



National Association of Insurance
and Financial Advisors

August 4, 2017

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

**RE: RIN – 1210-AB82
RFI Regarding the Fiduciary Rule and Prohibited Transaction Exemptions**

To Whom It May Concern:

The National Association of Insurance and Financial Advisors (“NAIFA”)¹ appreciates this opportunity to comment on the Department of Labor’s (“Department” or “DOL”) request for information (“RFI”) regarding the fiduciary rule (Conflict of Interest Rule—Retirement Investment Advice (the “Rule”)) and related Prohibited Transaction Exemptions (“PTEs”);² specifically, the Department’s RFI with respect to substantive changes to the Rule/PTEs.³

As indicated in our July 12, 2017 letter, attached hereto as Exhibit A, it is imperative that the Department immediately delay the January 1, 2018 applicability date for the remainder of the Rule not already in effect. Much new information and data previously has been provided to the Department to justify such action. A summary is attached hereto as Exhibit B. In this letter, we address the remaining questions and issues pursuant to your RFI. We also will be submitting a

¹ Founded in 1890 as The National Association of Life Underwriters (NALU), NAIFA is one of the nation’s oldest and largest associations representing the interests of insurance professionals from every Congressional district in the United States. NAIFA members assist consumers by focusing their practices on one or more of the following: life insurance and annuities, health insurance and employee benefits, multiline, and financial advising and investments. NAIFA’s mission is to advocate for a positive legislative and regulatory environment, enhance business and professional skills, and promote the ethical conduct of its members.

² Department of Labor, Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions, 82 Fed. Reg. 31278 (July 6, 2017) (hereinafter “Department RFI”).

³ Department RFI, 82 Fed. Reg. 31278, 31279 (Questions 2-18).

separate letter to the Securities and Exchange Commission (“SEC”) on its RFI regarding standards of conduct for investment advisors and broker-dealers.⁴

EXECUTIVE SUMMARY

NAIFA urges the Department to withdraw the Rule/PTEs and to develop a new principles-based structure with a single Best Interest PTE. As they are currently written, the Rule/PTEs have and will make it harder—not easier—to provide investors with the services and products that could help them live independently during their retirement.

In an April 2017 survey of NAIFA members, 1,084 respondents confirmed that the Rule/PTEs already are having a harmful impact on the market. Specifically, 91% of respondents have already experienced or expect to experience restrictions on product offerings to their clients; nearly 90% believe consumers will pay more for professional advice services; and 75% have seen or expect to see increases in minimum account balances for the clients they serve. In addition, 78% noted that, although they continue to offer professional advice to clients, general confusion about the complex Rule and PTEs is impeding their ability to serve clients.

None of this data is or should be surprising. The United Kingdom (“UK”) already has studied the market results of a similar regulatory rule banning commissions for advisors and forcing them to shift to flat fee compensation arrangements (what the Obama DOL effectively attempted to do—and has been successful at achieving to some extent—by making it too complicated, expensive, and risky to continue to use non-fee-based compensation models). After publication of a 2016 UK government report about the impact of its rule, the Acting Chief Executive of the UK regulator responsible for the rule has indicated that the Authority is examining restoring the permissibility of commissions for investment products.

New fiduciary obligations under the Department’s Rule will, moreover, result in fewer firms and/or advisors offering services and/or products to small plans or individuals with small accounts. According to a LIMRA⁵ study, 54% of advisors say they will be forced to stop serving small account investors—and as the study notes, if only half of these advisors turn out to be correct about their expectation, more than four million Main Street households will lose access to advice.

Robo-advice is no substitute for these professional advisors. Although the technology is available, this is not what American consumers want or need. It is not a credible policy solution to force people into technology-based “solutions” they have neither the desire nor the intention to use and/or are not equipped to utilize effectively.

⁴ SEC, Public Statement, *Public Comments from Retail Investors and Other Interested Parties on Standards of Conduct for Investment Advisers and Broker-Dealers* (June 1, 2017), available at <https://www.sec.gov/news/public-statement/statement-chairman-clayton-2017-05-31>.

⁵ LIMRA stands for the Life Insurance Management Research Association, although it now regularly goes by its abbreviated name.

Finally, as discussed in further detail below, the current BIC exemption’s contract requirement for IRA accounts effectively—and improperly—transfers enforcement authority from federal regulators to private class action attorneys. This transfer will have a very real and harmful impact on the marketplace and investors. Federal regulators should develop a new principles-based structure relying on existing federal enforcement authority, and not delegate such authority to private attorneys and state courts.

In sum, there simply is no one-size-fits-all structure that is appropriate for all American investors. Flexibility and diversity of options are essential, particularly for lower- and middle-income families like those served by our members. Consumers—not the Department—should drive creation of new products and business arrangements.

By withdrawing the Rule/PTEs and creating a new Best Interest PTE that is truly principles-based and not overly prescriptive, burdensome, or costly, the Department will avoid the aforementioned problems associated with the current Rule/PTEs and actually advance the goal of promoting more retirement savings by more Americans.

I. THE RULE’S/PTEs’ KNOWN AND ANTICIPATED NEGATIVE MARKET IMPACT JUSTIFIES WITHDRAWAL OF THE RULE AND PTEs AND DEVELOPMENT OF A NEW APPROACH.

During a hearing of the House Education and Workforce Subcommittee on Health, Employment, Labor, and Pensions on June 17, 2015, former Secretary Thomas Perez acknowledged that “we have a retirement crisis” in this country and “we need to save more.”⁶ This problem should not be underestimated. It is more important than ever that *all* Americans are encouraged to save and have access to professional advice and appropriate retirement savings products. Employers need reliable advice on the design and investment options of their retirement plans, and employees need to be educated on the importance of saving early for retirement, determining their risk tolerance, and evaluating the investment options available through their workplace retirement plan. Individuals also need professional advice when rolling over retirement plan assets from one retirement plan to another plan or an IRA, and when taking distributions during retirement, and those without access to an employer retirement plan need education and guidance about other retirement savings vehicles.

Unfortunately, the Rule and PTEs are counterproductive with respect to this country’s retirement crisis and *years* of focus on complex, technical compliance requirements under the prior Administration’s Rule (by the Department and those attempting to figure out how to comply) has drawn focus away from the ultimate objective. At bottom, the Rule/PTEs have and will make it harder, not easier, to provide investors with the services and products that could help them live independently during their retirement.

⁶ Hearing of the House Education and Workforce Subcommittee on Health, Employment, Labor, and Pensions, *Restricting Access to Financial Advice: Evaluating the Costs and Consequences for Working Families and Retirees*, June 17, 2015 (hereinafter “June 17 Hearing”), hearing webcast available at <http://edworkforce.house.gov/calendar/eventsingle.aspx?EventID=399027>.

A. Post-Final Rule/PTE Data Shows that the Rule/PTEs Are Harming and Will Continue to Harm Main Street Advisors and their Clients.

In an April 2017 survey of NAIFA members, 1,084 respondents confirmed that the Rule/PTEs already are having a harmful impact on the market. Specifically, 91% of respondents have already experienced or expect to experience restrictions on product offerings to their clients; nearly 90% believe consumers will pay more for professional advice services; and 75% have seen or expect to see increases in minimum account balances for the clients they serve. In addition, 78% noted that, although they continue to offer professional advice to clients, general confusion about the complex Rule and PTEs is impeding their ability to serve clients. A July 2017 survey found that a majority of financial advisors surveyed say that the Rule “is restricting me from serving my clients’ best interest.”⁷

Additionally, the Rule is impacting the work methods of financial advisors. The July 2017 survey found that 73% of respondents say that the Rule is either impacting their methods “a lot” or “some.”⁸ A separate survey of 552 U.S. financial advisors conducted in October 2016 found that 71% “plan to disengage from some mass-market investors because of the DOL rule.”⁹ Further, 94% of advisors say that small clients “orphaned” by advisors will have to turn to robo-advice.¹⁰

⁷ Memorandum from Brock McCleary, Harper Polling, to Financial Services Roundtable re Key Poll Findings – National Survey of Financial Advisors (July 17, 2017) (hereinafter “FSR Survey”).

⁸ *Id.* at 2.

⁹ CoreData Research London, Press Release, *Fiduciary Rule to Leave US Mass-Market Investors Stranded, Study Shows* (Nov. 2016), available at <http://www.valuwalk.com/wp-content/uploads/2016/11/Fiduciary-rule-Press-Release-%E2%80%93-CoreData-Research.pdf>.

¹⁰ *Id.*; see also, e.g., Michael Wursthorn, Wall Street Journal, *Edward Jones Shakes up Retirement Offerings Ahead of Fiduciary Rule* (Aug. 17, 2016) (Edward Jones announces it will limit mutual fund access for retirement savers in accounts that charge commissions), available at <https://www.wsj.com/articles/edward-jones-shakes-up-retirement-offerings-ahead-of-fiduciary-rule-1471469692>; Steve Daniels, Crain’s, *Why State Farm Agents are Getting Out of the Investment Game* (Sep. 3, 2016) (State Farm directs 12,000 securities-licensed agents to no longer provide their clients with mutual funds, variable annuities and other investment products), available at <http://www.chicagobusiness.com/article/20160903/ISSUE01/309039993/why-state-farm-agents-are-getting-out-of-the-investment-game>; Daisy Maxey, Wall Street Journal, *New Rule Helps No-Load Funds—But Investors Still Need to Watch for Other Fees* (Nov. 7, 2016) (Charles Schwab stops selling fund share classes with front-end sales loads in May 2016), available at <https://www.wsj.com/articles/new-rule-helps-no-load-funds-but-investors-still-need-to-watch-for-other-fees-1478488142>. See, e.g., Jeff Benjamin, InvestmentNews, *DOL Fiduciary Rule Class-Actions Costs Could Top \$150M a Year* (Feb. 9, 2017) (“Some firms, including Merrill Lynch, Capital One, and Commonwealth Financial Network, have already announced plans to use a streamlined [BIC exemption] that does not include a contract or variable commission rate, making them exempt from class-action lawsuits. Other firms will be rolling the dice.”), available at <http://www.investmentnews.com/article/20170209/FREE/170209902/dol-fiduciary-rule-class-actions-costs-could-top-150m-a-year>.

None of this data is or should be surprising. The United Kingdom (“UK”) already has studied the market results of a similar regulatory rule and those outcomes should serve as a caution for U.S. regulators. In late 2012, the UK banned commissions for advisors and forced them to shift to flat fee compensation arrangements (what the Obama DOL effectively attempted to do—and has been successful at achieving to some extent—by making it too complicated, expensive, and risky to continue to use non-fee-based compensation models). A 2016 UK government report about the impact of its rule found:

- The number of professional advisors shrank by 23% in 2015, and that number has not rebounded;
- Advisors who remained in the market increased their minimum account balance requirements for new clients by 50% (\$80,000 to \$120,000 in USD);
- Lower balance account holders were especially impacted—opening of accounts with less than \$100,000 declined by 50% and major banks cancelled advisory services for lower-dollar account holders; and
- “Consumers without significant wealth currently find it more difficult to access advice or support to meet their needs.”¹¹

As a result of these findings, the Acting Chief Executive of the UK regulator responsible for the rule has indicated that the Authority is examining restoring the permissibility of commissions for investment products.¹²

As explained below, we fully expect that the current Rule/PTEs—which similarly steer the marketplace via regulation, including compensation-based warranties, away from certain compensation arrangements and toward a fee-based model for everyone—will produce long-term results in the U.S. similar to those experienced in the UK.

B. Fewer Guaranteed-Income Products Will Be Sold.

Having enough money to last throughout retirement is a top concern for Americans, and 8.5 million households are interested in investing in guaranteed lifetime income products.¹³ The Rule and PTEs, however, will result in fewer annuity products being sold, which again, is especially harmful to low- and middle-income consumers.¹⁴ Indeed, LIMRA estimates that

¹¹ LIMRA Secure Retirement Institution Study (2017), at 3-9 (citing HM Treasury and Financial Conduct Authority, Final Report, “Financial Advice Market Review” (March 2016)) (hereinafter “LIMRA 2017 Study”).

¹² *Id.* at 10 (citing Emma Dunkley, Financial Times, *Financial Conduct Authority Considering Return of Commission Payments* (Jan. 9, 2016), available at <https://www.ft.com/content/8e0a207e-b6d5-11e5-bf7e-8a339b6f2164>).

¹³ LIMRA 2017 Study, at 33.

¹⁴ Notably, high-end, fee-for-service providers do not sell annuity products because their client base can self-annuitize extensive investment portfolios. On the other hand, low- and middle-income Americans rely heavily on annuity products of all kinds to provide them income security in retirement. The disproportionate burden, discussed in detail above, placed by the Department on advisors to middle-market clients could very well be a boon to more expensive providers who are hoping to capitalize on advisors exiting the market and potentially capture clients on the upper-middle-market cusp.

access to guaranteed income products will decline 29% under the Rule/PTEs.¹⁵ We are aware of only three ways to receive guaranteed income in retirement—annuities, Social Security, and defined benefit pensions—which explains why annuity products have always been trumpeted by the Department. Somewhat ironically, however, the Rule and PTEs foist heightened burdens on advisors who offer annuity products to non-fee-paying clients.

The PTEs' structure for annuities is particularly complex and confusing (i.e., splitting up rules and requirements for annuities by type of product between the BIC exemption and PTE 84-24), which will only make offering these products more difficult and costly.¹⁶ Further, because fixed and independent annuities often are distributed through the independent IMO channel, there is a lot of uncertainty and potential for harmful disruptions with respect to this market segment.¹⁷

On a practical level, when clients are interested in annuity products, advisors typically educate and advise them on the various product options available. Under the Department's current structure, an advisor who recommends to an IRA owner an indexed or variable annuity product, and, alternatively, a fixed annuity product is under two separate compliance regimes with quite different requirements (i.e., would have to execute a contract for one recommendation, but not the other). This likely will lead to (understandable) consumer confusion and may result in advisors choosing to avoid discussion of guaranteed-income products altogether.

Further, for those annuity products that fall under the BIC exemption, firms and/or advisors are likely to avoid promoting them because of the onerous compliance obligations and risk of litigation (including costly class action suits). Ultimately, the result will be fewer recommendations and sales of vital guaranteed-income products. Already, over half of financial advisors surveyed report that the Rule is restricting their ability to serve their clients.¹⁸

C. Less Education and Advice, and Fewer Product Options for Small Businesses and Small Account Holders.

1. *Less investment advice will be provided to consumers.*

It is no surprise that when faced with a multitude of new fiduciary obligations—which, at this point, entail substantial cost and administrative burdens, new business models and fee structures, as well as immeasurable litigation exposure—some firms and/or advisors no longer will offer

¹⁵ LIMRA 2017 Study, at 34.

¹⁶ It is worth noting that annuity products are already subject to multiple layers of regulation. Because they are insurance products, they are heavily regulated at the state level. States have product content and marketing rules in place, as well as sales practices requirements. Additionally, the National Association of Insurance Commissioners (“NAIC”) has model regulations (adopted by almost all of the states) on disclosures and suitability in annuity transactions. And of course, at the federal level, the SEC and FINRA regulate the sale of variable annuities. The Department should not add on top of this structure another complex, confusing and costly layer of regulation.

¹⁷ As explained more fully in NAIFA's filed comment letter, the proposed rule for IMOs issued by the Department in early 2017 is entirely unworkable because very few independent firms can satisfy the proposed minimum book of business threshold.

¹⁸ FSR Survey, at 3.

services and/or products to small plans or individuals with small accounts. Indeed, according to LIMRA, 54% of advisors say they will be forced to stop serving small account investors—and as the LIMRA study notes, if only half of these advisors turn out to be correct about their expectation, more than four million Main Street households will lose access to advice.¹⁹ A 2017 study confirms these findings.²⁰ Reduced access to professional advice and fewer services is not a desirable outcome, and, presumably, is not the aim of the current Administration.

a. Retirement savers are better off with professional advice.

The value of professional advice should not be overlooked or underestimated—although, tellingly, the cost of *lost* access to advice was not taken into consideration at all in the Obama Administration’s cost-benefit analysis of its Rule. The fact is, advisors help people plan and save for retirement by helping employers set up retirement plans and by providing advice to individual investors outside of the workplace. It is a fact that advised investors are better off than non-advised investors.

First and foremost, American consumers value and appreciate their advisors and the services they provide. In particular, consumers value that their advisors: minimize risk of running out of money; perfect portfolio principal; minimize taxes; and bring a realistic and professional perspective about what investors can afford in retirement and about market developments and trends.²¹ The Department should not substitute its own judgement for the true value of advisor-client relationships, nor should its regulations make it prohibitively expensive and/or complicated to continue these relationships.

An Oliver Wyman study published in 2015 found that 84% of individuals begin saving for retirement via a workplace retirement plan, and workplace-sponsored defined contribution plans represent the primary or only retirement vehicle for 67% of individuals who save for retirement with a tax-advantaged retirement plan.²² Notably, small businesses that work with a financial advisor are 50% more likely to set up a retirement plan, and micro businesses with 1-9 employees are almost twice as likely.²³

Moreover, according to a 2017 LIMRA survey, of households that save 10% or more of their income, 63% work with an advisor.²⁴ Similarly, Oliver Wyman found that advised individuals have a minimum of 25% more assets than non-advised individuals, and for individuals aged 65

¹⁹ LIMRA 2017 Study, at 14-15. The study further notes that nearly half of households with less than \$250,000 in investable assets currently are working with an advisor.

²⁰ Those surveyed said they would definitely (45%) or definitely/probably (62%) take on fewer small accounts, due to increased compliance costs and legal risks. FSR Survey, at 4.

²¹ *Id.* at 22.

²² Oliver Wyman Study, *The Role of Financial Advisors in the US Retirement Market* (July 10, 2015) (hereinafter “Oliver Wyman Study”), at 5 (citing Oliver Wyman Retail Investor Retirement Survey 2014).

²³ *Id.*

²⁴ LIMRA 2017 Study, at 17.

and older with \$100,000 or less in annual income, advised individuals have an average of 113% more assets than non-advised investors.²⁵

The value of advice increases even further at crucial points during the retirement savings timeline, particularly for lower-income investors. For instance, in NAIFA members' experience, an employee with a balance of \$5,000 in an employer-provided retirement plan likely would—without professional advice—cash out the account when changing jobs, suffer the resulting tax penalties, and deplete all of her retirement savings rather than continue to save. Less education and access to advice will only contribute to these anti-saving behaviors at critical retirement planning junctures (e.g., when leaving or changing employer-sponsored plans).

Professional advisors also help save investors from making costly mistakes with their retirement savings. The Department itself estimated that in 2010 alone, investment mistakes cost ERISA plan and IRA participants approximately \$114 billion.²⁶ The Department noted that, in its belief, receipt of professional advice would cut down on these mistake-driven costs by helping investors pay *lower* fees and expenses, engage in less excessive or poorly timed trading, more adequately diversify their portfolios, achieve a more optimal level of compensated risk, and/or pay less excess taxes.²⁷

Advisors help American families in a number of important strategic areas when it comes to pre-retirement planning. LIMRA found, for instance, that 40% of survey respondents who do not work with a professional advisor have *not*: calculated the amount of assets they will have available for retirement; determined what their income and expenses will be in retirement; estimated how many years their assets will last in retirement; or identified activities they plan to engage in during retirement and their likely costs.²⁸ Ultimately, aside from the numbers and actual dollars saved, investment advisors help cultivate an overall awareness of the realities and challenges associated with a secure retirement.

Finally, professional advice provides valuable peace of mind to consumers, versus having to go it alone. LIMRA found that 43% of people who work with an advisor—across all asset levels—feel very prepared for retirement, compared to only 21% who do not work with an advisor.²⁹ Although this may be less easy to quantify, it is a true benefit and should not be discounted. Additionally, many people choose their professional advisor based on personal connections and referrals, or local word of mouth. In this context, “buy local” is often favored because Main Street advisors develop positive and trusted reputations within their communities. Again, the comfort level investors have with their advisors is valuable and should have been taken into account by the Department when the Rule and PTEs were crafted.

²⁵ Oliver Wyman Study, at 6.

²⁶ Department of Labor, Final Rule, *Investment Advice—Participants and Beneficiaries*, 76 Fed. Reg. 66, 136, 66, 152 (Oct. 25, 2011).

²⁷ *Id.*

²⁸ LIMRA 2017 Study, at 19.

²⁹ *Id.* at 20.

- b. The Rule/PTEs already are, and will continue to, restrict consumers’ access to professional advice.

Over 20% of NAIFA members surveyed in April say they have experienced an increase in minimum account balances for the clients they serve; and another 54% expect to see such an increase. Many advisors do not have latitude with respect to these minimum account balances because their financial institutions establish the requirements.

Further, 2,708 NAIFA members—along with thousands more Main Street advisors across the country—no longer will be able to provide personalized retirement investment advice to their clients because *just one* financial institution (of the many with which NAIFA members are affiliated) has banned its advisors from offering mutual funds, variable annuities, and other investment products that trigger onerous compliance obligations under the Rule/PTEs. Instead, these clients—*hundreds* per advisor—will be sent to a self-directed call center where they will have to make investment decisions on their own.

- c. Robo-advice is not a substitute for a professional advisor.

Despite the Obama Administration’s confidence that new technologies and robo-advice opportunities are the low-cost answer to various alleged problems within the industry, those so-called solutions simply are not what American consumers want or need. Today, despite the ready availability of such options/services, only one in ten consumers use a robo-advice platform.³⁰ As discussed above, consumers value and appreciate human advisors and what they provide, and only 11% of Americans say that could be “fully automated” for financial guidance.³¹ And not surprisingly, non-Millennials are far less likely to even consider using robo-advice.³²

Self-directed robo solutions assume a certain level of comfort and knowledge in users of those technologies. It is far from clear, however, that Americans feel they have the necessary tools to go it on their own. In fact, 48% of Americans say they are not very or are not at all knowledgeable about investments and financial products.³³ Ultimately, it is not a credible policy solution to force people out of their advisor relationships and into technology-based “solutions” they have neither the desire nor the intention to use and/or are not equipped to utilize effectively.

- 2. *Investment education for individuals and employers will be severely curtailed under the Rule.*

Given the Rule’s overly restrictive definition of investment “education,” advisors who do not wish to trigger fiduciary status by providing personalized advice—and its attendant obligations and costs—will no longer be able to provide any meaningful education to their employer or individual clients. During a meeting on May 4, 2015 with NAIFA members, Department officials stated that one of their objectives is to preserve investor education. And former

³⁰ *Id.* at 25.

³¹ *Id.* at 26.

³² *Id.* at 25.

³³ *Id.* at 32.

Secretary Perez told members of Congress on June 17 that investor education is “exceedingly important.”³⁴ Unfortunately, the narrow scope of the education safe harbor under the Rule will not facilitate the goal of preserving or expanding investor education.

In reality, the Rule strips advisors of the ability to provide any effective education by prohibiting under the investment education safe harbor:

- Plan information that references the appropriateness of any individual investment alternative or any individual benefit distribution option for a plan or IRA;
- Financial, investment, and retirement information that addresses specific investment products, specific plan or IRA investment alternatives or distribution options available to the plan or IRA or to plan participants, beneficiaries, and IRA owners, or specific investment alternatives or services offered outside the plan or IRA; and
- Asset allocation models and interactive investment materials that identify any specific investment product or alternative available (except, for plans, models and materials may identify investment alternatives already specified under the plan, and interactive materials may display specific investments specifically chosen by the plan or IRA owner).

What does constitute education under the Rule is so high-level and generic that it has very little utility, if any. There are approximately 9,000 mutual funds available today, not to mention the host of other types of products available in the retirement space. Telling an inexperienced investor to choose among mutual funds without providing any guidance as to the strength or desirability of any particular funds is not meaningful education; it is simply overwhelming. Meaningful education requires some identification and characterization of specific investment options.

Notably, the Department has not historically restricted “education” to generic, high-level conversations. Instead, the Department has allowed for meaningful education to take place, with appropriate disclosures. For instance, under Interpretive Bulletin 96-1,³⁵ the Department has not included within fiduciary “investment advice” asset allocation models that identify specific investment alternatives, as long as they are accompanied by a statement indicating that other investment options with similar characteristics may be available. Bulletin 96-1 reasons: “Because the information and materials described above would enable a participant or beneficiary to assess the relevance of an asset allocation model to his or her individual situation, the furnishing of such information would not constitute a ‘recommendation’ . . . and, accordingly, would not constitute [fiduciary investment advice].”³⁶ The Department’s rationale in Bulletin 96-1 makes perfect sense and unlike the Rule, which cuts off virtually all education, its approach strikes an appropriate balance between ensuring the availability of meaningful investment education and providing investor protection.

³⁴ June 17 Hearing.

³⁵ 29 C.F.R. Part 2509.

³⁶ *Id.*

Not only will individual investors be deprived of education under the Rule, small business owners also will lack education with respect to plan design options for their employees—and may, as a result, forego setting up any retirement plan at all. As drafted, the education safe harbor does not allow for plan design education without triggering fiduciary obligations (rather, the asset allocation and interactive material provisions require that the plan options already be chosen in order to be referenced—i.e., do not cover the selection/design stage of the process).

This approach makes little sense and is extremely detrimental with respect to small employers' provision of employee retirement savings programs. Unlike investment advice provided directly to individual plan participants or IRA owners, recommendations on menu design for participant-directed plans are a step removed from recommendations pertaining to actual investment decisions. The employer narrows down the product options (from thousands) available to employees, but the employees decide how their assets are allocated among different products. Thus, the risk of a conflict of interest arising at this stage between the advisor and employee investors is minimal. Furthermore, in the plan design space, the plan administrator—regardless of plan size—is under a separate obligation to make informed and prudent decisions with respect to the plan.³⁷

3. *Marketing of retirement saving services and products to Main Street clients, including referrals to other advice professionals, will be inhibited, thereby limiting awareness of these important tools.*

Similar to the narrow education safe harbor, the Rule's so-called "seller's exception" will harm Main Street by unnecessarily limiting information available for non-institutional investors. Whereas a robust seller's exception would allow advisors and financial institutions to market their products and services to the general public before they must take on fiduciary obligations, the Rule's seller's exception does not cover such activities for retail investors (e.g., individuals, small plan administrators/fiduciaries). Additionally, the Rule includes within fiduciary investment advice recommendations about *other* persons who provide investment advice or management services.

Again, this approach is misguided. Marketing and referrals, as opposed to true investment advice, pose very little threat of conflicts of interest. Presumably, this is why marketing has not historically been considered fiduciary activity under ERISA or the Code. Indeed, it is unclear whether the Department has statutory authority to capture such marketing and sales activities under the fiduciary umbrella.

Functionally, sales pitches in the financial advisor context are like sales pitches in all other retail contexts; they are take-it-or-leave-it promotions designed to create awareness and attract consumers in the first instance so that products and services can *then* be delivered. And like other retail contexts, financial advisor marketing should not be limited to certain segments of the

³⁷ See 29 U.S.C. § 1002(21)(a)(iii) (under ERISA, a person is a fiduciary with respect to a plan to the extent he has any discretionary authority or discretionary responsibility in the administration of such plan); see also 26 U.S.C. § 4975(e)(3)(C) (corresponding fiduciary definition under the Code).

population (here, for instance, to other registered financial service providers or managers of \$50 million or more in assets).

There is no evidence that management-level sophistication or a large account is needed to understand when someone is making a sales pitch rather than delivering personalized impartial advice. Particularly with respect to proprietary products, consumers understand that they are limiting their universe of options, but they *choose* to do so for any number of reasons, including brand trust/recognition, convenience, comfort with a particular seller, etc. (the same, of course, is true of a Starbucks coffee shop, a Ford car dealership, etc.).

Likewise, consumers and small business owners do not confuse professional referrals with personalized investment advice. Referrals are several steps removed from actual investment activity—one must assume, for instance, that the recipient of the referral recommendation will in fact pursue the recommended professional, the other professional to whom the individual is referred will be in a position (and agree) to work with the individual, investment advice will be given, and that advice will be acted upon. Reducing referrals will only harm consumers. Referrals are an important service for investors who are new to or inexperienced with retirement planning. A list of names in a phone book or a Google search does not offer meaningful guidance for investors to narrow down their options or find professionals who are suitable for them. Professional-to-professional referrals, on the other hand, provide investors with some comfort that they will be talking to an advisor who is, at least in someone's estimation, an appropriate advisor for the investor.

The Rule's overly paternalistic approach will only prevent a large number of consumers from learning about available products, services, and professionals, which—again—is counterproductive for the retirement crisis in this country. On the other hand, a general seller's exception, coupled with non-fiduciary referrals, would allow for effective marketing and client development, which would help advisors reach those populations that are arguably in most need of professional retirement planning assistance.

4. *The Rule/PTEs are restricting consumer choice with respect to products and preferred compensation arrangements.*

The Rule and PTEs already have sparked reactions from financial institutions that take away product options for certain consumers and restrict favored compensation arrangements (as discussed in further detail below) in order to avoid the cost of complying with the Rule—particularly the BIC exemption—and mitigate the threat of costly class action lawsuits.³⁸ In fact, nearly half of NAIFA's members (46%) already have experienced a restriction of product offerings to their clients, and another 45% anticipate that such restrictions are forthcoming. More specifically, 68% of our members have been told that they cannot recommend certain mutual fund classes to clients, and over 70% say they cannot recommend certain annuities.³⁹

³⁸ See, e.g., *supra* note 10 (public announcements).

³⁹ As discussed above, annuity products are particularly important for low- and middle-income savers' retirement security, so this latter figure is especially troubling.

NAIFA members' experience is consistent with public announcements regarding financial institutions' response to the Rule/PTEs. Commonwealth Financial Network—an independent broker-dealer/RIA—announced in October 2016 that it will no longer offer *any* commission-based products in retirement accounts.⁴⁰ Bank of America Merrill Lynch similarly announced in May 2017 that it will restrict commission-based products to “limited purpose brokerage IRAs,” which generally appear to be limited to cash-based investments like deposits, money market funds, and certificates of deposit.⁴¹ It appears that the majority of Merrill's clients with commission-based IRAs will, however, be moved into the firm's advisory fee-based accounts, “self-directed” brokerage platform, or robo advisory service.⁴²

It also is worth noting that the Rule and PTEs themselves, without revision, may significantly decrease product availability in the marketplace. Currently, indexed and variable annuity sales (with commission-based compensation) fall under the BIC exemption. The definition of “Financial Institution” under that exemption, however, effectively precludes independent insurance intermediaries (IMOs) dealing in annuities—and by extension, the independent insurance agents and brokers with whom they work—from receiving prohibited transaction relief. The Rule/PTEs therefore threaten to significantly disrupt annuity sales in the independent distribution channel—a channel in which roughly one-third of NAIFA members operate.

D. Higher Costs for Small Businesses and Small Account Holders.

For low- and middle-income clients who do continue to receive professional retirement advice, that advice is likely to get more expensive for them because the Rule/PTEs will force them into more expensive compensation arrangements and because the high costs of compliance will be passed on.

The Rule and PTEs effectively leave advisors with three choices:

- (1) do not give investment advice, as defined under the Rule, and avoid becoming a fiduciary;
- (2) become a fiduciary and turn all of your compensation arrangements into advisory fee-for-service arrangements or wrap accounts (with no third-party compensation); or

⁴⁰ ThinkAdvisor, *DOL Rule Casualty: Commonwealth Drops Commission Retirement Products* (Oct. 24, 2016), available at <http://www.thinkadvisor.com/2016/10/24/dol-rule-casualty-commonwealth-drops-commission-re>.

⁴¹ Greg Iacurci, Investment News, *Merrill Lynch Will Allow IRA Commissions In Some Circumstances Under DOL Fiduciary Rule* (May 11, 2017), available at <http://www.investmentnews.com/article/20170511/FREE/170519975/merrill-lynch-will-allow-ira-commissions-in-some-circumstances-under>.

⁴² Christine Idzelis, InvestmentNews, *Bank of America Merrill Lynch Tells Advisers to Stop Selling Mutual Funds in Brokerage IRAs Now* (Nov. 1, 2016), available at <http://www.investmentnews.com/article/20161101/FREE/161109984/bank-of-america-merrill-lynch-tells-advisers-to-stop-selling-mutual>.

- (3) become a fiduciary, retain current compensation arrangements,⁴³ and comply with a PTE (with attendant compliance obligations and high costs).

As discussed above, the first option leaves clients with no meaningful guidance whatsoever because investment “education” is defined so narrowly under the Rule. The second and third options will harm consumers by increasing their costs. Tellingly, roughly 90% of NAIFA members believe consumers will need to pay more for professional advisor services under the Rule/PTEs.

1. *Flat fee compensation arrangements will leave some consumers worse off.*

With respect to the second option, traditional commission-based compensation models can—as discussed below—*benefit* low- and middle-income investors and should not be uniformly discouraged. Unlike for high-wealth consumers, the alternatives—upfront advisory fees with ongoing asset management fees, and wrap account arrangements—are not workable or palatable for many of our members’ Main Street clients. In fact, a 2011 survey of 25.3 million IRA accounts found that a large majority of IRA investors opted for commission-based arrangements over fee-based arrangements, and low-balance account holders favored commission-based arrangements at an even higher rate—for good reason.⁴⁴ Additionally, LIMRA’s recent study of the Rule’s/PTEs’ impact found that *only 15%* of Americans are willing to pay \$100 for advice on financial risks and insurance products.⁴⁵

Clients who are deciding whether they have the resources to save for retirement at all will be unable or unwilling to pay a substantial out-of-pocket fee that represents a significant portion of the assets they may have to invest. For those who are rolling over retirement account balances, opting to pull these fees from the rollover amount will have tax implications and result in greater cost. Moreover, fees will have to be set high enough to compensate for anticipated services during a given timeframe, taking into account the fact that client needs can vary dramatically at various times (e.g., during the initial strategy phase, while transitioning between accumulation and distribution phases, in light of major life events, etc.).

Attached hereto as Exhibit C is a chart demonstrating how a small saver with a monthly retirement plan contribution of \$100 could very well pay significantly more under a fee-based model (i.e., “non-conflicted” advice) than a commission-based arrangement. And this example is not anomalous. A recent NAIFA survey shows that for 78% of our members, *more than half* of their current clients would experience increased costs if their accounts were shifted from

⁴³ Notably, although this is the purported purpose of having PTEs in the first place, it is not clear how existing compensation arrangements *can* be retained under the BIC exemption’s compensation warranty requirements. As we interpret those obligations, firms and advisors are effectively limited to level compensation arrangements or they face tremendous liability exposure.

⁴⁴ Meghan Milloy, American Action Forum, *The Consequences of the Fiduciary Rule for Consumers* (Apr. 10, 2017), available at <https://www.americanactionforum.org/research/consequences-fiduciary-rule-consumers/>.

⁴⁵ LIMRA 2017 Study, at 13.

commission-based to fee-based arrangements; and for about 41% of our members, *more than 80%* of their clients would see such an increase.

Generally, under a brokerage model, investors pay a one-time commission when an asset is purchased or when “new money” in the account is invested. Under a fee-based model, on the other hand, investors can wind up paying regular (e.g., annual) fees for account “management” services based on the amount of all of the assets under management, not just “new money.” Thus, for some investors, the fee-based arrangement will likely result in unnecessary charges—for example, annuity purchasers, young investors who buy and hold assets for a long period and do not require any real level of “management,” or investors who simply transfer money between investments in the same fund family (a move for which many commission-based advisors receive no compensation).

Ultimately, these fee-based arrangements only make sense—and in fact, are only currently used—for accounts with high balances. Indeed, advisory fee-based accounts usually carry account balance minimums. The Oliver Wyman study estimates that 7 million current IRAs would not qualify for an advisory account due to low balances.⁴⁶ The study also reports that 90% of 23 million IRA accounts analyzed in 2011 were held in brokerage accounts, and found that retail investors face increased costs—73% to 196%, on average—shifting to fee-based advisory compensation arrangements.⁴⁷

Not surprisingly, fee-based advisors have been supportive of the Rule and PTEs—as consistently reflected in testimony during the Department’s public hearing held in August 2015—because they benefit from it.⁴⁸ They will not be negatively impacted by the onerous PTEs, while their competitors will be, and they will continue serving the same clients under the same business arrangements with the added prospect of being able to compete for more clients who are effectively being forced into flat fee compensation arrangements by the new regulatory regime. Commission-based advisors, on the other hand, will be burdened with a complex new regime (with its attendant costs) and the prospect of losing clients, or at the very least, increasing their clients’ costs. In effect, then, the Department’s Rule and PTEs create “winners” and “losers”

⁴⁶ Oliver Wyman Study, at 6; *see also* Investment Company Institute’s IRA Investor Database (Recently announced fee-based account minimums range from \$20,000 to \$100,000, but an Investment Company Institute study from 2014 shows that over 42% of IRAs in America have balances of less than \$20,000, and almost 74% have less than \$100,000—leaving a large portion of IRA accounts ineligible for this type of arrangement.).

⁴⁷ Oliver Wyman Study, at 7.

⁴⁸ For a variety of reasons, high-wealth investors and their advisors will not be negatively impacted by the Rule/PTEs like low- and middle-income Americans and their advisors. Many wealthy investors are accustomed to, and are comfortable with, fee-based arrangements. Unlike small savers, they are able to pay substantial up-front fees and they carry high account balances commonly required by fee-based advisors. Further, while the cost of doing business for commission-based advisors will increase substantially (through the cost of implementing new PTE compliance requirements, higher errors and omissions insurance premiums, litigation expenses, etc.) and those costs will likely be passed on to consumers with those accounts, fee-based advisors and their clients will not see such cost increases. In other words, wealthy Americans’ investor-advisor relationships, costs, and product choices will largely be untouched, but smaller savers will pay a significant price.

among both advisors and consumers—those who will operate under the status quo and those who will incur substantial new costs, obligations, and risks under an overly onerous PTE.

2. *Compliance costs will be passed on to consumers.*

Under the third option, for advisors who keep commission-based arrangements and rely on a PTE, low- and middle-income and small business clients will still wind up paying more. The *high* cost of compliance with the PTEs (particularly the BIC exemption, upon which many of our members ultimately will have to rely) will be borne by someone. Inevitably, the regulated entities (e.g., broker-dealers, advisors, registered reps) will pass on some of those costs to consumers. Of those surveyed, 47% reported that higher compliance costs may be passed on to clients in the form of additional fees.⁴⁹

The compliance costs associated with the Rule and PTEs are not to be underestimated. They constitute the most expensive regulatory action of 2016 and the second most expensive non-environmental rule since 2005.⁵⁰ The Financial Services Institute estimates that total *start-up* costs (to firms and clients) to implement the Rule/PTEs will be nearly \$3.9 billion.⁵¹ And the Securities Industry and Financial Markets Association (“SIFMA”) estimates that annual compliance costs will range from \$240 million to \$570 million over the next ten years.⁵²

But the cost burden on advisors and their clients goes further. New litigation exposure under the BIC exemption—particularly personal liability exposure for individual advisors—will dramatically increase the overall risk and cost of doing business, not to mention actual litigation expenses. According to a recent survey of NAIFA members, roughly 23% of respondents have already seen an increase in E&O premiums and another 60% expect to see such an increase.

Anticipated litigation-related costs (and fears) align with current market realities. In 2016, nearly 4,000 Financial Industry Regulatory Authority (“FINRA”) arbitration cases were filed by consumers alleging broker-dealer wrongdoing (only 158 of those cases were decided in favor of the consumer)—meaning that broker-dealers spent a lot of time and money defending these cases.⁵³ Additionally, under the BIC exemption, class action lawsuits are permitted, which by some estimates could cost \$70 million to \$150 million per year beyond other ongoing costs of compliance.⁵⁴

It is impossible to accurately measure and evaluate the true cost of litigation exposure/risk under the current BIC exemption. It is certain, however, that to the extent *any* parts of the Rule or exemption requirements are unclear, litigation risk arises and *state* courts will be interpreting

⁴⁹ FSR Survey, at 4.

⁵⁰ Meghan Milloy, *American Action Forum*, *supra* note 44.

⁵¹ Bruce Kelly, *InvestmentNews*, *DOL Fiduciary Rule to Cost the Securities Industry \$11B by 2020: Study* (Sep. 21, 2016), available at <http://www.investmentnews.com/article/20160921/FREE/160929978/dol-fiduciary-rule-to-cost-the-securities-industry-11b-by-2020-study>.

⁵² *Id.*

⁵³ Meghan Milloy, *American Action Forum*, *supra* note 44.

⁵⁴ *Id.*

those grey areas.⁵⁵ This potential patchwork of lawsuits and legal interpretations will impact the cost of doing business, product offerings, and advisor-client relationships in the short and long term.

II. THE DEPARTMENT SHOULD CONDUCT A NEW COST-BENEFIT ANALYSIS TO INFORM AND SHAPE A NEW RULE AND PTEs.

Based on the foregoing, it is essential that the Department conduct a new cost-benefit analysis, and craft a new best interest structure (discussed in detail below) based on a sounder cost-benefit foundation. While the Department’s rule-making agenda to date has been driven by the purported cost of “conflicted advice,” there are other notable costs to be considered. The Department’s earlier Regulatory Impact Analysis neglected, for instance, to account for many of the harmful consequences discussed above. Missing from the initial analysis are key elements such as:

- Acknowledgement and evaluation of the impact of reduced annuity sales for long-term retirement security for low- and middle-income savers;
- The full value of professional advice (versus robo or no advice) to investors, and the cost of losing access to such advice;
- Recognition that high management fees and advisory account models are not better than commission-based arrangements for many consumers, and will actually *increase* costs for many investors;
- Forward-looking, long-term costs of increased litigation risk, including limitations on product offerings and advice based on firm and advisor risk tolerances, actual litigation expenses, and a potential patchwork of state court interpretations of the Rule and PTEs; and
- Recognition that consumers understand that sellers of products have a business interest in the transaction, but have numerous rationales for seeking out professional services anyway (e.g., convenience, personal relationships, peace of mind, quality recognition, etc.).

NAIFA believes that when these factors are accounted for properly, the benefits of the current Rule/PTEs for American retirement savers clearly do not outweigh the costs. Instead, on the whole, consumers are worse off under the Rule/PTEs, and the current structure will not help alleviate the retirement crisis in the U.S. (but rather, may ultimately be counterproductive). NAIFA therefore urges the Department to begin anew with a cost-benefit analysis that accounts for true (and complete) market realities.

⁵⁵ For example, although the preamble to the current BIC exemption states that a recommendation in the “best interest” of the client does not equate to the cheapest or best performing investment, state courts—not the Department—will be interpreting those very questions under the text of the PTEs.

III. THE DEPARTMENT SHOULD WITHDRAW THE RULE AND PTEs AND DEVELOP A NEW PRINCIPLES-BASED STRUCTURE WITH A SINGLE BEST INTEREST PTE.

To be clear, NAIFA members support a “best interest” standard for retirement investment advisors, along with related, reasonable processes and investor protections. Indeed, we believe that our members already adhere to such a standard. It is critical, however, that any “best interest” regime be operationalized in a fashion that is workable for Main Street advisors and their clients, and does not unnecessarily interfere with the private market by driving—via onerous and biased regulatory requirements—industry participants and/or consumers toward *DOL*-preferred products or business arrangements. Specifically, any compliance structure must present a feasible path by which diverse product offerings, various compensation arrangements, and different distribution channels can be preserved with minimal disruptions to competitive market forces and competition and without harming low- and middle-income savers.

NAIFA urges the Department to withdraw the Rule and PTEs, which are overly burdensome, complex, paternalistic, and costly, and replace them with a principles-based regime with reasonable compliance obligations. Moreover, NAIFA believes that the Rule and PTEs as promulgated exceed the Department’s statutory authority, are unconstitutional, and are arbitrary and capricious under the Administrative Procedure Act. If the Department does not rescind the Rule and PTEs in whole, however, NAIFA offers the following specific recommendations for a new rule and a Best Interest PTE that will avoid the aforementioned problems associated with the current Rule/PTEs, reduce their harm to consumers and actually advance the goal of promoting more retirement savings by more Americans.

- A. The Definition of “Investment Advice Fiduciary” should Cover Only Those Providing Actual Personalized Investment Advice to Avoid Harming Consumers with Less Education and Diminished Awareness of Professional Products, Services and Professionals.

We urge the Department to avoid the paternalism embedded in the current Rule, and its unnecessary interference with pre- and non-advice communications between advisors and prospective clients (or even existing clients). The new rule should not diminish the availability of effective education, marketing, or professional referrals—all of which benefit consumers tremendously and do not present conflict of interest concerns. Ultimately, imposition of compliance obligations related to fiduciary investment advice should be reserved for those individuals providing actual *advice*.

Specifically, with respect to the definition of investment advice fiduciary, the Department should:

- Include a meaningful education exception based on Interpretive Bulletin 96-1;
- Include a seller’s exception that does not distinguish between retail investors based on size of account and/or assets (or any other arbitrary classification), but rather adopts a

common-sense, blanket carve-out for all communications that are understood to be sales pitches and/or marketing in nature;

- Refrain from categorizing referrals to other professionals as investment advice; and
- Limit the definition to those providing individualized (i.e., directed to a particular retail investor) advice upon which the advice recipient actually relies to execute an investment transaction.

B. The Department Should Create a New Best Interest PTE that is Truly Principles-Based and not Overly Prescriptive, Burdensome, or Costly in Order to Avoid Government Overreach and Harm to Consumers.

NAIFA strongly believes that the problems associated with the current PTEs cannot be cured with revisions, clarifications, or any other modifications to the existing structure. Instead, to achieve the policy objectives of the current Administration, the Department must begin again and create its own solution.

As discussed at length above, the sheer complexity and cost of the current PTEs, particularly the BIC exemption, is causing market disruptions and negative consequences for consumers. By driving the market in a particular direction through substantial differentials in compliance obligations and costs, the existing PTE structure represents a substitution of the Department's preferences and judgments with respect to particular products and business arrangements for those of consumers. A less disruptive and heavy-handed approach can and should be employed to achieve the current Administration's ultimate objective—establishment of a best interest standard of care for retirement investment advisors in their dealings with retail investors, while maintaining access to professional advice and products that encourage retirement savings and long-term security.

The proper balance, NAIFA believes, is struck by creating a single "Best Interest PTE" that applies to *all* plan types, products, and non-flat fee compensation arrangements subject to the rule. The benefits of such an approach vis-à-vis the current Rule/PTEs are clear, including, *inter alia*:

- preservation of *consumer* choice among marketplace offerings (with respect to advisors, compensation, products, etc.);
- minimized government interference in/manipulation of the marketplace, and avoidance of over-regulation that naturally leads to more consumer confusion, increased cost of services and products, and less access to products and services for low- and middle-income retirement savers;
- ease of administration (and related cost savings) for entities subject to the rule; and
- improved overall compliance and enforcement (by eliminating confusion and establishing clear, enforceable and uniform rules for all).

Below are specific recommendations for creation of a Best Interest PTE.

1. *Advance a best interest standard that is clearly defined and properly accounts for diverse products, perspectives and clients in the industry.*

The Department should include a “best interest” standard for advisors and firms in the retail retirement investment space—a move publicly supported by NAIFA and other industry groups. Such a standard should affirmatively state what constitutes compliance to avoid unnecessary confusion and/or conflicting interpretations. NAIFA supports the following language:

A fiduciary investment advisor acts in the best interest of a retail investor at the time advice is rendered if the advisor acts with the skill, prudence, and diligence, under the circumstances then prevailing and based on the investor’s investment profile, that a prudent person acting in a like capacity serving similar clients and offering a similar array of products would use in the conduct of an enterprise of a like character and with like aims.

As discussed below, this language contains several important elements for any advisor standard of conduct.

First, the recommended language makes clear that the standard applies as of the time the advice is rendered. It is important to clarify that the standard applies to all investment advice actually given, but does not otherwise create any ongoing obligation to manage, monitor, or advise.

Second, the proposed language recognizes and allows for varying perspectives and opinions among industry professionals with respect to products, recommendations, and compensation arrangements (i.e., avoid de facto elimination of entire classes of products from the marketplace).⁵⁶ To illustrate, industry professionals’ perspectives and opinions vary widely with respect to proprietary products and variable annuity products, which may create distinct problems (i.e., litigation risk) under a best interest standard. Regardless of advisors’ differing sentiments, however, consumers want to buy—and in fact seek out—variable annuity and proprietary products because they provide unique benefits to investors.⁵⁷ Thus, any best interest

⁵⁶ FINRA—well acquainted with drafting and enforcing a standard of conduct for broker-dealers—agrees with both of NAIFA’s concerns. In its letter to the Department regarding the proposed Rule and PTEs, FINRA noted that “[r]easonable and qualified financial advisers may reach different conclusions about which factors are more significant and which product best meets the criteria that the financial adviser believes are most relevant. . . . A requirement to recommend the ‘best’ product would impose unnecessary and untenable litigation risks on fiduciaries.” Letter from Marcia Asquith, FINRA, to the U.S. Department of Labor re Proposed Conflict of Interest Rule and Related Proposals (July 17, 2015), available at http://www.finra.org/sites/default/files/FINRACommentLetter_DOL_07-17-15.pdf.

⁵⁷ For instance, variable annuities provide guaranteed life income and an opportunity for investors (who may not otherwise have the opportunity) to take advantage of upside in the market. NAIFA members’ clients’ primary concern with respect to retirement planning is out-living their savings. Variable annuities, like other annuity products, provide invaluable protection against longevity risk. Further, consumers who invest in variable annuity products to maximize their retirement security have the opportunity (like wealthier investors who put their savings in other vehicles) to enjoy a greater variety of investment choices and benefit from positive market performance.

standard should account for intra-industry differences in opinion and preserve consumer choice with respect to various products.⁵⁸ To avoid any confusion on these points, NAIFA supports inclusion of the following language in conjunction with the above best interest standard:

Neither investment advice limited to recommendations of principal transactions or proprietary products (or any similar limitation on the range of products recommended), nor advice pertaining to any particular class or type of investment product shall render advice not in the best interest of the investor. Receipt of any particular type of compensation by the advisor also does not render advice not in the investor's best interest.

This particular language also makes clear that the best interest standard is compensation-neutral. By making it clear that advisors must act in their clients' best interest (in combination with the additional requirements discussed below), there is no reason for the regulations to dictate particular compensation arrangements. As discussed at length above, some compensation arrangements favor certain investors and advisors over others, and the government need not and should not pick "winners and losers" in this fashion. Instead, industry professionals and consumers should be free to employ the arrangements that make the most sense for them.

Finally, "best interest" should not be conflated with "best performance." It is equally important not to confuse "best interest" with "least expensive." The best- and worst-performing assets change constantly. Because no one can predict the future, diversification is essential to any investment strategy. Further, not all investment products are created equal—the quality and level of risk of different products can vary dramatically. And of course, clients' needs differ and fluctuate widely. Thus, in many instances, an appropriately diversified, high-quality, individually-tailored investment portfolio will not include the least costly products; and yet, given the multitude of factors to consider, such a portfolio is in the client's best interest. Accordingly, NAIFA supports inclusion of the following additional language:

An advisor shall not be required to recommend the least expensive investment product or strategy (however quantified) or to analyze all other possible products or strategies before rendering investment advice to act in the investor's best interest.

Propriety products also benefit consumers. Indeed, some investors choose to work with captive advisors because proprietary products from well-known and respected financial institutions provide consumers with peace of mind and high-quality investment options. Additionally, advisors who sell proprietary products are experts regarding those products and can offer consumers extensive information and guidance on their investment options within a fund family. Finally, consumers who work with captive advisors often have a long-standing relationship with the financial institution and the advisor (because, for example, they also have a bank account, home loan, insurance, or other business relationship with the institution), and they feel most comfortable working with a person they know (who also knows them) to protect their retirement savings.

⁵⁸ Relatedly, "without regard to advisors' or firms' interest" language within a best interest standard is problematic for sellers of proprietary products. For the above reasons, these products are desirable to consumers—who recognize and appreciate sellers' interest in branded products. Accordingly, any best interest standard should accommodate such sales.

At a minimum, to the extent an ultimate best interest standard differs materially from the recommended language above, NAIFA strongly urges the Department to consider and account for the above-referenced concerns in its standard.

2. *Include reasonable and meaningful disclosure requirements and other reasonable parameters that benefit, rather than hurt, consumers.*

A clear best interest standard modeled on the above language does not require additional layers of onerous and costly compliance obligations to be effective and enforceable. In fact, avoiding such burdens will *strengthen* the efficacy of a best interest standard by protecting consumers from conflicts of interest *and* avoiding market disruptions that take away professional advice, product choices, and compensation arrangements from low- and middle-income savers.

The current PTEs, especially the BIC exemption, contain needless requirements that are negatively impacting the market and consumers—as we have seen from market reactions so far. For example, under the current BIC exemption, financial institutions must warrant that they do not use differential compensation or any other actions or incentives that would tend to encourage individual advisors not to act in the best interest of their clients. These warranties effectively undermine any compensation-related benefits an advisor could receive for complying with the BIC exemption,⁵⁹ and effectively force all investors into flat-fee and wrap account arrangements they do not want and from which they do not benefit.⁶⁰ Moreover, the warranties are duplicative because the best interest standard is in place to address precisely the alleged conflicts of interest targeted by the warranties.

Similarly, the contract requirement for IRA accounts under the BIC exemption is unnecessary and is fueling many of the market disruptions we have seen to date (including elimination of entire product lines for certain clients). As discussed in more detail below, regulators already have tools to enforce a best interest standard without resorting to private litigation (a huge cost-driver) as the primary enforcement mechanism. These are just two examples of unnecessary interference with marketplace dynamics, as well as unnecessary cost-generators, under the current approach.

NAIFA urges the Department to develop a Best Interest PTE that does not contain these types of counterproductive requirements, but rather, focuses on what will actually help consumers and improve the functioning of the retirement investment industry as a whole.

⁵⁹ According to the Department, the BIC exemption is designed to allow financial professionals to continue receiving compensation that is ubiquitous in the marketplace (e.g., commissions, 12b-1 fees, revenue sharing, etc.). But this warranty requirement forces those professionals to effectively promise not to employ any of those common compensation arrangements in the first place.

⁶⁰ The Department's examples in the preamble of acceptable compensation arrangements (i.e., arrangements that would not violate this warranty) indicate that the Department is forcing everyone to flat-fee and wrap account arrangements. For the reasons discussed in the introduction to this comment letter, those arrangements will not benefit NAIFA members' clients.

a. Adopt reasonable and clear disclosures.

First, the Department could include within its Best Interest PTE a clear general disclosure requirement. Specifically, the Department could require that certain information be provided at or before the point of sale/execution of a transaction for all new clients (with updated disclosures to be provided if/when material changes in the underlying information occur).⁶¹ This disclosure could include:

- the type and scope of services the advisor offers and may provide to the investor;
- the best interest standard that applies to the advisor with respect to all advice rendered;
- the type(s) of compensation the advisor and other parties may receive as a result of advice rendered;
- any material conflicts of interest between the advisor (and/or the pertinent financial institution) and the investor; and
- the availability of additional information about any of the above categories upon an investor's request.

Advisors and their firms should be given flexibility to determine the form and manner of delivery (e.g., paper or electronic) of these disclosures, with an option for investors to request and receive a particular form of delivery.

Additionally, upon request by an investor, the advisor and/or firm may be required to provide additional details and/or information beyond the original general disclosure (e.g., more detailed information about a particular service or compensation). Again, there should be flexibility in delivery methods, unless specified by the investor. This two-tiered approach to disclosure ensures that investors who want additional information receive it, but those who do not feel they would benefit from more information can make informed decisions based on the original disclosure.

b. Prohibit misleading statements.

Relatedly, the Department could include within the PTE a prohibition on any misleading statements by a firm and/or advisor to a retail investor. This prohibition could apply to representations made with respect to products, investment strategies, compensation disclosures, etc.

⁶¹ It is important that any disclosure requirement not be required *before* the point of sale in order to avoid a dampening effect on advisors'/firms' willingness to have preliminary discussions with prospective clients (including providing much-needed investment education). Further, by requiring disclosures only at the beginning of a new client relationship or when material changes in information occur, unnecessary administrative burdens and costs are minimized—which ultimately saves on costs for consumers.

- c. Overall advisor and firm compensation must be reasonable.

While the Department's new rule and Best Interest PTE should be compensation-neutral (i.e., not favor or penalize particular types of compensation or compensation arrangements versus others), the Department could require that overall compensation for all parties involved in an investment transaction be reasonable (within the meaning of ERISA section 408(b)(2) and Internal Code section 4975(d)(2)). As discussed at length above, not all compensation arrangements are appropriate or beneficial for all consumers, so preserving consumer choice and market freedom with respect to all existing compensation arrangements is essential.

- d. Financial institution policies and procedures reasonably designed to ensure compliance with the above-cited standard and requirements.

While NAIFA does not believe it would be necessary to prescribe thorough regulations (because firms already take such precautions to protect themselves and their advisors from liability), the Department could require financial institutions to adopt policies and procedures reasonably designed to ensure that they and their advisors are adhering to the best interest standard and the other requirements mentioned above. To the extent such a requirement is included, however, it is essential that the details of such policies and procedures (and related internal recordkeeping and oversight requirements) be left up to the financial institutions. Each business in the industry already has extensive compliance infrastructure in place and should be allowed to incorporate new requirements into their existing models without unnecessary interference from the Department.

Notably, the suggested Best Interest PTE contents described above are not a new construct. They generally are consistent with the approach under PTE 84-24, as modified by the Department in its April 2016 final rule (i.e., it also is built upon a best interest standard, common-sense disclosures, and a reasonable compensation limitation). As NAIFA has noted in previous comment letters, it is telling that these basic requirements were considered sufficient for the Obama Administration's DOL's *preferred* products (i.e., fixed annuity products). We have questioned all along why the same standards, including enforcement by federal regulators instead of private litigants, should not apply to all plan types, products, and retail investors—a true principles-based approach.

C. Federal Regulators should Retain and Exercise Enforcement Authority over Any New Rule and PTE.

The current BIC exemption's contract requirement for IRA accounts effectively—and improperly—transfers enforcement authority from federal regulators to private class action attorneys. This transfer will have a very real and harmful impact on the marketplace and investors. Litigation risk—the cost of which cannot fully be measured in advance—already has and will continue to drive firms and advisors away from entire product lines, compensation arrangements, and low- and middle-income clients.

Notably, ERISA and the Code already provide for penalties for firms and advisors who break the rules. Delegation of enforcement authority away from these existing mechanisms to untold litigation threats, including class action suits and potential class settlements, will:

- increase costs for *everyone* in the industry;
- have a dampening impact on advisor-client relationships (e.g., advisors' willingness to recommend otherwise perfectly suitable/desirable products), due to firms' and advisors' personal liability concerns; and
- create unwanted uncertainty around the Department's Rule and PTEs because various state courts will be left to interpret their meaning and bounds.

These developments are undesirable and completely unnecessary. A new Best Interest PTE can and should avoid them by relying on existing federal enforcement authority, and not delegating such authority to private attorneys and state courts.

IV. SPECIFIC REPOSES TO RFI QUESTIONS 2 – 18

Q2: What has the regulated community done to comply with the Rule and PTEs to date, particularly including the period since the June 9, 2017, applicability date? Are there market innovations that the Department should be aware of beyond those discussed herein that should be considered in making changes to the Rule?

NAIFA reiterates its position that the problems associated with the Rule/PTEs cannot be cured by mere modifications to the existing regime. Moreover, no market innovations with respect to new or specific products, business arrangements, etc. will solve all of the current problems for all consumers, institutions, advisors and/or products our members' clients want to buy. Adding layers of product-specific or other complexity to the PTEs, particularly the BIC exemption, or creating yet more PTEs with different compliance obligations will only exacerbate the fundamental flaws in the current approach.

Driving the market toward DOL-preferred or DOL-blessed "solutions" with the threat or promise of regulations (either by making them heftier or alleviating them) is an illusory solution. The financial services market is and should remain *consumer*-driven and the market should be allowed to innovate based on consumer demands and needs, not changes in government regulations.

Q3: Do the Rule and PTEs appropriately balance the interests of consumers in receiving broad-based investment advice while protecting them from conflicts of interest? Do they effectively allow Advisers to provide a wide range of products that can meet each investor's particular needs?

No. As discussed at length above, the Rule and PTEs are skewed toward DOL's preferred business models. They already are driving advisors into more limited product offering and compensation arrangement options. There is a better approach—outlined above with respect to

creation of a new Best Interest PTE—that protects against conflicts of interest and ensures advisors act in the best interest of their client, but does not limit competition or choice.

Q4: To what extent do the incremental costs of the additional exemption conditions [applicable January 1] exceed the associated benefits and what are those costs and benefits? Are there better alternative approaches? What are the additional costs and benefits associated with such alternative approaches?

Above, NAIFA has addressed the costs of the current Rule/PTEs, which clearly outweigh the benefits. The requirements set to become effective January 1, notably, are the most onerous and expensive, and also the least likely to add actual value or benefit for America’s retirement savers (particularly low- and middle-income savers). On the contrary, anticipation of these pending requirements is harming consumers.

We have provided specific suggestions for a better, alternative approach (a single Best Interest PTE), which will result in fewer costs (for all parties, including consumers), more access to advice and valuable investment education, more competition and consumer choice, and fewer gratuitous administrative compliance obligations.

Contract Requirement in BIC and Principal Transaction Exemptions

Q5: What is the likely impact on Advisers’ and firms’ compliance incentives if the Department eliminated or substantially altered the contract requirement for IRAs? What should be changed? Does compliance with the Impartial Conduct Standards need to be otherwise incentivized in the absence of the contract requirement and, if so, how?

A best interest standard does not require layers of unnecessary and costly administrative and compliance burdens to be effective or meaningful. Firms and advisors do not need to be “otherwise incentivized” to comply with a standard memorialized in and enforced under Department regulations (any contrary belief is founded on unjustified skepticism that American businesses and their employees do not generally follow the rule of law). *Many* rules and standards exist without the added threat of private class action litigation (notable among them is the regime under the Investment Advisers Act of 1940).

The Department has tended to ignore the enforcement mechanisms already in place under ERISA and the Internal Revenue Code. Additional “enforcement” via private causes of action is not necessary and, as we have seen play out already, only drives up the cost of doing business (and by extension, the cost of products and services for consumers) and/or inspires reluctance for firms and advisors to even work with small-dollar account holders because of unknown litigation/financial risk.

Q6. What is the likely impact on Advisers’ and firms’ compliance incentives if the Department eliminated or substantially altered the warranty requirements? What should

be changed? Does compliance with the Impartial Conduct Standards need to be otherwise incentivized in the absence of the warranty requirement and, if so, how?

The existing warranties and any similar construct should be rejected. Again, extra “incentives” to comply with the law are unnecessary. As noted above, the warranties in the current BIC exemption are duplicative of the very purpose of developing and imposing a best interest standard and only serve to force industry professionals and their customers into a particular compensation arrangement (i.e., a flat fee arrangement, which ultimately undermines the utility of complying with a PTE in the first instance).

Alternative Streamlined Exemption

Q7, Q8, Q9, Q10: Separate exemption for clean shares, T-shares, and/or Fee-based annuities, and “model” Department policies and procedures.

As noted above, no discrete product or fee-related innovations will solve the problems associated with the Rule/PTE for all consumers, advisors, or products that consumers want to buy. Designing new PTE structures around particular market innovations DOL prefers will only add complexity and costs, and further erode competition and choice in the marketplace. Consumers—not the Department—should drive creation of new products and business arrangements—in reality, if consumers want them, they will be developed and offered. The Department should not be in the business of telling the marketplace which products can be sold, by whom, and in what manner. Such an approach does not recognize or appreciate the depth and variety of products and services offered today to diverse types of consumers.

Similarly, creation of model policies and procedures by the Department for use by every firm and advisor in such a broad and complex industry is another false one-size-fits-all solution. No single set of policies and procedures would be appropriate or reasonable for all firms. Indeed, the SEC refrains from creating such templates because, to be effective, policies and procedures must be tailored to each firm’s unique characteristics. Moreover, firms *already* have extensive internal compliance programs with policies and procedures, which are capable of absorbing and addressing changes in the regulatory/legal landscape.

Incorporation of Securities Regulation of Fiduciary Investment Advice

Q11: If the Securities and Exchange Commission or other regulators were to adopt updated standards of conduct applicable to the provision of investment advice to retail investors, could a streamlined exemption or other change be developed for advisers that comply with or are subject to those standards? Etc.

As NAIFA stated in its comment letter on Question 1 in the Department’s RFI (regarding delay of the January 1 applicability date), the Department should avoid creating compliance obligations or standards that conflict with those set by the other (primary) regulators. The SEC has issued its own RFI on a standard of conduct for financial professionals. We urge the

Department to pace its process for creating a new rule and Best Interest PTE with the SEC to achieve maximum consistency between the resulting regulations. We also note that, with respect to insurance products, state regulators also are working (through the National Association of Insurance Commissioners) on modifying their own standard for the sale of annuities. This is another process of which the Department should be mindful as it creates its new approach.

Principal Transactions

Q12: Are there ways in which the Principal Transactions Exemption could be revised or expanded to better serve investor interests and provide market flexibility? If so, how?

As explained above, the existing PTE structure, including the Principal Transactions Exemption, should be withdrawn entirely, and a single low-cost, high-quality Best Interest PTE should be created in its place. Modifying the current regime will not “provide market flexibility” because the entire construct is designed to be, and is in fact, inflexible with respect to current market dynamics.

Disclosure Requirements

Q13: Are there ways to simplify the BIC Exemption disclosures or to focus the investor’s attention on a few key issues, subject to more complete disclosure upon request? For example, would it be helpful for the Department to develop a simple up-front model disclosure that alerts the retirement investor to the fiduciary nature of the relationship, compensation structure, and potential sources of conflicts of interest, and invites the investor to obtain additional information from a designated source at the firm? Etc.

NAIFA has outlined its specific recommendations above for a reasonable two-tiered disclosure approach within a new Best Interest PTE (not the BIC exemption). Again, as with the proposed model policies and procedures discussed above, the Department should not create or mandate a one-size-fits-all disclosure. Firms and advisors should be free to communicate information to their clients in a manner that makes sense for their particular investors, while ensuring that the most important and appropriate information is conveyed—the Department simply does not have expertise in making these determinations.

Contributions to Plans or IRAs

Q14: Should recommendations to make or increase contributions to a plan or IRA be expressly excluded from the definition of investment advice? Should there be an amendment to the Rule or streamlined exemption devoted to communications regarding contributions? If so, what conditions should apply to such an amendment or exemption?

NAIFA interprets the current Rule to not cover recommendations regarding contributions within the definition of “investment advice.” This provides an example, however, of the Rule’s unwarranted interference with investment education communications, which—given the current

savings crisis—should be encouraged, not discouraged. As noted above, NAIFA urges the Department to recraft a rule with a clear and meaningful education carve-out.

Bank Deposits and Similar Investments

Q15: Should there be an amendment to the Rule or streamlined exemption for particular classes of investment transactions involving bank deposit products and HSAs? If so, what conditions should apply, and should the conditions differ from the BIC Exemption?

HSAs should not be within the scope of any future investment advice fiduciary rule. These products are not traditional retirement investment products; rather, they provide an important safety net for individuals and families with high deductible health plans. Expenditures from HSA accounts are limited to approved medical expenses, and funds in these accounts are meant to be available on demand for unforeseen medical costs (i.e., they are not held for long-term retirement planning purposes).

Grandfathering

Q16: To what extent are firms and advisers relying on the existing grandfather provision? How has the provision affected the availability of advice to investors? Are there changes to the provision that would enhance its ability to minimize undue disruption and facilitate valuable advice?

The Rule's/PTEs' (including the grandfathering and all other provisions) negative impact on availability of advice to investors is discussed at length above. The grandfathering rules are examples of the unnecessary complexity (and related confusion) embedded in the current PTE structure. As we have outlined, the only effective way to “minimize undue disruption and facilitate valuable advice” is to withdraw the existing PTEs and develop a broadly applicable, streamlined and simplified Best Interest PTE.

PTE 84-24

Q17: If the Department provided an exemption for insurance intermediaries to serve as Financial Institutions under the BIC Exemption, would this facilitate advice regarding all types of annuities? Would it facilitate advice to expand the scope of PTE 84-24 to cover all types of annuities after the end of the transition period on January 1, 2018? What are the relative advantages and disadvantages of these two exemption approaches (i.e., expanding the definition of Financial Institution or expanding the types of annuities covered under PTE 84-24)? To what extent would the ongoing availability of PTE 84-24 for specified annuity products, such as fixed indexed annuities, give these products a competitive advantage vis-à-vis other products covered only by the BIC Exemption, such as mutual fund shares?

The current PTEs' bifurcation of the annuity world between PTE 84-24 and the BIC exemption is one of the clearest examples of steering by the Department toward *its* favored products. Guaranteed income products are vital to middle- and lower-income Americans planning for their retirement. They want to—and do—purchase many different types of annuity products to suit their particular goals and investment profiles. A single Best Interest PTE that covers all retirement investment products, including all annuity products, is the best avenue for ensuring that guaranteed income products will continue to be available to all consumers who want to buy them.

Communications With Independent Fiduciaries With Financial Expertise

Q18: To the extent changes would be helpful, what are the changes and what are the issues best addressed by changes to the Rule or by providing additional relief through a prohibited transaction exemption?

As outlined above, the current Rule unnecessarily inhibits valuable investment education and marketing with respect to products and financial professionals. A new rule should have clear and meaningful education and sales/marketing carve-outs applicable to *all* retail investors. The Department should not arbitrarily decide who is sufficiently “sophisticated” and who is not; by doing so, it cuts off many individuals and families from receiving important information and guidance about planning for a secure future, and does not support the objective of encouraging more saving by all Americans.

IV. CONCLUSION

For all of the foregoing reasons, NAIFA believes that the Department should withdraw the Rule and PTEs and develop a new principles-based Best Interest PTE. The new rule should cover only those who provide actual personalized investment advice, so as to not diminish the availability of effective education, marketing, or professional referrals—all of which benefit consumers tremendously and do not present conflict of interest concerns. To the extent the Department's RFI queries the desirability and/or advisability of various adjustments or additional layers of complexity to the current Rule/PTEs, NAIFA urges the Department to reject any such approach. Instead, the Department should craft a new solution based on its own cost-benefit analysis, which:

- avoids the inescapable harms already resulting from the existing Rule/PTEs;
- promotes consumer protection and awareness, *as well as* competition and consumer choice with respect to retirement investment products, services, and professionals;
- contains a strong best interest standard and reasonable compliance obligations that will not put undue cost burdens on consumers or businesses; and

- avoids the government picking “winners and losers” and driving particular outcomes through over-regulation.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Paul R. Dougherty". The signature is fluid and cursive, with the first name "Paul" being the most prominent.

Paul R. Dougherty, LUTCF, FSS, HIA
NAIFA President

EXHIBIT LIST

- Exhibit A: NAIFA's July 12, 2017 letter urging the Department to immediately delay the January 1, 2018 applicability date for the remainder of the Rule not already in effect.
- Exhibit B: Summary of new information procedural and analytical flaws.
- Exhibit C: Chart comparing commission-based and fee-based costs for a small saver.



National Association of Insurance
and Financial Advisors

EXHIBIT A

July 12, 2017

VIA ELECTRONIC FILING – www.regulations.gov

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

**RE: RIN – 1210-AB82
RFI Regarding the Fiduciary Rule and Prohibited Transaction Exemptions**

To Whom It May Concern:

The National Association of Insurance and Financial Advisors (“NAIFA”) appreciates this opportunity to comment on the Department of Labor’s (“Department” or “DOL”) request for information (“RFI”) regarding the fiduciary rule (Conflict of Interest Rule—Retirement Investment Advice (the “Rule”)) and related Prohibited Transaction Exemptions (“PTEs”);¹ specifically, the Department’s RFI with respect to a potential delay of the January 1, 2018 applicability date (“applicability date”).²

EXECUTIVE SUMMARY

NAIFA strongly supports a delay of the applicability date for the Rule and all PTEs for a minimum of 24 months. Such a delay is justified for several reasons; namely, to:

- (1) Facilitate completion of the Department’s economic and legal analysis of the Rule/PTEs pursuant to the President’s February 3 Memorandum and review of comments submitted in response to the current RFI, as well as any rulemaking to rescind or make changes to the Rule/PTEs based on the Department’s evaluation of all input gathered;

¹ Department of Labor, Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions, 82 Fed. Reg. 31278 (July 6, 2017) (hereinafter “Department RFI”).

² Department RFI, 82 Fed. Reg. 31278, 31279 (Question 1).

- (2) Allow for coordination and collaboration between the Department and the Securities Exchange Commission (“SEC”), which also is soliciting public comment on a standard of care and related requirements for financial institutions and advisors; and
- (3) Prevent further harm to Main Street retirement investors.³

Notably, the Department’s RFI solicits additional public comments on *numerous* potential changes to the Rule and PTEs, and states that the Department is still reviewing comments on issues raised in the President’s February 3, 2017 Memorandum.⁴ We applaud the Department’s continued evaluation of the substance of the Rule/PTEs and urge you to take sufficient time and care to complete your review. Of course, should the Department determine that rescission or revision of the Rule/PTEs is warranted, absence of an adequate extension of the applicability date would cause multiple major disruptions to the regulatory environment and the marketplace, and needless consumer confusion and harm.

Additionally, the Securities Exchange Commission (“SEC”) recently released its own RFI regarding standards of conduct for financial institutions and advisors. Both Secretary Acosta and Chairman Clayton have publicly expressed their desire and intent to work together on developing consistent standards and requirements—a prospect fully supported by NAIFA. Given the parallel and related regulatory processes now underway, we encourage the Department to extend the applicability date so that it and the SEC can collaborate and finalize complimentary structures.

Finally, as discussed in further detail below, the negative impact of the Rule/PTE on Main Street advisors and retirement savers already is evident. Substantial changes (about which NAIFA intends to submit separate detailed comments) must be made to the current regime to accomplish its purported goal—to increase retirement savings. Such a revamp will require more time than the roughly five months remaining until the January 1, 2018 applicability date. In the meantime, tremendous resources are being spent to comply with the counterproductive Rule/PTEs

³ Of course, the Rule also continues to be challenged in litigation, and some or all of the requirements currently set to take effect on January 1, 2018 could be rendered unnecessary by forthcoming court rulings. Although we will not repeat them at length here, we do respectfully submit that the Rule raises a host of serious legal problems. Indeed, the Department itself has recently acknowledged in its legal briefing that the Exemptions’ restrictions on class-litigation waivers, which are among the requirements set to take effect January 1, are improper and should be vacated. A postponement of the January 1 deadlines is thus warranted to allow the courts additional time to consider these issues before further requirements take effect.

⁴ Presidential Memorandum, *Fiduciary Duty Rule* (Feb. 3, 2017), available at: <https://www.whitehouse.gov/briefing-room/presidential-actions/presidential-memoranda>.

(including building new websites, disclosures, auditing processes for new documentation requirements, and new policies and procedures and related front- and back-office training).

A decision by the Department to not delay the applicability date will only result in wasteful expenditures by U.S. businesses, increased costs for consumers, lack of retirement services and products for middle- and low-income savers, and additional market disruptions and consumer confusion. NAIFA encourages the Department to avoid all of these consequences by immediately delaying the applicability date for the Rule and all PTEs.

BACKGROUND & IMPACT OF THE RULE/PTEs ON NAIFA MEMBERS

Founded in 1890 as The National Association of Life Underwriters (NALU), NAIFA is one of the nation's oldest and largest associations representing the interests of insurance professionals from every Congressional district in the United States. NAIFA members assist consumers by focusing their practices on one or more of the following: life insurance and annuities, health insurance and employee benefits, multiline, and financial advising and investments. NAIFA's mission is to advocate for a positive legislative and regulatory environment, enhance business and professional skills, and promote the ethical conduct of its members.

NAIFA members—comprised primarily of insurance agents, many of whom are also registered representatives—are Main Street advisors who serve primarily middle-market clients, including individuals and small businesses. In some cases, our members serve areas with a single financial advisor for multiple counties. And often, our members' relationships with their clients span decades and various phases of clients' financial and retirement planning needs. Most of our members work in small firms—sometimes firms of one—with little administrative or back office support. Often, their business practices are dictated by the broker-dealer or insurance company with whom they work, including the format and provision of client forms and disclosures. They also are subject to transaction-level oversight and review by their overseeing financial institutions.

The retirement products most commonly offered by NAIFA members are annuity products (fixed and variable) and mutual funds. Some of our members are independent advisors working with independent broker-dealers; others are affiliated with (or captives of) product providers and are restricted to some degree in the products they are permitted to sell. Virtually all NAIFA members working in the individual IRA space will have to rely on the Best Interest Contract (“BIC”) Exemption, which represents a far more onerous compliance regime than any of our members (or their financial institutions) have previously faced.

Despite former Secretary Perez's statement before Congress on June 17, 2015 that the Department's Rule makes things “simpler” by imposing a uniform fiduciary standard on investment advisors, the Rule and its accompanying PTEs are anything but simple. Instead, the regime is complex and contains extensive conditions that will put a tremendous burden on advisors who serve the middle market, as well as their clients. As discussed below, we already have seen negative market reactions to the Rule and PTEs—direct evidence that concerns for

small and mid-level savers are justified and that the Department should take the time required to craft a more effective, less harmful rule.

NAIFA SUPPORTS A 24-MONTH DELAY OF THE JANUARY 1, 2018 APPLICABILITY DATE

First, the Department’s preparation of new legal and economic analyses of the Rule/PTEs and related determination of whether (and/or to what extent) they are consistent with the new Administration’s policies—including an assessment of all public comments received in response to the Department’s request for stakeholder input related to the President’s February Memorandum—will take a significant amount of time. Indeed, comment letters submitted on or before April 17 are still being reviewed by the Department some three months later. And in the event the Department’s final analysis reveals that changes need to be made, any new rulemaking to implement rescission of, or changes to, the Rule/PTEs will take even more time.

Second, beyond the ongoing analysis called for by the President, the Department itself has invited additional comments on a plethora of technical and conceptual issues underlying the Rule/PTE. Again, to the extent those comments justify changes to the prior Administration’s rule—as NAIFA believes they will—the Department will need ample time to recreate its own approach. As experience tells us, a thorough rulemaking process on such complex topics can take several months. Under a best case scenario, any such process would run right up to the existing applicability date of January 1, 2018, at which point impacted parties are expected to be in *full* compliance with the Rule/PTEs and will have expended tremendous resources on those compliance efforts.⁵

There is clear precedent for a delay of the applicability date to provide the Department with sufficient time to consider the merits of the Rule/PTEs and public comments thereon. In fact, earlier Department rules regarding fiduciary investment advice (issued by the George W. Bush Administration) were delayed for 60 days in 2009 by the Obama Administration, following public notice and comment, “in order to afford the Agency the opportunity to review legal and policy issues relating to the final rules.”⁶ Ultimately, to give the Department “additional time to

⁵ Notably, the more onerous PTEs (e.g., the BIC Exemption) were designed in the first instance to include an adequate transition period prior to the full compliance deadline on January 1, 2018. *See* Final BIC Exemption, 81 Fed. Reg. 21069 (Apr. 8, 2016) (explaining that the April 10, 2017 applicability date “is appropriate for plans and their affected service providers to adjust to the basic change from non-fiduciary to fiduciary status” while being “subject to more limited conditions;” and the transition period between then and January 1, 2018 “is intended to give Financial Institutions and Advisors time to prepare for compliance with the [full set] of conditions” under the exemption) (emphasis supplied). By the same rationale, and anticipating that at least some changes will be made to the Rule/PTEs over the coming months, any applicability date should be commensurately prolonged to account for adjustments to the compliance scheme.

⁶ *See* Department of Labor, Withdrawal of final rule, *Investment Advice—Participants and Beneficiaries*, 74 Fed. Reg. 60156 (Nov. 20, 2009) (background discussion of steps taken prior to ultimate withdrawal of the rule).

consider the issues raised by commenters” regarding the merits of rescinding, modifying or retaining the rules, the Department delayed the effective and applicability dates of those rules twice more (two successive six-month periods) before ultimately withdrawing the rules and formulating its own proposal.⁷

Third, coordination with the SEC, which currently is undertaking a parallel public comment process, is essential. Such coordination is necessary to harmonize any standards for firms and advisors in the retail investor context, and to avoid potentially conflicting rules and requirements for the same investment transaction. Moreover, as the primary regulator in this area, the SEC has invaluable expertise that can and should help inform the Department’s ultimate approach.

Finally, delay of the applicability date is warranted to avoid further harm to retirement savers. The President’s February Memorandum appropriately focuses on the Rule’s/PTEs’ potential impact on retirement savers, including savers’ access to investment advice and products, and market dislocations. It is clear from market reactions to date that these are serious concerns, which must be addressed.⁸

For instance, 2,708 NAIFA members—along with thousands more Main Street advisors across the country—no longer will be able to provide personalized retirement investment advice to their clients because *just one* financial institution (of the many with which NAIFA members are affiliated) has banned its advisors from offering mutual funds, variable annuities and other investment products that trigger onerous compliance obligations under the Rule/PTEs. Instead, these clients—*hundreds* per advisor—will be sent to a self-directed call center where they will have to make investment decisions on their own.

Additionally, according to a recent survey of NAIFA members (with 1,084 respondents), 91% of respondents have already experienced or expect to experience restrictions on product offerings to their clients, nearly 90% believe consumers will pay more for professional advice services, and 75% have seen or expect to see increases in minimum account balances for the clients they serve. And 78% of NAIFA members say that although they continue to offer professional advice to clients, general confusion about the complex Rule and PTEs is impeding their ability to serve clients. Further, a survey of 552 U.S. financial advisors conducted in October 2016 found that 71% “plan to disengage from some mass-market investors because of the DOL rule,” and 94% of advisors say that small clients “orphaned” by advisors will have to turn to robo-advice.⁹

⁷ *Id.*

⁸ NAIFA and other industry groups are working to collect additional data on the market impact of the Rule/PTEs since they partially went into effect on June 9, 2017.

⁹ CoreData Research London, Press Release, *Fiduciary Rule to Leave US Mass-Market Investors Stranded, Study Shows* (Nov. 2016); see also, e.g., Wall Street Journal, *Edward Jones Shakes up Retirement Offerings Ahead of Fiduciary Rule* (Aug. 17, 2016) (Edward Jones announces it will limit mutual fund access for retirement savers in accounts that charge commissions); Crain’s, *Why State Farm agents are getting out of the investment game* (Sep. 3, 2016) (State Farm directs 12,000 securities-

More broadly, since the final Rule and PTEs were published in April 2016:

- Many advisors plan to exit the business entirely, which will restrict consumers' access to much-needed professional advice;¹⁰
- Firms have restricted product offerings to certain clients, thereby limiting consumer choice, and have abandoned traditional, lower-cost compensation arrangements for advisors (e.g., commissions, rather than high upfront management fees that small and first-time savers cannot afford) in order to avoid the cost of complying with the BIC Exemption and mitigate the threat of costly class action lawsuits;¹¹ and

licensed agents to no longer provide their clients with mutual funds, variable annuities and other investment products); Maxey, Daisy, *Wall Street Journal*, *New Rule Helps No-Loan Funds—But Investors Still Need to Watch for Other Fees* (Nov. 7, 2016) (Charles Schwab stops selling fund share classes with front-end sales loads in May 2016). *See, e.g.*, Benjamin, Jeff, *Fiduciary Focus*, *DOL Fiduciary Rule Class-Actions Costs could Top \$150M a Year* (Feb. 9, 2017) (“Some firms, including Merrill Lynch, Capital One, and Commonwealth Financial Network, have already announced plans to use a streamlined [BIC exemption] that does not include a contract or variable commission rate, making them exempt from class-action lawsuits. Other firms will be rolling the dice.”); AdvisorHUB, *Merill to End Commission-Based Retirement Business on Retail Accounts* (Oct. 6, 2016) available at <https://advisorhub.com/exclusive-merrill-end-commission-based-retirement-business-retail-accounts/> (Merrill Lynch announces, in response to the fiduciary rule, that its 14,000 brokers cannot receive commissions for advice on retirement accounts and will have to shift clients who remain with the firm to fee-based advisory accounts).

¹⁰ *See, e.g.*, ThinkAdvisor, *DOL Fiduciary Has Many Advisors Mulling Career Change: Fidelity Survey* (Nov. 3, 2016) (in a blind online poll of 459 advisors conducted by Fidelity Clearing & Custody Solutions from August 18 to 26, 2016, 10% of advisors reported they are planning to leave or retire from the field earlier than expected because of the rule, and another 18% said they are “reconsidering their careers as advisors”).

¹¹ *See, e.g.*, *Wall Street Journal*, *Edward Jones Shakes up Retirement Offerings Ahead of Fiduciary Rule* (Aug. 17, 2016) (Edward Jones announces it will limit mutual fund access for retirement savers in accounts that charge commissions); Crain's, *Why State Farm agents are getting out of the investment game* (Sep. 3, 2016) (State Farm directs 12,000 securities-licensed agents to no longer provide their clients with mutual funds, variable annuities and other investment products); Maxey, Daisy, *Wall Street Journal*, *New Rule Helps No-Loan Funds—But Investors Still Need to Watch for Other Fees* (Nov. 7, 2016) (Charles Schwab stops selling fund share classes with front-end sales loads in May 2016). *See, e.g.*, Benjamin, Jeff, *Fiduciary Focus*, *DOL Fiduciary Rule Class-Actions Costs could Top \$150M a Year* (Feb. 9, 2017) (“Some firms, including Merrill Lynch, Capital One, and Commonwealth Financial Network, have already announced plans to use a streamlined [BIC Exemption] that does not include a contract or variable commission rate, making them exempt from class-action lawsuits. Other firms will be rolling the dice.”); AdvisorHUB, *Merill to End Commission-Based Retirement Business on Retail Accounts* (Oct. 6, 2016) available at <https://advisorhub.com/exclusive-merrill-end-commission-based-retirement-business-retail-accounts/> (Merrill Lynch announces, in response to the fiduciary rule, that its 14,000 brokers cannot receive commissions for advice on retirement accounts and will have to shift clients who remain with the firm to fee-based advisory accounts).

- Firms are cutting back on hiring and R&D, and are foregoing investments in growth opportunities in anticipation of the cost of complying with the Rule and PTEs.¹²

All of these developments are harmful to consumers, including NAIFA members' clients, and are contradictory to the Rule's objective: bolstering retirement savings. Thus, they warrant careful study by the Department and a complete revamping of the Rule/PTEs, and adequate time is a prerequisite.

* * *

Based on the foregoing, we strongly urge the Department to immediately delay the applicability date for a minimum of 24 months. Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Paul R. Dougherty". The signature is fluid and cursive, with the first and last names being the most prominent.

Paul R. Dougherty, LUTCF, FSS, HIA
NAIFA President

¹² See, e.g., Skinner, Liz, InvestmentNews, *Outlook 2017 Haze Ahead; With a New Year, a New Government and Old Regulations, Advisers Feel More Optimistic About the Economy than Their Own Books of Business* (Jan. 9, 2017) (“Joshua Mellberg is avoiding long-term contracts with technology providers and others until his advisory firm has judged the financial fallout from the Labor Department’s rule on retirement advice [and has also] cut this year’s research [and has] also cut this year’s research and development expenses and put a freeze on hiring to ensure that the hybrid advisory firm is prepared to handle any extra compliance costs or other ill effects of the fiduciary rule....”).

EXHIBIT B

DOL FIDUCIARY RULE REVIEW DIRECTED BY PRESIDENT TRUMP

New Information: Loss of Consumer Access to Retirement Advice

- According to a 2016 study, Americans who work with a financial professional save more than Americans who do not, including saving twice as much over a seven- to 14-year period.¹ (IRI, Davis & Harman, FSR and Chamber)
- A 2016 study by CoreData found that 71 percent of financial professionals will disengage from at least some retirement savers because of the Fiduciary Rule, and 64 percent think the Fiduciary Rule will have a large negative impact on their mass-market clients (i.e., investors with less than \$300,000 in net investable assets). On average, these financial professionals estimate they will no longer work with 25 percent of their mass-market clients, creating an advice gap for low-balance investors.² (IRI, Davis & Harman, ABA, Market Synergy, SIFMA, ACLI)
- A 2016 study by A.T. Kearney found that by 2020, broker-dealer firms (including wirehouses, independents, and dually-registered broker-dealer/registered investment advisors) will collectively stop serving the majority of the \$400 billion currently held in low-balance retirement accounts.³ (IRI, Davis & Harman, FSI)
- In a 2017 survey of IRI member firms, 70 percent of respondents either already have or are considering exiting smaller markets such as lower balance IRAs and small employer based plans, and nearly half already have or are considering raising IRA account minimums.⁴ (IRI)
- A 2017 survey by NAIFA found that nearly 90 percent of financial professionals believe consumers will pay more for professional advice services, 75 percent have seen or expect to see increases in minimum account balances for the clients they serve, and 91 percent have already experienced or expect to experience restrictions of product offerings to their clients.⁵ (IRI, NAIFA)
- One report notes that 35 percent of advisors surveyed “will move away from low-balance accounts” (i.e., less than \$25,000 in assets).⁶ And “nearly one in four advisers said that they will likely increase their current client minimums as a result of the fiduciary rule, focusing their attention on higher-net worth clients and more profitable relationships.”⁷ (FSR)
- One large mutual fund provider reports that its number of orphaned accounts nearly doubled in the first three months of 2017, and that the average account balance in these orphan accounts is just \$21,000. Further, it projects that ultimately 16% of the accounts it services will be orphaned this year because of the Fiduciary Rule. Extrapolating this prediction suggests that at least 1.6 million small retirement savers have already lost access to

investment assistance since January 2017, and an additional 1.6 million are likely to lose access after the Rule becomes applicable. (Chamber, ICI)

- The National Conference of Insurance Legislators (“NCOIL”) adopted a resolution stating that “the Rule will prevent consumer access to crucial retirement education and services, ultimately harming the very people it seeks to aid.”⁸ (Market Synergy)
- According to a February 2017 survey of more than 1,000 investors conducted by J.D. Power, more than half (59 percent) who pay commissions now say they either “probably will not” (40 percent) or “definitely will not” (19 percent) be willing to stay with their current firm if it meant being forced to move to fee-based retirement accounts. (Market Synergy)
- A 2017 report indicates that the Rule will result in additional charges to retirement investors of approximately \$800 per account or over \$46 billion in aggregate.⁹ (FSR, FSI, NAIFA)

New Information: Loss of Consumer Access to Retirement Products

- Some distribution firms and financial professionals have already significantly scaled back their use of commission-based products such as variable annuities because of concerns about the potential implications of the Fiduciary Rule on recommendations of such products. In fact, despite the existence of a rising stock market, which has always led to increased sales of variable annuities, sales declined by 21.6 percent from 2015 to 2016.¹⁰ (IRI)
- Adverse effects on annuities have already occurred. “The variable annuity industry took a beating in 2016, with several of the top sellers inking losses upwards of 25% on the year and some exceeding 40%. The Department of Labor's fiduciary rule, issued in its final form last spring, played a big role in the industry's bruising, observers said.”¹¹ (Davis & Harman, IRI)
- In 2015, variable annuities represented 56% of IRA annuity sales and 46% of 2016 IRA annuity sales. LIMRA projects that variable annuity purchases will decrease another 20-25% in 2017 if the Rule goes into effect.¹² (SIFMA)
- For IRA purchases, sales declined 22% in 2016 compared to the prior year.¹³ The ambiguous regulatory structure of the Rule is expected to result in additional decreases in purchases of variable annuities, which represents a significant amount of IRA annuity purchases. (SIFMA)
- More than 80 percent of respondents to the 2017 IRI survey have already introduced, plan to introduce, or are considering introducing fee-based variable annuities. However, those products are unlikely to be widely available in the near-term and may not be appropriate for all retirement savers, including some for whom a traditional commission-based variable annuity would be more economical, less costly, and likely in their best interest.¹⁴ (IRI)
- Several large intermediaries have already announced a variety of changes to service offerings, including firms no longer offering mutual funds in IRA brokerage accounts; others

offering no IRA brokerage accounts at all; firms reducing web-based educational tools; and firms raising account minimums for advisory fees.¹⁵ (ICI)

- Recent media reports have highlighted the decisions being made by some firms to change their service models and product availability, including (a) moving clients to fee-based accounts, (b) eliminating commission-based IRAs; (c) raising investment minimums for commission-based IRAs; (d) eliminating variable annuity products; and (e) excluding certain products from commission-based IRAs (*e.g.*, annuities, mutual funds, and exchange-traded funds).¹⁶ (FSR)
- Many firms have already determined the BIC Exemption is unworkable for certain products, and the substantial threat of unwarranted litigation cannot be justified for certain accounts.¹⁷ (ICI)

New Information: Value of Advice

- Reuter updates previous analyses based on data from 1994-2004 with newer data from 2004 – 2012. He finds a statistically significant decline in the apparent underperformance in earnings of commission broker sold, actively-managed mutual funds compared to actively-managed direct-sold funds. Instead of the 110 basis point disparity reported by Del Guercio and Reuter in their 2014 paper on which the Department relied for its regulatory impact analysis, Reuter reports that over the 2004-2014 period the disparity declined to 64 basis points. This decline suggests that the putative benefits estimated by the Department for the Fiduciary Rule and the predicted costs of delaying its implementation are grossly overvalued.¹⁸ (Chamber, ABA, SIFMA)
- Studies show that unadvised households tend to hold fewer equities than advised households. The likelihood of owning any stocks or stock-based mutual funds increases by 67% with the use of an advisor and the proportion dedicated to stock positions increases by 39%. Academic work clearly shows that asset allocation, not mutual fund selection, explains, on average, 100% of performance. If the Rule results in a reduction of equity allocations by only 15%, the ICI estimated that would result in a performance decline of 50-100 bps per year, on average, or \$95 billion and \$189 billion over the next 10 years and between \$202 billion and \$404 billion over the next 20 years. (ICI, SIFMA)
- New economic studies estimate that investors could lose \$109 billion over 10 years because of the Rule's implementation. This would amount to \$780 million per month in losses to investors. A 60-day delay would thus save investors \$402 million in lost returns over 60 days. A 180-day delay would save more than \$1.2 billion. Even a 60-day delay would amount to \$414 million in lost returns saved for investors over the first year if the Rule ultimately goes forward as now structured and \$542 million over a 10-year period (at a three percent discount rate). These lost returns far exceed the Department's estimated \$104

million losses in the form of foregone gains—gains that, as shown above, are widely overstated. (SIFMA, ICI)

- Kinniry, et al., found that having a financial professional can make up to a 300 basis point difference in annual compound returns. They found that the greatest contributing factor of assistance, amounting to 150 basis points in annual compound rate of return, was the “behavioural coaching” element of the interactions between a customer and a financial professional.¹⁹ (Chamber, FSR)
- A paper casts doubt on the social benefits of the Department’s promotion of passive index fund investing. The paper shows that despite the apparent advantages to some individual investors, widespread and growing adoption of the strategy could distort capital markets in ways that could slow overall economic growth. The author shows how inclusion of a stock in an index fund may artificially raise its internal cost of capital calculations and discourage otherwise profitable investment decisions. He also illustrates how an index fund investor may be exposed to unforeseen risk of loss.²⁰ (Chamber)
- A report finds that many retirement savers are adverse to assistance from call centers or robots. The personal connection with a financial professional is important for educating and motivating savings behavior.²¹ (Chamber)

New Information: Increased Litigation

- The increased litigation stemming from the inappropriate use of the private right of action in enforcing the BIC Exemption will result in \$70 and \$150 million in costs to the industry each year.²² (IRI and Chamber)
- Data shows that class action lawsuits like the type that would flow from the Rule provide almost no benefit to the class members of the action, but rather just help their lawyers.²³ (Chamber, ICI, FSR, Market Synergy)
- Companies interviewed by the Chamber suggest insurance costs could exceed two to three times the cost estimated by the Department. Some respondents to Chamber interviews cited numbers as high as \$10,000 per professional per year for Errors and Omissions coverage. (Chamber, NAIFA)
- Expanded incentive for class action litigation results in defendant’s settling with an extremely litigious plaintiff’s bar instead of spending years tied up in discovery. A survey of lawsuits filed against fiduciaries in recent years demonstrates how plaintiffs use these settlements to fund future lawsuits.²⁴ (ARA, ICI)
- In 2016, nearly 4,000 FINRA arbitration cases were filed by consumers alleging broker-dealer wrongdoing (only 158 of those cases were decided in favor of the consumer), meaning that broker-dealers spent a lot of time and money defending these cases.²⁵

- A SIFMA survey indicated “. . . more than 60% of the responding firms stated that they anticipate that some or all of the costs resulting from the potential increase in litigation and liability insurance may be passed on to clients.”

New Information: Compliance Costs

- SIFMA estimates that annual compliance costs will range from \$240 million to \$570 million over the next ten years.²⁶ (SIFMA)
- Small broker-dealers face the greatest financial risk under the Rule, forcing potential consolidation of broker-dealers.²⁷ (SIFMA, FSI, FSR)
- One recent study by the American Action Forum found reported compliance costs of at least \$106 million in 2016, representing up-front costs from just four companies. (Market Synergy)
- The DOL’s RIA grossly underestimated the cost of the rule.²⁸ (FSI)

Procedural Flaws

- An inquiry initiated by Senator Ron Johnson (R-WI) in 2015 found the Department “was predetermined to regulate the industry and sought evidence to justify its preferred action.”²⁹ In other words, the Department first concluded that it wanted to change the rules governing investment advice fiduciaries, and then sought to justify that conclusion. (IRI, Davis & Harman)
- The Department failed to consider how the Rule would likely create an “advice gap” for low- to middle-income families. The Department dismissed concerns of loss of access, and instead found “little evidence” that “financial advisers improve retirement savings.” However, this conclusion is contradicted by the Department’s own assessment in a prior rulemaking that investment mistakes cost investors approximately \$114 billion per year, that access to financial assistance reduced the cost of those mistakes by \$15 billion per year, and that increased access to financial assistance would enable them to save billions more. (IRI)
- The Department chose to ignore evidence regarding the impact of similar rules established in other jurisdictions. Most notably, following the United Kingdom’s 2013 move to a fee-based compensation model, the U.K. regulator determined that retirement savers—particularly those with lower incomes—were adversely affected and acknowledged that its “high standard of advice is primarily accessible and affordable only for the more affluent in society.” Rather than taking advantage of the opportunity to learn from mistakes made by other countries, the Department simply denied the existence of an “advice gap” in the U.K. and dismissed the possibility that a similar “advice gap” would develop in the U.S. under the Fiduciary Rule. (IRI, Chamber, ICI and Davis & Harman)

- Under Executive Order 12866³⁰ and related guidance issued by OMB,³¹ consideration of viable alternatives is a fundamental element of federal agency rulemaking. However, the lack of consideration given to all relevant costs of the Fiduciary Rule prevented the Department from properly evaluating less burdensome alternatives that would have greatly reduced the costs of the Fiduciary Rule, harmonized the Department’s regulatory regime with that of the SEC and, because they would have applied only to relationships in which the client has no reasonable expectation of fiduciary status, would not have caused any meaningful consumer harm. However, as a result of the Department’s flawed process, it arbitrarily rejected these and other alternatives. (IRI)
- According to the Johnson Report discussed above, the Department failed to adequately consider comments from expert regulators and professional staffers from the SEC, OIRA, and the Treasury Department expressing concerns and offering recommendations regarding the Rule. (IRI, Davis & Harman)

Analytical Flaws

- According to a February 2017 analysis by the American Action Forum, it is unclear how CEA found that \$1.7 trillion of IRA assets involved conflicts of interest. Total affected IRA assets are significantly less. Retirement account assets were \$7.3 trillion in 2013, 86.2 percent of which, by the CEA’s own definition, were not “conflicted.” That leaves less than \$1 trillion in so-called “conflicted” assets. And even that amount is too large because it represents total “conflicted” assets across all retirement accounts, while the CEA’s analysis was limited to IRA assets only. Total “conflicted” IRA assets are some amount less than \$1 trillion. Also, as the CEA stated, the \$1.7 trillion figure is some combination of front-load funds and variable annuity in IRAs. By including the annuity market, the CEA increased total affected assets by approximately \$600 billion, or about 50 percent. (Market Synergy, ACLI, SIFMA)
- The Final RIA is deficient because the Regulation is built on two false premises: all commission-based sales are conflicted, and all fee-only advice is always unconflicted and serves retirement savers’ best interest. Neither premise is correct, and neither is supported by the final RIA. (ACLI)
- The Department’s Regulatory Impact Analysis only briefly addressed the impact the Rule would have on jobs, noting the Rule could have “some social costs.”³² (IRI, Davis & Harman)
- In projecting the costs of the Rule, the Department did not give due consideration to the costs of the Rule specifically applied to annuity manufacturers and distributors, despite several studies made available to the Department demonstrating the costs.³³ (IRI)

- The Regulatory Impact Analysis overstated the benefits of the Fiduciary Rule, underestimated the Fiduciary Rule’s direct and indirect costs to the financial services industry and retirement savers, and, as described above, failed to give meaningful consideration to the costs to retirement savers from lost access to retirement assistance (including assistance with guaranteed lifetime income products such as annuities) and the transaction-based fee model as well as the costs of class action lawsuits arising from the BIC Exemption. The record shows those costs total tens of billions of dollars. (IRI, ICI)
- The Department relied on flawed and problematic factors and data in their Regulatory Impact Analysis projections. Specifically, the Department admitted to basing savers’ projected financial gains on research regarding “only one” issue: the purported “conflict that arises from variation in the share of front-end-loads that advisers receive when selling different mutual funds that charge such loads to IRA investors.” This research provides no basis for regulating products—such as annuities—that may not invest in mutual funds at all, and was not even a proper assessment of mutual fund performance. (IRI, ICI, FSR)
- Additionally, in estimating that the average mutual fund sold by brokers underperformed its benchmark, the Department improperly used performance data on certain unrepresentative funds to draw conclusions about the entire mutual fund market. The Department compounded this error by relying on data for the period 1993 through 2009 (a cherry-picked sample encompassing the entire global financial crisis and nearly none of the recovery) and basing its underperformance estimate not on actual holding periods, or even over a full market cycle, but rather on the single year in which funds were purchased. A series of comment letters from the Investment Company refuted this data, finding the Rule could cost investors \$109 billion in additional fees.³⁴ (IRI, ICI, ACLI, SIFMA, NAIFA)
- Vanderbilt Professor and former SEC Chief Economist Dr. Craig Lewis noted the research relied on by the Department did not analyze the performance of mutual funds held in annuities, relied on old data not reflecting the current marketplace, and the author of one of the key studies later revised his work to show the “cost” of conflicts was about 1/6th of the amount originally estimated.³⁵ (Chamber, ABA, SIFMA)
- The Department was far too optimistic in relying on “robo advisers” to alleviate the potential loss of access to retirement advice for small savers. The Chamber of Commerce is currently unaware of any “robo advisor” that recommends annuity products to generate retirement income, despite the clear need for those products. (Chamber, ICI)
- The Department seemingly concludes that “robo advisers” and low-expense passive investment options are the best course of action for retirement investors, while ignoring the reality that there is no “one size fits all” investment strategy and even if some investors would benefit from this development, others would be harmed. The Department failed to address this potential impact in their Regulatory Impact Analysis. (Chamber)

- DOL failed to acknowledge that annuities are governed by a distinct, customized, and comprehensive regulatory framework that was enhanced in 2010 to account for annuities' unique features. The dated mutual fund studies relied upon by the Department, which focus primarily on investment performance in the historical period 1991 to 2005, do not measure the efficacy of targeted and more rigorous annuity-specific rules. (ACLI)

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² CoreData Research, *Fiduciary Rule to Leave US Mass-Market Investors Stranded, Study Shows*, (November 2016), available at <http://www.valuewalk.com/wp-content/uploads/2016/11/Fiduciary-rule-Press-Release-%E2%80%93-CoreData-Research.pdf>.

³ A.T. Kearney, *The Fiduciary Rule and Its Impact on the Wealth Management Industry* (Oct. 2016), available at <https://www.atkearney.com/financial-institutions/dol-fiduciary-rule>.

⁴ *Id.*

⁵ National Association of Insurance and Financial Advisors, *NAIFA Survey Gauges Impacts of DOL Fiduciary Rule* (Apr. 2017), available at <http://www.naifa.org/news-publications/naifa-blog/april-2017/naifa-survey-gauges-impacts-of-dol-fiduciary-rule>.

⁶ Investment News, *The Economics of Change: How the DOL Fiduciary Rule Will Set Money in Motion and Alter Business Models Across the Advice Industry*, at 11 (May 6, 2016), available at <http://www.investmentnews.com/assets/docs/CI105297516.PDF>.

⁷ *Id.* at 13.

⁸ NCOIL, Resolution in Opposition to the United States Department of Labor (DOL) Fiduciary Rule (Nov. 20, 2016), available at <http://ncoil.org/wp-content/uploads/2016/12/DOL-resolution-portland-11-20-16.pdf>.

⁹ Meghan Milloy, American Action Forum, *The Consequences of the Fiduciary Rule for Consumers* (Apr. 10, 2017), available at <https://www.americanactionforum.org/research/consequences-fiduciary-rule-consumers/>.

¹⁰ Insured Retirement Institute, *IRI Issues Fourth-Quarter 2016 Sales Report* (Mar. 30, 2017) (variable annuity sales data provided by Morningstar, Inc.), available at <https://www.myirionline.org/newsroom/newsroom-detail-view/iri-issues-fourth-quarter-2016-annuity-sales-report>. See also Greg Iacurci, InvestmentNews, *Department of Labor's Fiduciary Rule Blamed for Insurers' Massive Hit on Variable Annuity Sales* (Mar. 28, 2017), available at <http://www.investmentnews.com/article/20170328/FREE/170329922/departement-of-labors-fiduciary-rule-blamed-for-insurers-massive-hit>.

¹¹ *Id.*

¹² Joseph E. Montminy, InsuranceNewsNet Magazine, *Bumpy Ride Predicted for Individual Annuity Sales in 2017* (Apr. 2017), available at <http://insuranceneedsnetmagazine.com/article/bumpy-ride-predicted-for-individualannuity-sales-in-2017-3268>.

¹³ *Id.* See also LIMRA Secure Retirement Institute, Fourth Quarter 2016.

¹⁴ Insured Retirement Institute, *March 2017 Survey of IRI Member Companies*.

¹⁵ See Michael Wursthorn, Wall Street Journal, *A Complete List of Brokers and Their Approach to 'The Fiduciary Rule'* (Feb. 6, 2017), available at <https://www.wsj.com/articles/a-complete-list-of-brokers-and-their-approach-to-the-fiduciary-rule-1486413491>.

¹⁶ See Michael Wursthorn, *Wall Street Journal*, *New Retirement Rule Is Delayed, but Not Its Impact* (Apr. 8, 2017), available at <https://www.wsj.com/articles/new-retirement-rule-is-delayed-but-not-its-impact-1491652800>; Michael Wursthorn, *Wall Street Journal*, *A Complete List of Brokers and Their Approach to 'The Fiduciary Rule'* (Feb. 6, 2017), available at <https://www.wsj.com/articles/a-complete-list-of-brokers-and-their-approach-to-the-fiduciary-rule-1486413491>.

¹⁷ See Elizabeth Dilts and David Henry, *Reuters*, *JPMorgan Chase to Drop Commissions-Paying Retirement Accounts* (Nov. 9, 2016), available at <http://www.reuters.com/article/us-jpmorgan-wealth-compliance-idUSKBN1343LK>; Andrew Welsch, *OnWallStreet*, *Fiduciary Ready: Edward Jones Unveils Compliance Plans* (Aug. 19, 2016), available at <https://www.onwallstreet.com/news/fiduciary-ready-edward-jones-unveils-compliance-plans>; Michael Wursthorn, *Wall Street Journal*, *Edward Jones Shakes up Retirement Offerings Ahead of Fiduciary Rule* (Aug. 17, 2016), available at <https://www.wsj.com/articles/edward-jones-shakes-up-retirement-offerings-ahead-of-fiduciary-rule-1471469692>.

¹⁸ Jonathan Reuter, *Boston College*, *Revisiting the Performance of Broker-Sold Mutual Funds* (Nov. 2, 2015), available at https://www2.bc.edu/jonathan-reuter/research/brokers_revisited_201511.pdf.

¹⁹ Francis M. Kinniry, Jr., et al., *Vanguard*, *Putting a value on your advice: Quantifying Vanguard Advisor's Alpha* (Sept. 2016), available at https://advisors.vanguard.com/VGApp/iip/site/advisor/researchcommentary/article/IWE_ResPuttingAValueOnValue

²⁰ Jeffrey Wurgler, *New York University*, *On the Consequences of Index-linked Investing* (Oct. 11, 2010), available at <http://pages.stern.nyu.edu/~jwurgler/papers/indexing13.pdf>.

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²² *Morningstar, Inc.*, *Weighing the Strategic Tradeoffs of the U.S. Department of Labor's Fiduciary Rule*, (Feb. 2017).

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²⁹ Senate Homeland Security and Governmental Affairs Committee, Press Release, Chairman Johnson Releases Report On Flawed Department of Labor Process That Could Hurt Retirement Savers (Feb. 24, 2016), available at <https://www.hsgac.senate.gov/media/majority-media/chairman-johnson-releases-report-on-flawed-department-of-labor-process-that-could-hurt-retirement-savers>.

³⁰ Exec. Order No. 12,866, 3 C.F.R. 638 (1993).

³¹ Office of Mgmt. & Budget, Circular No. A-4, Regulatory Analysis (Sept. 17, 2003).

³² U.S. Department of Labor, Employee Benefits Security Administration, *Regulating Advice Markets, Definition of the Term "Fiduciary" Conflicts of Interest - Retirement Investment Advice, Regulatory Impact Analysis for Final Rule and Exemptions* (Apr. 2016), at 244, 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>.

³³ See, e.g., Insured Retirement Institute, *Boomer Expectations for Retirement 2011*; Insured Retirement Institute, *Survey of Americans Aged 51 to 67*; Insured Retirement Institute, *Tax Policy and Boomer Retirement Saving Behaviors*.

³⁴ See, e.g., Comment Letters submitted to the Department of Labor by the Investment Company Institute on July 21, 2015, September 24, 2015, and December 1, 2015.

³⁵ See Craig Lewis, *Forbes*, *An Inflated \$17 Billion Talking Point from DOL* (Dec. 16, 2015), available at <https://www.forbes.com/sites/realspin/2015/12/16/an-inflated-17-billion-talking-point-from-the-dol/#68051cb72831>.

EXHIBIT C

	New \$ In	COMMISSION - A SHARE Portion of 12b1				FEE BASED EXAMPLES			
		EOY Balance	Upfront 5.75% on New Money*	fee broker receives to service acct .25%	Total broker fees paid each year	EOY Balance	Fee Based Acct 1.5% AUM**	EOY Balance	Fee Based Acct 1.2% AUM**
Year 1	\$ 1,200	\$ 1,215.00	\$ 69.00	\$ 3.04	\$ 72.04	\$ 1,266.00	\$ 18.00	\$ 1,269.60	\$ 14.58
Year 2	\$ 1,200	\$ 2,515.05	\$ 69.00	\$ 6.29	\$ 75.29	\$ 2,535.63	\$ 38.03	\$ 2,543.24	\$ 30.52
Year 3	\$ 1,200	\$ 3,906.10	\$ 69.00	\$ 9.77	\$ 78.77	\$ 3,875.09	\$ 58.13	\$ 3,890.74	\$ 46.69
Year 4	\$ 1,200	\$ 5,394.53	\$ 69.00	\$ 13.49	\$ 82.49	\$ 5,288.22	\$ 79.32	\$ 5,316.41	\$ 63.80
Year 5	\$ 1,200	\$ 6,987.15	\$ 69.00	\$ 17.47	\$ 86.47	\$ 6,779.07	\$ 101.69	\$ 6,824.76	\$ 81.90
Year 6	\$ 1,200	\$ 8,691.25	\$ 69.00	\$ 21.73	\$ 90.73	\$ 8,351.92	\$ 125.28	\$ 8,420.60	\$ 101.05
Year 7	\$ 1,200	\$ 10,514.64	\$ 69.00	\$ 26.29	\$ 95.29	\$ 10,011.28	\$ 150.17	\$ 10,108.99	\$ 121.31
Year 8	\$ 1,200	\$ 12,465.66	\$ 69.00	\$ 31.16	\$ 100.16	\$ 11,761.90	\$ 176.43	\$ 11,895.31	\$ 142.74
Year 9	\$ 1,200	\$ 14,553.26	\$ 69.00	\$ 36.38	\$ 105.38	\$ 13,608.80	\$ 204.13	\$ 13,785.24	\$ 165.42
Year 10	\$ 1,200	\$ 16,786.98	\$ 69.00	\$ 41.97	\$ 110.97	\$ 15,557.28	\$ 233.36	\$ 15,784.78	\$ 189.42
Year 11	\$ 1,200	\$ 19,177.07	\$ 69.00	\$ 47.94	\$ 116.94	\$ 17,612.94	\$ 264.19	\$ 17,900.30	\$ 214.80
Year 12	\$ 1,200	\$ 21,734.47	\$ 69.00	\$ 54.34	\$ 123.34	\$ 19,781.65	\$ 296.72	\$ 20,138.52	\$ 241.66
Year 13	\$ 1,200	\$ 24,479.88	\$ 60.00	\$ 61.20	\$ 121.20	\$ 22,069.64	\$ 331.04	\$ 22,506.55	\$ 270.08
Year 14	\$ 1,200	\$ 27,417.47	\$ 60.00	\$ 68.54	\$ 128.54	\$ 24,483.47	\$ 367.25	\$ 25,011.93	\$ 300.14
Year 15	\$ 1,200	\$ 30,560.70	\$ 60.00	\$ 76.40	\$ 136.40	\$ 27,030.06	\$ 405.45	\$ 27,662.62	\$ 331.95
Year 16	\$ 1,200	\$ 33,923.94	\$ 60.00	\$ 84.81	\$ 144.81	\$ 29,716.71	\$ 445.75	\$ 30,467.06	\$ 365.60
Year 17	\$ 1,200	\$ 37,522.62	\$ 60.00	\$ 93.81	\$ 153.81	\$ 32,551.13	\$ 488.27	\$ 33,434.15	\$ 401.21
Year 18	\$ 1,200	\$ 41,373.20	\$ 60.00	\$ 103.43	\$ 163.43	\$ 35,541.44	\$ 533.12	\$ 36,573.33	\$ 438.88
Year 19	\$ 1,200	\$ 45,493.33	\$ 60.00	\$ 113.73	\$ 173.73	\$ 38,696.22	\$ 580.44	\$ 39,894.58	\$ 478.73
Year 20	\$ 1,200	\$ 49,901.86	\$ 60.00	\$ 124.75	\$ 184.75	\$ 42,024.51	\$ 630.37	\$ 43,408.46	\$ 520.90
TOTAL	\$ 24,000		\$ 1,308.00	\$ 1,036.54	\$ 2,344.54		\$ 5,527.15		\$ 4,521.39

Assumes \$1200 annual deposit earning 7% (net of mutual fund fees).

*Broker doesn't receive all of this. Some goes to fund family and some to broker dealer. Upfront sales charge is also reduced by breakpoints.

**Most broker dealers have a platform fee of .20%. So the broker receives 1.3% or 1% in these examples.