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April 17, 2017

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

Re: RIN 1210-AB79; Definition of the Term "Fiduciary"; Updated Economic and Legal Analysis

To Whom It May Concern:

I write on behalf of the Public Investors Arbitration Bar Association ("PIABA"), an international bar association comprised of attorneys who represent investors in securities arbitrations. Since its formation in 1990, PIABA has promoted the interests of the public investor in all securities and commodities arbitration forums, while also advocating for public education regarding investment fraud and industry misconduct. Our members and their clients have a strong interest in rules which govern the conduct of those who provide advice to investors.

PIABA strongly opposes any revision or revocation to the Department of Labor's Conflict of Interest Rule (the "Rule") and accompanying exemptions (collectively, the "PTEs"). On February 3, 2017, the President, by Memorandum to the Secretary of Labor, directed the Department to prepare an updated economic and legal analysis and to "examine the Fiduciary Duty Rule to determine whether it may adversely affect the ability of Americans to gain access to retirement information and financial advice."

PIABA urges the Department to move forward with implementation of the Rule and PTEs as initially adopted over a year ago. The Rule is necessary to protect investors like Steve, a 69 year old Vietnam War veteran. He lives in Sycamore, Illinois with his wife, Constance, who has a pacemaker and other serious health problems. Steve had been a supervisor for Ideal Industries, a manufacturer of electrical connectors, testers, and other electrical components. In 1999, Steve went through a corporate downsizing after the company began moving some of its manufacturing to China. After being laid off, he worked several jobs. He worked on the assembly line at Caterpillar and as a real estate appraiser. He is now receiving social security and does not work.

In about 2007, Steve's broker invited him to a "free lunch" seminar. At the seminar, and in later meetings, the broker said he recommended taking a cautious, conservative approach to investing. He also offered his clients the services of an attorney to set up trusts at reduced rates. Steve was convinced that his broker was an advisor he could trust with his life savings and he rolled over his pension. The broker recommended that Steve invest in Inland American and Behringer Harvard REITs because they were safe, secure investments that would pay him supplemental retirement income. He invested over 80% of Steve's life savings in these two speculative, nontraded REITs, which made no sense for someone who was 60 years old at the time, retired, had no pension, and needed to preserve his savings. Steve ended up losing $144,000, or approximately half of his initial investment. The losses were devastating to him.

The Department engaged in a lengthy rulemaking process before it adopted the Rule and accompanying PTEs. The Department has already considered the concerns raised in the Presidential Memo, and determined that associated costs were outweighed by the benefits to retirement investors. Nothing has changed since the Rule and PTEs were adopted, and they should be permitted to be fully enacted.

I. **<u>The Rule and PTEs were adopted after significant study and analysis</u>**

The Department adopted the Rule and the PTE's after it engaged in the rulemaking process over at least a six year period. The Department filed its initial proposal to amend the definition of "investment advice fiduciary" in October 2010.[1] The Department received over 300 comment letters on the 2010 proposal, held a public hearing at which 38 speakers testified, and then received an additional 60 comments following the public hearing.[2] The Department then met with various stakeholders over the next several years.[3] This process resulted in the Department's withdrawal of the 2010 proposal and submission of a new proposal in April 2015.[4] Throughout 2015, the Department received over 3,000 comment letters and over 300,000 submissions made as part of 30 separate petitions submitted on the new proposal.[5] The Department held four days of public hearings at which over 75 speakers testified.[6] On April 8, 2016, the Department filed its final rule in the Federal Register.[7] It provided for an applicability date of April 10, 2017.[8] The Department delayed the applicability date for full compliance with the terms of the various PTEs to allow firms to continue to benefit from the relevant exemptions without having to meet all of the exemptions' requirements for a number of months.[9] In support of the final rule, the Department prepared a 395 page Regulatory Impact Analysis.[10]

When issuing the Rule, the Department determined that "in light of the importance of the final rule's consumer protections and the significance of the continuing monetary harm to retirement investors without the rule's changes, an applicability date of April 10, 2017, is adequate time for [retirement] plans and their affected

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[1] *See*, Dep't of Labor, *Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice; Final Rule*, 81 Fed. Reg. 20946, 20956 (April 8, 2016) ("DOL Final Rule"), available at http://webapps.DOL.gov/FederalRegister/PdfDisplay.aspx?DocId=28806.
[2] *Id.* at 20957.
[3] *Id.*
[4] *Id.*
[5] *Id.* at 20958.
[6] *Id.*
[7] *Id.* at 20946.
[8] *Id.*
[9] *Id.*
[10] *See*, "Regulating Advice Markets; Definition Of The Term "Fiduciary"; Conflicts Of Interest - Retirement Investment Advice; Regulatory Impact Analysis for Final Rule and Exemptions" (April 2016) ("RIA"), available at https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/conflict-of-interest-ria.pdf.

financial services and other service providers to adjust to the basic change from non-fiduciary to fiduciary status."[11]

It is important that the Rule and the PTEs move forward and begin the intended protection of retirement investors. Currently, brokers, often called financial advisors by themselves and others, are governed primarily by FINRA rules and state law (which is inconsistent across the country). For example, the FINRA suitability rule requires that a broker only have a "reasonable basis" for making an investment recommendation, and that the recommendation be "suitable" for the investor. Under this suitability standard, a broker can sell a high-priced fund to an investor rather than a lower cost S&P 500 Index fund as long as the broker determines that the higher priced fund is "suitable" for the investor. The broker is not required to disclose to the investor that there were other lower cost options available that were also suitable or that there were conflicts of interest which may have influenced the broker's recommendation. This conflicted advice costs investors **$17 billion each year**.[12]

Under the Rule, financial advisors are obligated to eliminate conflicts of interest which permeate the financial services industry. Financial advisors are given the ability to manage certain conflicts, so long as they comply with an exemption to the Rule which provides transparency to the investor. No longer will the financial advisor be permitted to recommend an imprudent investment product or one based on the amount of commissions paid, even if it they are suitable, without disclosing the potential conflicts of interest that may be affecting the advice the investor receives.

The Department created the Best Interest Contract Exemption (the "BICE"), which would allow firms to continue receiving commissions and other forms of compensation that are common to retail transactions involving retirement plans, which would otherwise be prohibited under the Rule.[13] However, the BICE also ensures that investors receive retirement investment advice that is in their best interests. Pursuant to the BICE, financial advisors and firms that provide retirement advice may continue to receive commissions, 12b-1 fees, revenue sharing payments from issuers, sales loads or other similar compensation, provided that the investment advice they give is in the investor's best interest and "that they implement safeguards against the harmful impact of conflicts of interest on investment advice."[14]

II. <u>If the applicability date of the Rule and PTEs is delayed for 6 months, a year, or more, the costs to investors will be substantial</u>

Any further delay in implementation of the Rule and PTEs would cause investors to incur substantial costs. While estimates of those costs vary, there is widespread agreement that each month of delay would cost retirement investors over one billion dollars. This confirms what the Department concluded after over six years of careful review, as set forth in the Regulatory Impact Analysis ("RIA") – that delaying the beneficial protections of the Rule will cost investors billions of dollars.

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[11] DOL Final Rule at 20946.
[12] *See*, White House Council of Economic Advisers, "The Effects of Conflicted Investment Advice on Retirement Savings" (Feb. 2015) ("CEA Report"); available at https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_coi_report_final.pdf.
[13] DOL Final Rule at 20991.
[14] *Id.* at 21003, 21004.

a. Delays in implementing the Rule and PTEs would cost investors billions of dollars

After six years of careful analysis, the Department reached the conclusion that the cost to investors of investing based on conflicted advice is about $1.4 billion a month.[15] The White House Council of Economic Advisors reached a similar conclusion – that investors lose about $17 billion a year – over one billion dollars a month.[16]

These estimates have been accepted not just by investor advocacy organizations, but by the CFA Institute and the Financial Planning Coalition – organizations that represent financial advisors. The CFA Institute describes itself as a global, not-for-profit professional association of nearly 146,400 investment analysts, advisers, portfolio managers, and other investment professionals in 163 countries and territories, of which more than 140,000 hold the Chartered Financial Analyst® (CFA®) designation.[17] The Financial Planning Coalition (Coalition) is comprised of the Certified Financial Planner Board of Standards (CFP Board), Financial Planning Association® (FPA®) and National Association of Personal Financial Advisors (NAPFA).

In its March 17, 2017 comment opposing delay, the CFA Institute cites the Department's analysis and estimate of investor losses. It goes on to identify other potential causes of investor losses such as "revenue sharing, or mark-ups in principal transactions, … excessive or poorly timed trading, … annuity sales to IRA investors…."[18] The CFA Institute notes that "these compensation arrangements, transactions, conflicts, activities and investment instruments all raise questions about whether the investment firms selling these types of products and services have the best interests of their clients in mind."[19] The investor losses to which the CFA Institute refers are in addition to the losses identified in the RIA.

The Financial Planning Coalition also opposes delay because of the costs it will impose upon investors.[20] Citing the DOL's analysis of the substantial costs to investors from conflicted advice, the Financial Planning Coalition points out that "retirement investors' losses will be compounded over the life of the investment product."[21]

b. Federal courts have found the Department of Labor's estimates of investor losses to be credible

While the financial services industry has brought multiple lawsuits to block the Rule and PTEs, each court that has considered those lawsuits has upheld the rule. Those courts have rejected claims that the Department's adoption of the Rule and PTEs was arbitrary and capricious. In upholding the Rule and PTEs, those federal courts have found the Department's cost/benefit analysis was properly based upon the evidence before it. [22]

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[15] *See*, RIA, supra n. 10.
[16] *See*, CEA Report at 20, supra n. 12.
[17] *See* March 17, 2017 Comment of CFA Institute, available at https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/01045.pdf.
[18] *Id.* at 2.
[19] *Id.*
[20] *See* March 15, 2017 Comment of Financial Planning Coalition, available at http://financialplanningcoalition.com/wp-content/uploads/2017/03/FinancialPlanningCoalition_Comment-RIN-1210-AB79.pdf.
[21] *Id.* at 7.
[22] *See National Association for Fixed Annuities v. Perez*, 2016 WL 6573480 (D.D.C. Nov. 4, 2016) (granting summary judgment in favor of the Department) ("NAFA"); *Chamber of Commerce of the United States v. Hugler*, 2017 WL 514424 (N.D. Tex. Feb.

In *Chamber of Commerce*, a Texas federal court found that the Department's evaluation of the costs to investors of conflicted advice was based upon evidence – not arbitrary and capricious.[23] The court rejected the industry complaint that the Department failed to obtain more specific evidence of IRA investor losses.[24] The court noted that during the comment period, "DOL specifically requested the industry provide any and all relevant data for IRA investments, but was told the data either did not exist or would be too expensive to collect."[25]

In *Market Synergy*, a Kansas federal court concluded that "[a]ny injunction will produce a public harm that outweighs any harm that plaintiff may sustain from a rule change."[26] The court noted there was no basis in the administrative record to question the Department's conclusion that the Rule would produce valuable net benefits:

> The Department has determined that the Rule changes will benefit retirement investors throughout the United States by requiring investment advisers to act in the best interest of those investors. Congress authorized the Department to evaluate these competing interests and it has concluded that significant public interests favor the proposed regulatory changes. As already explained, evidence in the administrative record supports the Department's determination and the court finds no basis for contradicting those findings.[27]

In *NAFA*, the D.C. federal district court rejected all of the plaintiff's claims that the Rule was invalid. The court granted summary judgment to the Department. In rejecting the plaintiff's request for a stay pending appeal, the court emphasized the need to ensure that the "core protections" in the Rule go into effect no later than April of 2017: "this [is] not a case in which other interested parties or the public will suffer "little if any harm" if the new rules are enjoined pending appeal."[28]

III. <u>The anticipation of the Rule has not caused brokerage firms to cease to offer commission based products, or to otherwise abandon or de-emphasize the needs of small investors</u>

Virtually every major brokerage firm has announced that they intend to continue to offer commission based accounts and products to their clients, after the Rule goes into effect. These brokerage firms include: Morgan Stanley, Ameriprise, Raymond James, LPL Financial, Edward Jones, Cambridge Investment Research, Cetera Financial Group, Wells Fargo Advisors, and the brokerage firms affiliated with insurance companies Massachusetts Mutual Life Ins. Co., Lincoln National Corporation, and Primerica.[29] Similarly, Merrill Lynch has recently stated that

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8, 2017) (granting summary judgment in favor of the Department); and *Market Synergy Group, Inc. v. Hugler*, 2017 WL 661592 (D. Kan. Feb. 17, 2017) (granting summary judgment in favor of the Department).

[23] *Chamber of Commerce*, slip op. at 61-62.

[24] *Id.*

[25] *Id.* at 62.

[26] *Market Synergy* at *30.

[27] *Id.*

[28] *Nat'l Ass'n for Fixed Annuities v. Perez*, No. CV 16-1035 (RDM), 2016 WL 6902113, at *3 (D.D.C. Nov. 23, 2016).

[29] Greg Iacurci, "Insurance – based Broker-dealers Plan Use BICE Under DOL Fiduciary Rule", investment news.com (July 7, 2016); Greg Iacurci & Christine Idzelis, "Broker-dealer Split on Commissions in Wake of DOL Fiduciary Rule", investment news.com, (October 30, 2016); Bruce Kelly, "Cambridge, Cetera Will Continue to Pay Commissions on IRAs Under DOL Fiduciary Rule", investment news.com (November 1, 2016); Greg Iacurci, "Wells Fargo to Keep Commission Retirement Accounts Under DOL Fiduciary Rule", investment news.com (December 2, 2016).

it may not eliminate commission based accounts for all of its retirement customers, as it had originally planned.[30] Indeed, a recent study of representatives affiliated with 14 of the largest independent brokerage firms reflects that 74% of such advisors/firms will continue to allow commission based transactions in retirement accounts after the fiduciary rule goes into effect.[31] These representatives reported that they believe that they can operate in the best interest of their clients, while still offering commission based products.[32] In fact, the only brokerage firm that has affirmatively stated that it will no longer offer commission based accounts in response to the Rule is Commonwealth Financial Network.[33] Commonwealth's shift away from commission based accounts is unlikely to have any significant impact on customers because Commonwealth only employs 1,600 advisors, and derives less than 10% of its revenues from commissions on retirement accounts.[34]

The vast majority of brokerage firms and financial advisors have also stated, without equivocation, that they will continue to offer the full panoply of financial products to small investors, once the fiduciary role goes into effect. For example, Morgan Stanley announced that its transaction based retirement brokerage accounts will continue to offer a broad array of products after the Rule goes into effect, including, but not limited to, mutual funds and exchange traded products.[35] Similarly, Raymond James has announced that it fully expects to continue to offer a full range of investment options for all of its clients once the Rule goes into effect.[36] Likewise, Edward Jones customers who utilize its transaction based IRAs will be able to invest in a full range of stocks, bonds, certificates of deposits, and variable annuities.[37] Indeed, the recent survey of representatives affiliated with 14 major independent brokerage firms also found that 74% of such advisors/brokerage firms have not reduced the number of products that were available to their transaction based customers as a result of the Rule.[38] These same representatives reported that, while they are acting as fiduciaries, much of their business is still transaction based and therefore available to small investors.[39]

Several brokerage firms have also reduced their fees for small investors and/or reduced account minimums, in response to the Rule. As a result, the Rule has benefitted small investors by providing them with lower fees and access to services and accounts that they did not previously have. For example, Merrill Lynch is discounting fees for IRA accounts that are moved over to an advisory relationship in order to equalize the fee level for its low trading brokerage customers.[40] Edward Jones will be reducing the minimum on its fee-based accounts to $25,000 for clients who want to purchase stocks, mutual funds, or exchange traded funds, and to $50,000 for clients who

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[30] Diana Britton, "Delay or not IBDs Moving Toward a Fiduciary Future", wealth management.com, (April 5, 2017).
[31] *Id.*
[32] *Id.*
[33] Greg Iacurci & Christine Idzelis, Broker-dealer Split on Commissions in Wake of DOL Fiduciary Rule", investment news.com, (October 30, 2016).
[34] *Id.*; Andrew Welsch, "Raymond James Follows Morgan's Lead in Keeping Commissions Under Fiduciary Rule", on Wall Street.com, (October 27, 2016).
[35] Jim Wiggins, "Morgan Stanley to Preserve Client Choice for Retirement Accounts", Morgan Stanley.com/press releases (October 26, 2016).
[36] Andrew Welsch, "Raymond James Follows Morgan's Lead in Keeping Commissions Under Fiduciary Rule", on Wall Street.com (October 27, 2016).
[37] Andrew Welsch, "Fiduciary Ready: Edward Jones Unveils Compliance Plans", on Wall Street (August 19, 2016).
[38] Diana Britton, "Delay or not IBDs Moving Toward a Fiduciary Future", wealth management.com, (April 5, 2017).
[39] *Id.*
[40] Greg Iacurci & Christine Idzelis, "Broker-dealers Split on Commissions in Wake of DOL Fiduciary Rule", investment news.com (October 30, 2016).

want to purchase individual bonds.[41] In addition, Edward Jones will continue to have a minimum investment requirement of $5,000 for its Guided Solutions Fund Account.[42] Similarly, LPL Financial has announced that it will be reducing the account minimum for its Optimum Market Portfolios from $15,000 to $10,000, in anticipation of the Rule.[43] Charles Schwab has also recently announced that it plans to launch a new advisory service in the first half of 2017 that will have an investment minimum of $25,000, but will offer comprehensive financial and investment planning, ongoing guidance from planning consultants, and fully automated and diversified portfolios comprised of low-cost, exchange traded funds from Schwab and third-party providers such as Vanguard.[44]

In short, the anticipation of the Rule has not resulted in any meaningful reduction of commission based products. It has not caused any decline in the products or services that are available for small investors. It has done exactly the opposite. As a result of the Rule, brokerage firms will be offering more services and investment products to small investors than they did prior to the enactment of the Rule.

The lack of any adverse impact to small investors from a fiduciary rule is further borne out by an extensive study that was conducted in 2012, which examined whether there were differences in the services available to investors in states that have fiduciary standards and those that do not. The study found that customers in the states that have a common law fiduciary rule applicable to broker-dealers and financial advisors [California, Georgia, Florida, Missouri, Puerto Rico, South Carolina, and South Dakota], have full access to investment advice and financial services.[45] This study found no statistical difference between the quantity and diversity of financial and investment services and products that were available in states that impose a fiduciary standard on brokers and brokerage firms, and those that do not.[46] This study further found that brokerage firms and advisors operating in states which hold brokers and brokerage firms to be fiduciaries provide the same level of service for lower wealth clients as in states without a fiduciary standard, that they provide a broad range of products to such clients, and that they allow for commission based compensation.[47]

Most importantly, small investors have an equal if not greater need for the protections of a fiduciary rule than investors with larger accounts. Many small investors have less ability to withstand the risk or bear the expense that is associated with conflicted financial advice than those with greater wealth. Further, small investors are at a disadvantage if they lose money due to conflicted financial advice. It will often cost investors too much to pay an attorney hourly fees to try to recover such losses and it is often not cost-effective for an attorney to represent such an investor on a contingency fee basis (*i.e.*, where the attorney's compensation is a percentage of the amount recovered on behalf of the investor). Accordingly, it is disingenuous in the extreme to suggest that reversing and/or eliminating the Rule would somehow benefit small investors.

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[41] Andrew Welsch, "Fiduciary Ready: Edward Jones Unveils Compliance Plans", on Wall Street (August 19, 2016).
[42] *Id.*
[43] Think advisor, "LPL Cuts Prices, Account Minimums Ahead of DOL Fiduciary Rule", think advisor.com, (March 16, 2016).
[44] Michael Cianfrocca, "Schwab Announces Schwab Intelligent Advisory", Charles Schwab press release (December 13, 2016).
[45] Michael Finke and Thomas P. Langdon, "The Impact of the Broker-dealer Fiduciary Standard on Financial Advice" (March 9, 2012), onefPA.org/journal.
[46] *Id.*
[47] *Id.*

IV. <u>The anticipation of the Rule has caused positive changes for investors and retirees</u>

As discussed above, the Rule has benefitted small investors in several respects. The Rule has also led to many other positive effects for all investors, including a reduction in fees, and a pivot toward lower cost investment products.

For example, as a result of the Rule, LPL Financial has standardized the fees it charges for mutual funds, so that all of its customers now pay the same lower fee on mutual funds that are recommended by its representatives.[48] LPL has also announced that it intends to drop the pricing of its centrally managed platforms, to eliminate the research strategist fee and annual IRA maintenance fee on several of its portfolios, and to reduce the total cost to investors of accessing its financial services by nearly 30% compared to current pricing, in anticipation of the Rule.[49] Similarly, as stated above, nearly two-thirds of advisors affiliated with 14 independent brokerage firms have reported that their firms have realigned their products and services to introduce low-cost mutual funds, eliminate high-cost mutual funds, and introduce new share classes that are less expensive for the clients, in response to the Rule.[50]

The Rule has also caused several mutual fund issuers to lower the costs of mutual funds and exchange traded funds, thereby causing a substantial financial benefit to customers. Specifically, in January 2017, the Securities and Exchange Commission approved a proposal to create a new class of mutual fund shares for American Funds which would allow the brokers to determine how much to charge for the shares, thereby making it easier for brokerage firms to adopt compensation policies that pay standardized amounts across different mutual funds and different types of investments.[51] This change will eliminate many of the conflicts that are the target of the Rule without eliminating the ability of brokerage firms to offer commission based advice.[52] It is particularly beneficial and influential because American Funds is one of the largest mutual fund families. Indeed, many other mutual fund families have followed suit by issuing new types of mutual fund shares that dramatically reduce the commissions for brokers who sell those funds, and the compensation related conflicts associated with the sale of those funds, thereby resulting in substantial savings for investors.[53] Specifically, these new share classes carry a maximum sales load of 2.5%, compared with an industry standard for mutual fund Class A shares of 4.75% to 5.75%.[54] The issuance of these low-cost mutual funds is also likely to exert downward pressure on fees charged for other types of investment products, so that advisors remain cost competitive.

Not surprisingly, that has already proven to be the case. Specifically, since the Rule was enacted, several asset managers have reduced the fees charged for their products in order to be more competitive under the Rule. For example, in the fall of 2016, Blackrock eliminated commissions on eighteen of its exchange traded funds.[55] In October of 2016, Fidelity investments removed all commissions on all of its U.S. Ishares core exchange traded

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[48] Bruce Kelly, "DOL Fiduciary Rule Sparks LPL to Standardize Fees on Mutual Funds", investment news.com (August 24, 2016).
[49] Think advisor, "LPL Cuts Prices, Account Minimums Ahead of DOL Fiduciary Rule", think advisor.com (March 16, 2016).
[50] Diana Britton, "Delay or not IBDs Moving Toward a Fiduciary Future", wealth management.com, (April 5, 2017).
[51] Consumer Federation of America, "The Department of Labor Conflict of Interest Rule Is Already Delivering Benefits to Workers And Retirees: Delay Puts Those Benefits At Risk" (January 31, 2017).
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] Jeff Benjamin, "Fidelity Fires the Latest Salvo in ETF War", investment news.com, (October 12, 2016).

funds, thereby resulting in more savings for investors.[56] Shortly thereafter, Prudential investments cut expenses on nine of its mutual funds.[57] Charles Schwab has also recently reduced the fees for its exchange traded funds.[58]

The Rule has also caused insurers to cease the sale of expensive L share variable annuities, again providing significant savings to investors.[59] Further, variable annuity sales declined sharply in 2016, in large part because of the Rule.[60] The decline in variable annuity sales is a positive development for investors because of the high costs and fees associated with variable annuities.

The most significant benefit of the enactment of the Rule, however, is the difference that it has made in the mindset of financial advisors. Specifically, a recent survey of advisors affiliated with fourteen different independent brokerage firms reflects that 78% of those advisers now consider themselves to be fiduciaries to the customers, up from 59% the previous year.[61] Seventy percent of those advisors also report that their firms have enhanced the compliance oversight of their business in response to the Rule.[62] As a result of the Rule, the vast majority of financial advisers now understand that they should act in the best interest of their customers.

As the foregoing reflects, the enactment of the Rule has already resulted in many benefits for investors and retirees. These significant and positive developments show that the Rule is doing exactly what it was intended to do, which is to preserve and protect the retirement savings of the American people. However, if the protections of the Rule are eroded through revision or revocation, these changes may be short-lived. The Rule ensures that these changes will remain in effect and continue to offer retirement investors protections.

V. <u>There is no realistic way to ensure compliance with the fiduciary standard if it is not an enforceable legal obligation</u>

The Employee Retirement Income Security Act ("ERISA") was enacted in 1974. Prior to the enactment of the Rule in April of 2016, ERISA regulations regarding the duties and obligations of financial advisors had not been updated in over forty years. During the 42 years that elapsed between 1974 and 2016, brokerage firms made no meaningful changes in their treatment of their customers. Brokerage firms took no steps to adopt a fiduciary standard, or to implement policies that require all financial advisors to act in the best interests of the customers. Instead, brokerage firms routinely advertised that their customers came first, but then denied a fiduciary obligation whenever those customers were put in a position where they had to take legal action against them.[63]

In the six years of research and study which led up to the enactment of the Rule, the Department heard numerous stories from customers and retirees whose retirement savings had been decimated as a result of

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[56] *Id.*
[57] Jeff Benjamin, "Prudential Investments Joins the Fee Cuts Bandwagon", investment news.com (October 18, 2016).
[58] *Id.*
[59] Greg Iacurci, "DOL Fiduciary Rule Hastens Death of L – share Variable Annuities", investment news.com (January 11, 2017).
[60] Barron's, "Fiduciary Rule Crushes Variable Annuities, Barron's.com, (March 29, 2017).
[61] Diana Britton, "Delay or not IBDs Moving Toward a Fiduciary Future", wealth management.com, (April 5, 2017).
[62] *Id.*
[63] PIABA Report, "Major Investor Losses due to Conflicted Advice: Brokerage Industry Advertising Creates the Illusion of a Fiduciary Duty; Misleading Ads Fuel Confusion, Underscore Need for Fiduciary Standard" (March 25, 2015) ("PIABA Report"), available at https://piaba.org/system/files/pdfs/PIABA%20Conflicted%20Advice%20Report.pdf.

conflicted financial advice.[64] The Department determined that the lack of a fiduciary duty rule caused retirees to lose $17 billion each year due to conflicted financial advice, which led to them purchasing more expensive products.[65] The Department further determined, after an extensive review of independent research, that conflicted financial advice causes the average retiree to lose an estimated 12% of the value of his or her savings if drawn down over 30 years.[66]

As a result of its six years of study and research, the Department concluded that the only way to ensure that brokerage firms act in the best interests of the customer, and avoid the conflicts which cause brokers to recommend high cost investments that the customers do not need, was to enact a fiduciary requirement. That necessity, and, in particular, the need to save retirees the $17 billion or more that they lose each year due to conflicted financial advice, has not gone away. Indeed, if all financial advisors had already been providing advice based solely on the best interests of the clients prior to the enactment of the fiduciary rule, there would have been no need for a fiduciary rule in the first place.

We have had over forty years to see what happens, and the high costs that retirees bear, when brokerage firms and their representatives are not required to act in the best interests of their customers. There is no rational basis for believing that brokerage firms and their representatives would voluntarily adhere to a fiduciary standard, given their decades of inaction and resistance, and the great harm to retirees which occurred in the decades that preceded the enactment of the fiduciary rule. On the contrary, the billions of dollars that brokerage firms and financial advisors have received each year as a result of conflicted advice would be too much money for any rational business person to walk away from, in the absence of an enforceable legal mandate. It is naïve, unrealistic, and contrary to history to expect otherwise.

Further, eliminating the Rule now would only serve to hurt the financial services firms that have expended considerable resources to comply with the rule, and reward the financial services firms who have unjustifiably resisted it. Businesses that do the right thing by their customers should be rewarded, not punished.

VI. Investor education cannot address the investor confusion that currently exists

The confusion about whether a financial advisor is a fiduciary or not is not one that investor education can remedy. Research has shown over and over again that investors are confused about whether their financial advisor is acting as a fiduciary or not. This has persisted even as the issue of the Rule has been in the news. In large part this confusion persists because the industry still represents financial advisors as trusted advisors whether they are fiduciaries or not.

a. Investors remain confused

The industry is well-aware that investors are confused about whether their advisors are fiduciaries or not. In a survey open to all brokers, investment advisers, and insurance consultants and producers, 97 percent of them said “investors don’t understand the differences between brokers and investment advisers.” More than three out of four investors don’t understand that the current laws and rules may impose different duties on brokers and

[64] *See e.g.*, PIABA Comment Letter to the Department of Labor, piaba.org (July 21, 2015).
[65] CEA Report, supra n. 12.
[66] Department of Labor “Faqs: Conflicts of Interest Rule Making”, dol.gov.

investment advisers, according to a 2010 survey conducted for the Consumer Federation of America (CFA), AARP, the Investment Adviser Association, the Financial Planning Association, the CFP Board, the North American Securities Administrators Association (NASAA), and the National Association of Personal Financial Advisors. A 2015 study confirmed that this confusion persists – most retail investors think their financial advisor is a fiduciary.

It is no accident that a financial advisor does not call himself a "broker" or a "salesperson." Firms confer upon their "brokers" a myriad of confusing and misleading titles to give the impression that they are trustworthy (fiduciary) advisors. Individual brokers serving investors have titles like "Financial Advisor" and "Wealth Management Specialist."

The confusion is compounded by the fact that a financial advisor may owe fiduciary duties in handling some of an investor's accounts but not in handling other accounts. It is not unusual for investors to have multiple investment accounts with the same financial advisor. An investor could have certain accounts for which the financial advisor is a fiduciary, such as investment advisory accounts or accounts in which the financial advisor has discretion to buy and sell securities. At the same time, the investor may have non-fiduciary commission-based brokerage accounts in which the same financial advisor may only have to recommend investments that are appropriate for the investor under the much lower suitability standard.

b. The industry advertising creates more confusion

Firms routinely advertise themselves as giving personalized, ongoing, non-conflicted advice that puts the customer first. There is a striking difference between the positions brokerage firms take when soliciting customers and those they take when those same customers file arbitrations to resolve disputes against them. At the front end, in their advertising, firms promise unconflicted, trustworthy advice – as a fiduciary would. At the back end, in arbitrations, those same firms disclaim anything more than the obligations of a used car salesman: nothing more than following customer instructions to buy and sell securities.

We provide the following statements from UBS and Morgan Stanley as examples of what firms are doing generally. At the front end, UBS holds itself out as a fiduciary in its advertising, saying:

> Until my client *knows* she comes first. Until I understand what drives her. And what slows her down. Until I know what makes her leap out of bed in the morning. And what keeps her awake at night. Until she understands that I'm always thinking about her investment. (Even if she isn't.) Not at the office. But at the opera. At a barbecue. In a traffic jam. Until her ambitions feel like my ambitions. Until then. We will not rest. UBS.[67]

(emphasis in original.) What UBS describes is a fiduciary duty – a continuous ongoing advisory relationship. That is not what UBS says in arbitrations with its "clients." In arbitrations, UBS says it is just a broker and "a broker does not owe a fiduciary duty to his customer in a nondiscretionary account."[68] Once an investor hires the brokerage firm, that investor becomes a "client" to whom the firm says it does not owe the duty that it advertised.

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[67] *See*, PIABA Report, supra n. 63; *see also*, Consumer Federation of America & Americans for Financial Reform, "Financial Advisor or Investment Salesperson? Brokers and Insurers Want to Have it Both Ways" (Jan. 1 8, 2017) ("CFA /AFR Report"), available at http://ourfinancialsecurity.org/wp-content/uploads/2017/01/Financial-Advisor-or-Investment-Salesperson.pdf.
[68] PIABA Report, supra n. 63.

Morgan Stanley and Ameriprise do the same. At the front end in its advertising, Morgan Stanley says:

> Having an intimate knowledge of blue chips and small caps is important. But even more important is an intimate knowledge of you and your goals. Get connected to a Morgan Stanley Financial Advisor and get a more personalized plan for achieving success.[69]

Yet, in arbitration Morgan Stanley says it owes its customer a fiduciary duty ***only*** when Morgan Stanley has discretion to buy and sell securities in the account:

> There is no fiduciary duty where, as here, the client maintains a non-discretionary brokerage account.
>
> [Customer's] claim of breach of fiduciary duty fails as a matter of law and should be dismissed in its entirety. [Customer's] claim seeks to impose 'fiduciary' obligations and duties on [Morgan Stanley] that only arise in very limited circumstances that do not exist here, i.e. where [Morgan Stanley brokers] are given discretionary trading authority over Claimant's accounts.[70]

Similarly, Ameriprise tells investors:

> You can expect to hear about the options you have and any underlying factors to consider. ***Our advisors are ethically obligated to act with your best interests at heart.***[71]

Nonetheless, in arbitration Ameriprise routinely disclaims these responsibilities, saying it "owed no fiduciary duties" to its customers.[72]

It is no wonder that investors believe their financial advisors are fiduciaries -- that is what firms and brokers tell them. Investor education can be used to try to counter the multitude of confusing claims made by firms and brokers on various topics, however it is highly unlikely that it will eliminate the industry-created perception that it is acting in a fiduciary capacity on behalf of investors.

c. Options for investing retirement accounts are myriad and complex

Investor education is not sufficient to address the dizzying array of investment products that investors must choose between when investing their nest eggs.

There is a great need for protection of retirement savings because IRAs and 401(k) and 403(b) retirement plans have become the primary tool for retirement planning and savings for millions of working Americans. Pensions have become rare, making it more important for retirement investors to be responsible for ensuring they have the necessary funds to support themselves in retirement. One-time transactions like rollovers will involve trillions of dollars over the next five years and can be among the most significant financial decisions families will

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[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.*

ever make.[73] As pensions and employer retirement accounts are rolled into IRAs, investors seek guidance and advice from financial advisors.

Retail investors now confront a myriad of choices of how and where to invest. Retirement accountholders must choose whether to invest in stocks, bonds, mutual funds, exchange traded funds, real estate investment trusts (REITs), various structured debt instruments, insurance products that offer menus of direct or formulaic market exposures and guarantees from which consumers can choose, and an extensive array of derivatives and other alternative investments. These choices vary widely with respect to risk characteristics, potential return, liquidity, degree of diversification, contractual guarantees and/or restrictions, degree of transparency, regulatory oversight, and available consumer protections. These choices are complex and specialized in nature, using financial terms and formulae beyond the knowledge of most investors (and some brokers).

What investors often do not understand is that some of these products, such as oil and gas partnerships and REITs, pay substantial commissions to the broker selling them. Even the most conscientious broker can talk himself into why a product that pays him an 8% or 10% upfront commission is good for an elderly investor – Steve, the retiree discussed on the first page of this letter, is a perfect example of that. Unfortunately, even when those high commissions are "disclosed" to investors, the disclosure is buried in fine print that most investors are too overwhelmed at the time of purchase to read.

Thus, it is not surprising that after six years of study and research, the Department concluded that the only way to ensure that brokerage firms act in the best interests of the customer in handling retirement accounts was to enact a fiduciary requirement. As time goes on, the options available to investors multiply and firms find new and better ways to sell their services with fiduciary language. No amount of investor education can address this problem.

Conclusion

Delaying implementation costs investors money every day. SaveOurRetirement.com estimates that retirement savers lose between $57 million and $117 million every day due to conflicted investment advice, amounting to at least $21 billion annually.[74] The Council of Economic Advisers estimates Americans are suffering $17 billion in losses annually due to conflicted advice they receive from financial advisors.[75] It is imperative that the Rule become applicable as soon as possible so retirement investors can receive the protections that they deserve.

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[73] Rollovers" are expected to approach $2.4 trillion cumulatively from 2016 through 2020. *See*, Regulating Advice Markets; Definition of the Term "Fiduciary"; Conflicts of Interest – Retirement Investment Advice; Regulatory Impact Analysis for Final Rule and Exemptions (April 2016); available at https://www.DOL.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/completedrulemaking/1210-AB32-2/conflict-of-interest-ria.pdf.

[74] *See*, Save our Retirement Comment Letter (May 8, 2015), available at http://saveourretirement.com/cms/wp-content/uploads/2015/02/DOL-SOR-Letter-Comment-Period-Request-5-8-15.pdf.

[75] *See*, White House Council of Economic Advisers, "The Effects of Conflicted Investment Advice on Retirement Savings." "Conflicted advice" refers to advice given on particular investment products where the financial advisor is compensated in fees and commissions that depend on which investment product the customers buys.

It is also worth noting that, as discussed above, the Rule and PTEs have already been reviewed by three separate federal courts following challenges by various industry members.[76] In each case, the federal judge determined that the Rule and PTEs should go forward.[77] In considering whether to issue an injunction to delay implementation of the Rule and PTEs, Judge Crabtree stated:

> an injunction will lead to confusion about the law and likely produce unwarranted delay. This is not in the public's interest. Any injunction thus will produce a public harm that outweighs any harm that plaintiff may sustain from the rule change. The DOL has determined that the rule changes will benefit retirement investors throughout the United States by requiring investment advisers to act in the best interest of those investors. Congress authorized the DOL to evaluate these competing interests and it has concluded that significant public interests favor the proposed regulatory changes. As already explained, evidence in the administrative record supports the DOL's determination and the court finds no basis for contradicting those findings.[78]

Likewise, any revision or revocation of the Rule and PTEs would similarly harm investors. The Department has previously justified the Rule and the implementation period. Nothing has changed which would justify a reconsideration at this time. As the Department itself points out, underperformance of investments due to poor fund selection could cost IRA investors between $95 billion and $189 billion over the next 10 years, and that implementation of the rule could reduce these costs to investors by between $33 billion and $36 billion.[79] Conversely, complying with the Rule and PTEs would cost firms only $16 billion over ten years.[80] Considering the cost benefit analysis, there is no reason to delay the Rule any further, or to revise or revoke the Rule.

Accordingly, the Department should fully proceed with the applicability timeline set forth in the Rule and PTEs and ensure that investors, like Steve, are protected moving forward.

Respectfully submitted,

Marnie C. Lambert, President

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[76] *National Association for Fixed Annuities v. Perez* (D.C. 2016)(No. 16-CV-01035); *Chamber of Commerce v. U.S. Dep't of Labor* (N.D. Tex. 2016)(No. 16-CV-01476-M) consolidated with *American Council of Life Insurers v. U.S. Dep't of Labor* (No. 16-CV-01530-C) and *Indexed Annuity Leadership Council v. Perez* (No. 16-CV-01537-N); *Market Synergy Group, Inc. v. U.S. Dep't of Labor* (Kan. 2016)(16-CV-04083); and *Thrivent Financial for Lutherans v. Perez* (Minn. 2016)(16-CV-03289).
[77] *National Association for Fixed Annuities v. Perez,* 2016 WL 6573480 (D. D.C. 2016); *Chamber of Commerce v. U.S. Dep't of Labor,* 2017 WL 514424 (N.D. Tex. 2017); and *Market Synergy Group, Inc. v. U.S. Dep't of Labor,* 2017 WL 661592 (D. Kan. 2017).
[78] *Market Synergy Group, Inc. v. U S. Dep't of Labor*, No. 16-CV-4083-DDC-KGS, 2016 WL 6948061, at *30 (D. Kan. Nov. 28, 2016).
[79] Dep't of Labor, *Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice; Proposed Delay of Applicability Date*, 82 Fed. Reg. 12319, 12323 (March 2, 2017), available at https://www.federalregister.gov/documents/2017/03/02/2017-04096/definition-of-the-term-fiduciary-conflict-of-interest-rule-retirement-investment-advice-best.
[80] *Id.*