow the most critical parts of the Rule—namely, the amended definition of fiduciary and the Impartial Conduct Standards of the related exemptions—to become applicable while it conducts an examination of the Rule and complies with the President's requests. As discussed above, the Rule itself, including any partial implementation of it, would cause harm by limiting access to investment advice for middle-income investors, causing representatives and small firms to leave the industry, increase consolidation for larger firms, frustrate the President's request for review of the Rule and further confusion and harm if ultimately revised. Thus, the Department must delay the Rule in its entirety until it has completed the presidentially-mandated examination and decided what appropriate steps it must take in accordance therewith.

Given that the Department has itself acknowledged that it may revise or rescind the Rule, including those parts that become applicable on June 9, 2017, it is clear that the Department has *good cause* to issue an

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[108] 74 Fed. Reg. 23,951 (May 22, 2009).
[109] 74 Fed. Reg. 59,092 (Nov. 17, 2009). A few days after the last delay, the Department withdrew the final rule, and subsequently proposed and finalized a new version of the regulations based on its further consideration of the comments received. 76 Fed. Reg. 66,135 (Nov. 25, 2010);74 Fed. Reg. 60,156 (Nov. 20, 2009); 75 Fed. Reg. 9,360 (proposed Mar. 2, 2010).
[110] 82 Fed. Reg 16,903 (Apr. 7, 2017).
[111] *Id*. at 16,906.
[112] *Id.* (emphasis added).

interim final rule further delaying the Rule in its entirety. In particular, according to the Department, one of its objectives in providing the 60-day delay of the applicability date of the Rule was to "avoid unnecessary confusion and uncertainty in the investment advice market ..."[113] The Department concluded that it could not delay the Rule any further because the cost savings did not outweigh the additional investor losses in connection with a further delay. As discussed above, however, as a result of flaws in the RIA, the Department grossly overestimated the scope of the purported investor losses and underestimated the harms to investors. Additionally, the Department did not accurately or adequately consider the immense investor confusion that is likely to result if the Rule goes into effect but is subsequently rescinded or revised in part or in whole. The impact of such confusion will be widely felt.

Accordingly, unless the Department completes the Presidentially-mandated examination of the Rule prior to June 9, 2017, to avoid the harm that the Rule will cause (as discussed above), the Department must issue a further delay of the Rule in its entirety, until the Department completes its examination and determines whether to revise or rescind the Rule. As set forth above, such delay would not only be consistent with previous actions taken by the Department, but would be in the public interest.

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New data and public-company announcements confirm that the Rule is poised to cause greater harm than benefit to middle-income consumers' retirement savings success. The Rule will result in a wholesale restructuring of the delivery of financial services to retirement investors in a disruptive manner that is not likely to inure to the "best interests" of savers, and that will particularly disadvantage American families with modest amounts to invest. This new evidence is conclusive that the Rule is not the proper means for addressing the Department's desire to enhance investor protections. Partial implementation of the "Fiduciary Rule" and the "Impartial Conduct Standards" on June 9, 2017 will have the same harmful results. For these reasons, we believe it is imperative that the Department respond to the President's directive to study its Rule *before* implementing any part of it.

For the reasons discussed herein, we respectfully request that the Department delay the applicability date of the Rule, for good cause, for a period of no less than 180 days, and simultaneously with the delay issue a notice of proposed rulemaking for complete withdrawal. We thank the Department for its efforts in this matter and we appreciate the opportunity to share our thoughts in this critical rulemaking.

Sincerely,

[113] 82 Fed. Reg. 16,912 (Apr. 7, 2017).