



Consumer Federation of America

August 7, 2017

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

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

Ladies and Gentlemen:

We are writing on behalf of the Consumer Federation of America (CFA)¹ to respond to the Department's Request for Information (RFI) regarding its reexamination of its conflict of interest (or "fiduciary") rule. A key purpose of the request is to seek input that could form the basis for new prohibited transaction exemptions (PTEs) or changes to the existing exemptions. Since the rule and PTEs were finalized, however, firms have developed a variety of innovative, pro-investor approaches to implementing the rule and new investment products to ease that implementation. As a result, retirement savers are benefiting from broad access to both fee-based and commission advisory relationships, with fewer conflicts and lower costs, and with a wide array of investment products available to meet their needs and goals. Contrary to the dire predictions of the rule's opponents, these developments clearly show that the existing rule and PTEs are not only workable, but working far better than the Department or the rule's proponents could have predicted when the rule was finalized.

In light of these positive developments, it is premature to consider sweeping changes to the rule and its exemptions just as they are beginning to deliver the dramatic, tangible benefits that proponents of the rule have long predicted. Instead, we urge the Department to focus on providing additional guidance, based on the positive examples already available in the marketplace, for how the rule can be implemented efficiently and effectively under the existing PTEs. Such an approach would reward the firms that have moved forward in good faith to develop innovative implementation plans and consumer-friendly investment products while providing those that have fallen behind in their implementation plans with greater clarity regarding the variety of acceptable options they have for coming into compliance with the rule.

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

Not only is it unnecessary to provide different exemptions or make changes to the rule, doing so now carries considerable risk. The assumption appears to be that new investment products, in particular “clean shares,” could form the basis for a more streamlined exemption as an alternative to relying on the Best Interest Contract Exemption (BIC) to implement the rule. While we have cheered the development of clean shares -- with their potential to make broker compensation less conflicted, more transparent, and more subject to market forces that discipline costs -- the fact is that these products remain largely untested in the broker-dealer space. If brokerage firms are given too much leeway under a new, streamlined exemption, there is a risk that even these seemingly benign investment products could be used in a way that evades the protective purposes of the rule and is ineffective at mitigating conflicts in financial advice. To protect against that possibility and avoid unintended consequences, the use of clean shares and other innovative investment products needs to develop within the contours of the BIC.

Moreover, much as we admire clean shares and view them as one of the real, positive developments attributable to the rule, we question the wisdom of granting new exemptions based on specific products. If the Department grants a new exemption too narrowly -- for example, for specific classes of products -- that could unduly favor distributors of those products relative to others. Not only would that put the Department in the inappropriate position of picking winners and losers, it could freeze further innovations that might otherwise be developed in response to the rule. The hallmark of the BIC is that it was designed to flexibly accommodate a range of business models, compensation structures, and implementation plans. We think that was the prudent approach and one that the Department should preserve. Indeed, the very fact that firms have developed a variety of approaches to compliance confirms the wisdom of the Department’s principles-based approach to key features of the rule, such as enforcement mechanisms and anti-conflict policies and procedures. While adjustments can be made in the future depending on how the rule works in practice, now is not the time. In the meantime, the Department can and should monitor compliance and market developments to assess whether the rule is achieving its goals. What it learns based on that real world experience should inform possible future refinements to the rule or the PTEs’ scope or conditions.

If, in our view, it is too early to develop a new exemption based on product innovations prompted by the rule, it is even more premature to contemplate an exemption based on compliance with an as yet nonexistent Securities and Exchange Commission (SEC) standard. We do not question the sincerity of SEC Chairman Jay Clayton’s pledge to address the issue, any more than we question the sincerity of previous chairs going back to Christopher Cox who have made similar pledges. The SEC has been struggling with this issue for the past decade without developing a clear roadmap for reform. There is simply no guarantee that the SEC will reach consensus on a rule. And there is even less certainty that, if they do adopt revised standards for the delivery of investment advice to retail investors, the rule will be sufficiently protective of plans, plan participants, and IRA investors to pass muster under ERISA’s standards for approving PTEs.

The SEC and DOL have very different missions and purposes. The DOL was charged by Congress with protecting retirement assets according to much stricter restrictions and conditions than apply under the securities laws precisely because retirement assets are special, as evidenced

by their tax preference. Creating a PTE based on securities laws -- where conflicts of interest have traditionally been addressed primarily through disclosure rather than through avoidance and mitigation -- risks subjugating DOL's purpose to protect retirement plans and retirement investors to a standard that is not in the interests of plan participants, beneficiaries, and IRA owners, and is not sufficiently protective of their rights. According to a wealth of evidence, including the DOL's own Regulatory Impact Analysis (RIA) as well as research conducted and commissioned by the SEC, disclosure alone is ineffective in arming investors to protect themselves against the harmful impact of such conflicts. While we remain hopeful that the SEC will recognize that a more rigorous approach to dealing with conflicts is necessary when applying a fiduciary standard to brokers' highly conflicted investment advice, one that mirrors the approach adopted in the BIC, it is far too soon to judge the outcome of this process. If, on the other hand, the SEC were to adopt a rule along the lines sought by DOL rule opponents -- one that substitutes disclosure for meaningful restrictions on conflicts -- allowing compliance with such a rule to substitute for compliance with the DOL rule would be arbitrary and capricious and subject the DOL to considerable legal risk.

In assessing the record regarding reconsideration generally, a potential implementation delay, and this particular RFI, the Department needs to recognize the motivations that inform those comments. Even firms that have moved forward efficiently and effectively to develop innovative implementation plans are likely to want more time, fewer restrictions, and freedom from legal accountability if they can get them. That is simply human nature. But that is not the relevant question for the Department to consider. The real question is whether the existing regulatory framework is workable and can be implemented to benefit investors without subjecting firms to undue or inappropriate costs or burdens. Thanks to the good faith compliance efforts from a number of financial firms, the early evidence unequivocally shows that firms can still run profitable businesses, offer a variety of services and products, and serve a broad range of investors under the rule. In short, there is simply no need or justification at this time either to develop new exemptions to the rule or to revise the existing exemptions.

I. Continued positive developments in the market prove that the rule provides sufficiently flexibility to accommodate a range of approaches to compliance, and in many ways is delivering tangible benefits far greater and faster than ever predicted.

If the Department were to draw its understanding of the rule's impact exclusively from the letters of industry rule opponents, it would be left with an understandably negative impression. These commenters would have you believe that a majority of firms are eliminating commission accounts, that minimums on advisory accounts and costs of accounts are on the rise, and that investors of all stripes are being left out in the cold by firms no longer willing or able to serve them under this "onerous" rule. The picture they paint is of an entire industry that is paralyzed by the rule, incapable of innovating to address challenges posed by compliance with its restrictions on conflicts of interest and obligation to act in customers' best interests. For example, according to one form letter (apparently circulated by a trade association as it was submitted by several firms), "Minimum account balances in advisory accounts are being revised upwards and consumers' access to retirement planning services will be limited by these changes

as investors with low account balances are being moved to different account types.”² These letters are noticeably devoid of evidence to substantiate their claims. They typically do not, for example, identify specific firms that are making the changes they claim are pervasive, the customers that are being affected, or how exactly the accounts are being revised. Moreover, they ignore numerous contrasting examples where firms have lowered account minimums, reduced fees and commissions, introduced new product lines with investor-friendly features, developed technology solutions to support compliance efforts, and found innovative ways to meet the rule’s requirement to reduce conflicts of interest.

The Department’s obligation in weighing the public record, however, is to base its regulatory decisions on the best available evidence. Without specific examples that would enable the Department to independently verify claims about the rule’s supposedly harmful impact, the Department cannot reasonably rely on these allegations. To do so would be arbitrary and capricious. Nor can the Department reasonably rely on trade associations’ “informal surveys” of their members when key information is not disclosed, such as the identities of the survey participants, their respective business models, or how the survey questions were asked. Surveys that seek members’ opinions, as opposed to verifiable, factual information about how they are complying with the rule, are particularly unreliable as a basis for regulatory decisions.

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

Simply put, none of the studies industry opponents have offered to date to counter the Department’s robust and comprehensive RIA meet basic standards of transparency and objectivity. And none has successfully challenged the basic premise of the rule -- that conflicts of interest are pervasive in the retirement advice market, that those conflicts influence the recommendations financial professionals make to retirement plans, plan participants, and IRA

² See, e.g., Letter from David T. Bellaire, Financial Services Institute (FSI), to the DOL, July 7, 2017, <http://bit.ly/2wxWqBI>; Letter from Jeff Rosenthal, Triad Advisors, to the DOL, July 19, 2017, <http://bit.ly/2fkxCKr>; Letter from Doug Baxley, Ladenburg Thalmann, to the DOL, <http://bit.ly/2ugRynS>; Letter from David Coles, Wealth Management & Business Concepts Inc, to the DOL, <http://bit.ly/2hANd9q>; Letter from William J. Cruz, CFS, to the DOL, <http://bit.ly/2uwUtEy>; Letter from Patrick Farrell, Investacorp, to the DOL, July 13, 2017, <http://bit.ly/2wkvJgP>; Letter from Kirk Barr Young, Barr Financial Services, to the DOL, July 14, 2017, <http://bit.ly/2uxfjDw>; Letter from Eric S. Westberg, KMS Financial Services, to the DOL, July 14, 2017, <http://bit.ly/2vDXdny>; Letter from James R. Gelder, Highland Capital Brokerage, to the DOL, July 17, 2017, <http://bit.ly/2fkH0O1>; Letter from Daniel G. Head, Head Investment Partners, to the DOL, July 18, 2017, <http://bit.ly/2ueNroj>. These were some of the form letters that we found just in the first column on the Department’s website. We assume there are many others in the other columns.

investors, and that these advice recipients suffer financial harm as a result. The Department has applied an appropriately high level of independent rigor in assessing such submissions thus far in the regulatory process -- including subjecting them to independent, third-party analysis -- and we expect it to continue to do so going forward. To do otherwise would be arbitrary and capricious.

The good news is that the reality on the ground tells a very different story than that presented in industry rule opponents' comment letters. Market participants are showing through a variety of approaches that the rule is workable and is in fact working far better and faster than the DOL or rule proponents predicted when the rule was finalized. Presented with the challenge of complying with the rule, financial firms have done what they do best -- innovate to meet that challenge. The following are a few examples of the pro-investor innovations sparked by the rule.

- A. Recent innovations in the retirement advice marketplace, including new developments since firms began the first phase of implementation in June, provide further evidence that the rule is both workable for firms and beneficial for retirement savers.

In our April 2017 comment on the Department's reexamination of the rule, we provided a non-exhaustive summary of innovation in the retirement advice market, including new product developments, changes in the provision of investment advice, and the advent of technology-driven compliance tools.³ Since then, we've seen further innovation, as firms have adopted a variety of approaches to comply with those portions of the rule that went into effect in June and to prepare for the next phase of implementation scheduled for January. These innovations allow for firms to comply with the rule's requirements, and particularly its limits on conflicts, in a more efficient, administrable, and consumer-friendly way. In so doing, innovation has enabled firms to provide advice at lower cost and with significantly fewer conflicts, all while preserving investor choice with regard to how to pay for that advice and investor access to a broad array of products to meet their needs and goals.

1. Clean shares

Clean shares are an innovative mutual fund share class that eliminates distribution-related payments from the fund to the broker, and the conflict of interest associated with those payments, leaving those charges to be negotiated separately by the broker and the customer. Because they make it easy for firms to eliminate differential compensation among mutual funds, and normalize compensation for fund sales with compensation for other investment products, clean shares allow for efficient compliance with the rule by firms that want to continue to offer commission accounts to retirement savers. Under this approach, commissions on mutual fund transactions would be set in the same way they currently are for purchases and sales of individual stocks and ETFs and other similar products.

³ See Letter from Barbara Roper and Micah Hauptman, Consumer Federation of America (CFA), to the Department of Labor (DOL), April 17, 2017, <http://bit.ly/2uABfCv>. We hereby incorporate by reference, as if fully set forth herein, that letter as well as other letters submitted to the DOL on this rulemaking: Letter from Roper and Hauptman, CFA, to the DOL, July 21, 2015, <http://bit.ly/2mtNqgg>; Letter from Roper and Hauptman, CFA, to the DOL, September 24, 2015, <http://bit.ly/2nK64ge>; Letter from Roper and Hauptman, CFA, to the DOL, March 17, 2017, <http://bit.ly/2oUGSnU>; Letter from Hauptman and Roper, CFA, to the DOL, July 21, 2017, <http://bit.ly/2vZvH1w>.

One obvious benefit of clean shares is their potential to dramatically reduce advisers' incentives to recommend funds based on their own financial interests rather than the customer's best interest. But clean shares also have the potential to harness market forces to reduce investor costs by making those costs both more transparent and subject to negotiation. In seeking approval of the new share class, Capital Group, the fund manager for the American Funds, perfectly described the many potential benefits associated with clean shares. The approach they outlined "would allow for a brokerage model where all 'like' investment options are treated equally," they wrote.⁴ "This creates a fair, free-market environment where brokers compete on pricing and services. Further, this model preserves choice for investors who prefer to invest through a brokerage model and provides further transparency regarding the fees they pay and the associated services. This model would also allow funds, ETFs, individual securities and other 'like' securities to compete in a brokerage model on fees to the fund's investment adviser and returns, and not on external forces artificially driving sales to any specific investment option. In the end, all of these developments would benefit the investor who values the brokerage investment model. These investors will have greater clarity into the services and costs offered by different brokers which will create greater opportunity for the investor to pick the broker that offers the best combination of service and cost to meet their investment needs. Further, this brokerage model would subject fund commissions to the same competitive pressures that have been placed on equity and ETF commissions," which have fallen substantially over the past couple of decades.⁵

American Funds, a leader among broker-sold funds and actively managed funds in particular, became the first fund family to win approval of the shares in January,⁶ and Janus received approval shortly thereafter.⁷ Other mutual funds are reportedly either adapting already existing share classes that meet the SEC's definition of clean share or are developing new share classes that meet the definition. They include Lord Abbett,⁸ MFS,⁹ Columbia Threadneedle¹⁰, Fidelity,¹¹ J.P. Morgan,¹² Oppenheimer,¹³ and Federated Investors.¹⁴ We have been given to

⁴ Letter from Michael J. Downer, Paul F. Roye, and Michael Treissl, Capital Research and Management Co, to the SEC Division of Investment Management, January 6, 2017, <http://bit.ly/2vbYobG>.

⁵ *Id.*

⁶ Response of the Office of Chief Counsel, Division of Investment Management, January 11, 2017, <http://bit.ly/2ihls0z>.

⁷ Daisy Maxey, *The ABCs (and T's and Z's) of the New Fiduciary Rule*, THE WALL STREET JOURNAL, July 9, 2017, <http://on.wsj.com/2sH4mPB>.

⁸ Daisy Maxey, *5 Things Mutual-Fund Investors Should Know About Mutual-Fund 'T' Shares*, THE WALL STREET JOURNAL, April 9, 2017, <http://on.wsj.com/2oY1S0U>.

⁹ Bernice Napach, *MFS Adds Funds With 'Clean Shares'*, THINKADVISOR, May 31, 2017, <http://bit.ly/2uxyOMk>.

¹⁰ Greg Iacurci, *In new fiduciary rule FAQs, DOL gives quasi-endorsement of clean shares*, INVESTMENTNEWS, May 23, 2017, <http://bit.ly/2qOOq7Q>.

¹¹ Bradley Saacks, *PNC Brokerage Unit: We Are Ready to Go 'Clean,'* IGNITES, June 9, 2017, <http://bit.ly/2uwZWuM>.

¹² *Id.*

¹³ Hannah Glover, *'Archaic' Pricing Disclosure 'Hobbling' Mutual Funds*, Video interview with Art Steinmetz, IGNITES, June 8, 2017, <http://bit.ly/2sE2ms4>.

¹⁴ According to J. Christopher Donahue - President and CEO, Federated Investors: "We are prepared for the changes in the landscape related to DOL Fiduciary rules. We have 26 funds with R6 pricing, 56 funds that fit the definition of clean shares." Federated Investors' (FII) Q1 2017 Results – Earnings Call Transcript, April 28, 2017, SEEKING ALPHA, <http://bit.ly/2wm2Uoj>; Financial Advisor IQ, *Fund Shares Without Distribution Fees Are on the Rise*, May 31, 2017, <http://bit.ly/2wkBRtl>.

understand that Franklin Templeton, BlackRock, and several other fund complexes are also planning to offer mutual funds that meet the clean share definition. Without the DOL rule and its restrictions on conflicts, there is no reason to believe that clean shares would have been created or this new distribution model would have developed. The rule forced brokers and fund companies to reexamine their business model and innovate, and Capital Group led the charge, turning a challenge into an opportunity.

In our April 17 comment letter, we explained why we believe clean shares can be so beneficial for investors.¹⁵ Morningstar's Aron Szapiro and Paul Ellenbogen have also written extremely favorably about this market development.¹⁶ In their white paper, *Early Evidence on the Department of Labor Conflict of Interest Rule*, they observe that, "Early evidence suggests that the asset management industry is adapting in ways that will benefit investors by reducing conflicts of interest and adding transparency....Using a clean share model, advisors can align the level of advice they provide to their fee, and clients can choose how they would prefer to pay for advice: a flat dollar amount, a commission, or a level fee on assets under management."¹⁷

The benefits of clean shares for investors are obvious and paramount, but this innovative new share class also has the potential to benefit fund companies prepared to compete on cost and quality, particularly actively managed fund companies. The fiduciary debate often gets mischaracterized as a proxy for the debate over "active vs. passive" management. The real problem with broker-sold funds, however, is not that brokers tend to favor the sale of actively managed funds, but rather the harm investors suffer in a market where funds compete to be sold, not bought, and do so on terms that are favorable to the adviser, rather than the investor. This ability of funds to compete in the broker-sold market based on compensation rather than quality helps account for the persistent under-performance of broker-sold funds relative to direct-sold funds, which are more commonly recommended by investment advisers operating under a fiduciary standard.

Recently, financial planner and blogger Michael Kitces explained how the rise of clean shares, and the accompanying shift in how brokers are compensated for recommending such funds, is going to usher in an environment where actively managed funds can thrive.¹⁸ A key reason broker-sold funds tend to underperform is the drag on performance that results from using 12b-1 fees, which are incorporated in the fund expense ratio, to compensate brokers. Reducing the expense ratio by eliminating 12b-1 fees will improve funds' performance numbers, since performance is calculated net of fees. "[W]ith a shift to clean shares, reported performance for actively managed mutual funds is going to start looking better....[and will better reflect] the performance of mutual funds themselves who will no longer be saddling their performance records with broker compensation," Kitces explained.¹⁹ Similarly, Stuart Parker, the president of PGIM Investments (formerly Prudential Investments), recently stated, "I think clean shares are a

¹⁵ Letter from Barbara Roper and Micah Hauptman, CFA, to the DOL, April 17, 2017, at 67, 86-87, <http://bit.ly/2uABfCv>.

¹⁶ Aron Szapiro and Paul Ellenboge, *Early Evidence on the Department of Labor Conflict of Interest Rule*, MORNINGSTAR, April 13, 2017, <http://bit.ly/2wld88b>.

¹⁷ *Id.*

¹⁸ Michael Kitces, *Why Actively Managed Mutual Fund Performance Is About To Improve*, NERD'S EYE VIEW, June 15, 2017, <http://bit.ly/2vDUKtc>.

¹⁹ *Id.*

good thing. From an asset management perspective, we like clean shares because all that does is give us a lower bar from which to outperform. So I think as the business goes more and more to clean share classes, that's a positive....In fact, in many ways, I think it's going to be a positive for active managers to have the ability to outperform."²⁰

Members of the fund industry have expressed similar optimism about the potential for clean shares to improve their performance. In addition to stating that clean shares are "clearly better for the investor," for example, Oppenheimer Funds Chairman and CEO Art Steinmetz also discussed how clean shares are better for fund companies in a recent interview with *Ignites*.²¹ He said the way mutual fund pricing is disclosed is "hobbling '40 Act mutual funds."²² Making mutual funds responsible for setting the terms of the sale and disclosing those terms in the prospectus creates confusion among investors and adds unnecessary complexity to fund disclosures, Steinmetz said. "And that's why clean shares are so appealing," he said, "because they strip all of that out in terms of what gets rolled into the mutual fund cost as part of the fund, but rather makes it more visible at the advisory level."²³ With clean shares, mutual funds no longer act "as the middleman, or conduit, of the charges that the advisor has," he said, and those costs "no longer run through the mutual fund."²⁴

While some firms have argued they need more time to develop an implementation plan based on clean shares, one brokerage firm, PNC Investments, is already offering the shares.²⁵ As a result, according to Rich Ramassini, Senior Vice President of PNC Investments, "PNC Investments is ready, willing, and able to provide personalized guidance in your best interest, **regardless of account size.**"²⁶ (bold added for emphasis) "We are leveling the playing field for everyone," added Robert Santillo, managing director of product management and research for PNC Investments, in an email statement to *Ignites*.²⁷ "Charging a direct commission helps to bring more transparency to the clients on what they are paying for," Santillo told the *Wall Street Journal*.²⁸

The firm confirmed to *Ignites* that it is asking its 17 fund partners to provide clean shares.²⁹ In some cases, fund companies that work with PNC created a new share class to comply, according to Santillo. Other fund families had existing share classes that were either

²⁰ Hannah Glover, *Active Management Isn't Under Pressure, Pricing Is: PGIM*, Video interview with Stuart Parker, IGNITES, June 29, 2017, <http://bit.ly/2wxXh5s>.

²¹ Hannah Glover, 'Archaic' Pricing Disclosure 'Hobbling' Mutual Funds, Video interview with Art Steinmetz, IGNITES, June 8, 2017, <http://bit.ly/2sE2ms4>.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ See Bradley Saacks, *PNC Brokerage Unit: We Are Ready to Go 'Clean,'* IGNITES, June 9, 2017, <http://bit.ly/2uwZWuM>; Daisy Maxey, *PNC, in Fiduciary Move, Offers 'Clean' Mutual Fund Shares*, THE WALL STREET JOURNAL, June 9, 2017, <http://on.wsj.com/2s5fSgC>.

²⁶ PNC Financial Services, Department of Labor Fiduciary Rule, <http://pnc.co/2uxAipN> (last visited August 6, 2017).

²⁷ Bradley Saacks, *PNC Brokerage Unit: We Are Ready to Go 'Clean,'* IGNITES, June 9, 2017, <http://bit.ly/2uwZWuM>.

²⁸ Daisy Maxey, *PNC, in Fiduciary Move, Offers 'Clean' Mutual Fund Shares*, THE WALL STREET JOURNAL, June 9, 2017, <http://on.wsj.com/2s5fSgC>.

²⁹ Bradley Saacks, *PNC Brokerage Unit: We Are Ready to Go 'Clean,'* IGNITES, June 9, 2017, <http://bit.ly/2uwZWuM>.

institutional, advisory or retirement share classes that were then tweaked to meet the clean share class definition, Santillo told *Ignites*. “We assessed each share class from each fund company individually to find the lowest available share class expense ratio that met our definition, and have updated the prospectus to allow PNC to charge a commission,” Santillo continued.³⁰

Based on an inquiry to the company, we understand that PNC is charging a 3% commission for purchases and a \$75 flat fee for exchanges among funds. This would appear to compare favorably with the 5.75% commission and ongoing 12b-1 fees of 0.25% typical for smaller purchases of A shares in a modest amount that don’t qualify for a breakpoint discount. Assume, for example, a \$10,000 fund purchase. Investing in clean shares under the PNC pricing model would immediately save the investor \$275 compared with purchase of a typical A share. Investors in the A share would pay an additional \$25 a year in 12b-1 fees each year the investment is held. To the extent these investments are treated as buy and hold investments, investors should pay lower costs, making clean shares a clear winner for the small savers industry rule opponents typically claim are the biggest beneficiaries of commission accounts.

Industry rule opponents often base their criticism of the rule at least in part on an unsubstantiated claim that the rule is depriving investors, and particularly small savers, of the benefits of commission accounts. Such accounts, they argue, are often the lower cost option for small savers, who are often buy and hold investors.³¹ To reach this conclusion, however, they often distort the cost comparison to favor commission accounts, ignoring 12b-1 fees, for example, when comparing brokerage costs to fee accounts or assuming a front-load that is only available to the wealthiest investors who qualify for steep discounts.³² With both lower up-front

³⁰ *Id.*

³¹ For example, in its previous comment letters, SIFMA has routinely referred to brokerage accounts as “traditional ‘buy and hold’ commission brokerage accounts.” See Letter from Lisa J. Bleier, SIFMA, to DOL, April 17, 2017, at 3, <http://bit.ly/2uxjPIL>. For support, SIFMA has cited FINRA’s 2013 Report on Conflicts of Interest, which stated, “Commission-based accounts may be more cost-effective or appropriate for customers with low trading activity.” FINRA, Report on Conflicts of Interest, October 2013, <http://bit.ly/1Kxdp9z>. Similarly, ICI has stated on several occasions that “the commission-based model can be a more cost-effective means to receive advice, particularly for buy-and-hold investors, which is the case for many investors with modest-sized accounts.” See Letter from Brian Reid and David W. Blass, ICI, to the DOL, April 17, 2017, at 9, <http://bit.ly/2uxdoji>.

³² See, e.g., Letter from Brian Reid and David W. Blass, ICI, to the DOL, July 21, 2015, at 6 <http://bit.ly/2p5qLrO> (describing how it “adjust[s] for 12b-1 fees” in order to narrow the gap in performance between load and no-load funds). *But see* CFA’s response in our September 24, 2015 letter (“According to ICI’s analysis, front-end load funds underperformed direct-sold no-load funds by 43 basis points between 2007 and 2013. If, as ICI suggests, you remove 12b-1 fees from the calculations, that underperformance drops to 21 basis points. ICI’s argument that the Department should just ignore 12b-1 fees entirely is highly questionable. It justifies this approach on the grounds that 12b-1 fees are used to compensate brokers and their firms “for the services that they provide to their clients.” First, it’s not clear what those services are when the investor has already fairly compensated the broker via a front-load commission. Second, it’s worth noting these 12b-1 fees are charged for the life of the investment, even when the investor receives only one-time transactional advice. Moreover, the payment of those fees may still create an incentive for advisers to recommend funds which provide that compensation over funds that do not.”) See also SIFMA-NERA Comment on the Department of Labor Proposal and Regulatory Impact Analysis, July 17, 2015, <http://bit.ly/2wy0IJH>. (purporting to show account-level data on why advisory accounts are more expensive than commission based accounts). *But see* CFA’s response in our September 24, 2015 letter (“NERA excludes certain costs that brokerage investors pay to arrive at its conclusion that fee-based accounts are more expensive than commission-based accounts. According to the paper, ‘Fees include all proceeds paid by the account-holder directly to the firm, such as management fees and trading commissions. They exclude, however, fees paid to third-parties

commissions and no ongoing 12b-1 fees, however, clean shares offered under a pricing model comparable to PNC's have the potential to deliver the cost savings that industry rule opponents often falsely claim for commission accounts. And they could deliver those cost savings without compromising the objectivity of the advice. That is a clear win for retirement savers.

Moreover, while the DOL rule doubtless prompted their adoption, PNC reportedly plans to offer the new clean shares in both retirement and non-retirement accounts. According to a report in the *Wall Street Journal*, the company has already converted more than half of the existing assets in its fee-based advisory business to the new shares, and it plans to convert the remaining assets to the shares by year's end.³³ The company reportedly plans to offer the clean shares in its taxable accounts within the next few months.³⁴ PNC appears to recognize the benefits of clean shares -- with lower initial and ongoing costs, more transparency, and fewer conflicts -- for all their customers, benefits that PNC customers would not have received absent the DOL rule.

While PNC has already developed an implementation plan based on clean shares, we are mindful that different distributors may face varying degrees of operational challenges in getting clean shares to market. Broker-dealer firms and third-party system providers may have to enhance their systems in order to be able to begin collecting sales fees themselves. Whereas they've previously relied on funds to drive all commission structures and collect all fees, they will now have to enhance their systems and design their own commission structures for clean shares. Firms will have to make the necessary changes in their business structure and figure out the economics of offering clean shares. But PNC shows it's possible to answer these questions in a reasonable amount of time. Other broker-dealer firms will have to innovate as well or risk losing market share. That is evidence that the market is functioning and a sign that the rule is creating competition that rewards innovation.

2. T shares

T shares are another positive development attributable to the rule. Unlike clean shares, they keep funds in the role of setting adviser compensation, but they allow for level compensation across fund types and fund families. The projected front loads on T shares are much lower than typical loads on most A shares, except for investors who invest the \$250,000-\$500,000 in a single fund family needed to qualify for steep discounts. Although early reports suggested T shares would be the primary means brokers used to comply with the BIC, at least initially, they have not been adopted as widely as had been expected. This is reportedly due, not to any operational challenges, but rather to a lack of broker-dealer demand. That lack of demand has been attributed to growing uncertainty surrounding the rule's fate and to the SEC's approval of clean shares, which is considered by many to offer a better long-term solution for compliance with the rule. "It's not a technical issue at all; it's a demand issue," Frank Polefrone, senior VP at Broadridge's Access Data unit, told *Ignites*.³⁵ Broker-dealer firms are apparently reluctant to

such as mutual fund managers.' In a footnote, it makes clear that, 'Fees exclude revenue that the firm may receive indirectly from the account-holder, such as markup/markdown revenue or 12b-1 fees.' ")

³³ Daisy Maxey, *PNC, in Fiduciary Move, Offers 'Clean' Mutual Fund Shares*, THE WALL STREET JOURNAL, June 9, 2017, <http://on.wsj.com/2s5fSgC>.

³⁴ *Id.*

³⁵ Jackie Noblett, *Shops Asking Whether T Shares Are Worth the Hassle*, IGNITES, July 6, 2017, <http://bit.ly/2vcil28>.

invest the time, effort, and money necessary to develop a compliance approach based on T shares when it's widely viewed as a transitional approach, according to Polefrone.³⁶

In the absence of widespread broker-dealer demand, fund companies have reportedly halted their plans to create these products. Federated Investors' President and CEO J. Christopher Donahue recently acknowledged that, "We've put the offering of our T shares on hold pending the delayed application of the DOL Fiduciary rules and final direction from intermediaries."³⁷ Similarly, Cohen and Steers President and CIO Joseph Harvey indicated they are prepared to launch the new share class but, based on feedback from their distributors, have "put that on hold."³⁸

According to press reports, Wells Fargo appears to be the only major distributor to have expressed an interest in adopting T shares, rather than clean shares, as a long-term solution to compliance with the DOL rule. In May, Wells announced that it would require advisors to use T shares in commission-based IRAs³⁹ but just weeks later it announced it would pause implementation of T shares until sometime in July.⁴⁰ Based on an inquiry to the company, we understand T shares are still not available at the time of submission. It's not entirely clear why Wells decided to pause its implementation or why the delay has persisted beyond the original estimate, but the expectation of changes to the rule and a further implementation delay may have played a role. Meanwhile, Wells' retirement account customers are losing out on the opportunity to purchase lower-cost, less conflicted products.

Pershing's managing director of investment and retirement solutions, Robert Cirotti, indicated that the Department's decision regarding further delay will determine whether T shares come to market. "If we get to the December time frame and the DOL has not pushed out the January compliance date or made significant changes to the rule, I think T shares will come roaring back because it's a more quick-to-market solution that firms are going to be looking for. If the rule gets pushed out, or there's some other kind of change that the department makes, I think it's much more likely that firms will put T shares on the shelf more permanently."⁴¹

3. LPL

While some firms appear to be waiting to see how the Department's reconsideration of the rule plays out, LPL, the largest independent broker-dealer in the United States, has forged ahead with its own innovative approach to compliance. The LPL Mutual Fund Only platform will offer investors access to more than 1,500 mutual funds from 20 fund families while standardizing compensation for financial professionals and thus neutralizing incentives to favor

³⁶ *Id.*

³⁷ Federated Investors' (FII) Q1 2017 Results – Earnings Call Transcript, April 28, 2017, SEEKING ALPHA <http://bit.ly/2wm2Uoj>.

³⁸ Cohen & Steers' (CNS) Q2 2017 Results - Earnings Call Transcript, July 20, 2017, SEEKING ALPHA, <http://bit.ly/2vDub7R>.

³⁹ Elizabeth Dilts Reuters, *Wells Fargo Advisors creates new mutual fund class for fiduciary rule*, ST. LOUIS POST-DISPATCH, May 24, 2017, <http://bit.ly/2uepUnx>.

⁴⁰ Bradley Saacks, *Wells Hits Pause on T-Share Plans*, IGNITES, June 7, 2017, <http://bit.ly/2vv6K0F>.

⁴¹ Diana Britton, *DOL in the Real World, Interview with Robert Cirotti*, WEALTH MANAGEMENT, June 19, 2017, <http://bit.ly/2tAwYgm>.

one fund or fund family over another.⁴² Investors in the mutual fund only accounts will pay an initial maximum 3.5 percent onboarding commission for new investments in the account plus a 0.25 percent 12b-1 fee to cover the cost of servicing the account.⁴³ Rights of accumulation toward breakpoint discounts will apply across the platform, rather than within a single fund family, and exchanges among funds on the platform will be conducted free of cost.⁴⁴ This will provide increased choice and greater flexibility to move between fund companies, thus expanding the benefits of rights of accumulation farther than they've previously existed in the brokerage context. In addition, LPL is eliminating certain annual account and trading fees, including annual IRA maintenance fees, confirm fees, and inactive account fees, thereby eliminating the added costs that can sometimes be associated with holding mutual funds at the broker rather than at the fund company itself.⁴⁵ This new platform reportedly will be available for retirement and non-retirement accounts.

LPL's innovative approach is a prime example of how a firm that approaches compliance with the rule in good faith can develop a solution that is beneficial for investors and advisers alike. As LPL President and CEO Dan Arnold said in a recent earnings call, "The mutual fund-only solution is a great example of our commitment to preserving choice both across -- both brokerage and advisory solutions in a post-DOL world."⁴⁶ Arnold continued, "So in a post-DOL world, we're very optimistic that the mutual fund-only solution will help drive growth and do it in a very profitable way."⁴⁷ According to Arnold, the firm's overall strategy regarding compliance "remains to make our advisers' compliance work simpler and more efficient, so they can focus on running their business. The early feedback we hear from advisers is, they feel well prepared for the transition and are seeing opportunities to win business based on our approach."⁴⁸

In addition to the Mutual Fund Only platform, LPL announced this month that it is developing a digital platform that works alongside a personal adviser, who remains at the center of the relationship, according to Rob Pettman, LPL's executive vice president of product and platform management.⁴⁹ The platform will combine access to a low-cost technology solution with the personalized planning, service and advice of an advisor. Challenging the conventional wisdom that robo-advisers are offered only direct to consumer without human involvement, Pettman told *ThinkAdvisor*, "[W]e're going to be one of the first broker-dealers to be live with a tool like this that's delivered by independent advisors."⁵⁰ LPL says this new platform will expand options and choice for both investors and advisers. "Without the platform, [advisors] might not have engaged or proactively gone to help the small investor," he explained. "The platform affords them the ability to have scale. And the overall cost that a small investor might have on the infrastructure is significantly less now, because of the efficiencies that the platform

⁴² Press Release, LPL Financial, "LPL Financial Announces Details and Fund Companies For Its Industry-First Mutual Fund Only Platform," July 13, 2017, <http://bit.ly/2vc25hy>.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*; See LPL Financial, Miscellaneous Account and Service Fees Schedule, <http://bit.ly/2vuY8qJ>.

⁴⁶ LPL Financial Holdings (LPLA) Q2 2017 Results - Earnings Call Transcript, July 27, 2017, SEEKING ALPHA, <http://bit.ly/2hAgDnW>.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Emily Zulz, *LPL Launching Robo-Advisor This Month*, THINKADVISOR, August 1, 2017, <http://bit.ly/2vaoZrn>.

⁵⁰ *Id.*

provides.” This approach will make advisers more productive and efficient, according to Pettman. This new platform “takes out a lot of the low-value calls [between the advisor and client] but leaves the high-value calls,” Pettman explained. “Ultimately that helps advisers free up some time to be able to help new people.”⁵¹

4. UBS

UBS is taking a very different approach to compliance, according to press reports.⁵² The firm, which was among the last to announce its plans for compliance, will reportedly continue to charge commissions on its retirement accounts, but its advisers will not be paid based on commission. Rather, under this approach to complying with the BIC, UBS advisers’ monthly pay will be based on the value and returns of the last year’s retirement assets under management, the company said. Accordingly, adviser pay will not be driven by “the volume of transactions or the products they recommend for retirement accounts.”⁵³ This approach is designed to align advisers’ and investors’ interests, since commissions will no longer be a factor in setting advisers’ level of pay and the adviser will therefore not have an incentive to recommend particular investments to increase their compensation.

One benefit of the approach, according to these reports, is that it allows UBS advisers to continue to recommend a wide variety of investment products within retirement accounts. The company is reportedly limiting only a “small list” of products, based on “compensation, liquidity, and transparency characteristics that do not mesh well with the purposes” of the rule.⁵⁴ UBS pointed specifically to exchange-traded notes (ETNs) issued by UBS itself as an example of such a restricted product. Given both the conflicts and risks associated with such a recommendation, this offers further evidence of how the rule’s best interest standard is benefiting investors by limiting recommendations that might pass muster under a suitability standard but are not consistent with the best interests of the customer.⁵⁵

5. Raymond James

Raymond James has announced that it will implement the rule by adopting a new product-neutral pay grid for its independent brokers that more closely resembles its payment structure for its employee brokers. Compensation will no longer be based on specific products sold, thus mitigating the compensation-related incentives to recommend one product over another.⁵⁶ Raymond James is also reportedly revising the payout formula itself. On the one hand, this formula applies increases retroactively, which could magnify the adviser’s conflict of

⁵¹ *Id.*

⁵² John Manganaro, *UBS Signals Commitment to Asset-Based Compensation*, PLAN ADVISER, June 05, 2017, <http://bit.ly/2fjYXfy>; Bradley Saacks, *UBS Unveils DOL Plan Focused on Advisor Pay, Not Product Type*, IGNITES, June 2, 2017, <http://bit.ly/2ugvBFv>.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Both the SEC and FINRA have issued warnings about ETNs, as they present a whole host of risks, including conflicts of interest and the considerable credit risk to a single issuer to which the investor is exposed. *See* FINRA – Investor Alert – “Exchange-Traded Notes – Avoid Unpleasant Surprises,” July 10, 2012, <http://bit.ly/2wkU8qC>; SEC Investor Bulletin: Exchange Traded Notes (ETNs), Dec. 1, 2015, <http://bit.ly/2wl6E9E>.

⁵⁶ AdvisorHub Staff, *RayJay to Implement “Product Neutral” Grid for Indie Brokers*, ADVISORHUB, July 6, 2017, <http://bit.ly/2uemf9v>.

interest by increasing the incentive to make the sales necessary to cross the threshold.⁵⁷ However, it appears that increases may occur in several modest steps, beginning at 81 percent and peaking at 90 percent payout. More gradual increases are less likely to create impermissible incentives than grids characterized by large increases. These changes are designed to mitigate conflicts of interest while at the same time not dramatically changing either broker compensation or the products they are able to offer to retirement investors.

6. Edward Jones

Edward Jones' initial approach to implementation has been cited by a number of rule opponents as an example of how the rule is harming investors by limiting their access to investment products. Frankly, we cannot explain the thinking behind the firm's original decision to ban mutual funds in commission-based retirement accounts but allow other products, such as variable annuities, that create similar, if not greater, conflicts of interest and are, by and large, less likely to be in customers' best interests. In the days leading up to the initial June implementation deadline, Edward Jones signaled a reversal of its position. Company's spokeswoman Regina DeLuca-Imral reportedly told *InvestmentNews* that the company now believes it "can structure a new account that will allow for mutual funds in a transaction-based IRA as the industry works to develop and implement long-term solutions."⁵⁸ She indicated that the company hopes to roll out its new account option that would allow advisers to use mutual funds with clients in brokerage IRAs by midsummer. This suggests that some companies' over-reaction to the rule are likely to be corrected as they become more familiar with its requirements and see how their competitors are responding.

7. Advisor Group

In January, Advisor Group, which is comprised of four independent broker-dealers -- Royal Alliance, SagePoint, Woodbury, and FSC -- unveiled platform enhancements to help its advisers comply with the rule and "create competitive advantages for advisers in [the] 'Fiduciary Era.'"⁵⁹ Changes included continuing to support commission-based business with improved flat-fee pricing on its brokerage platform, thus preserving client choice with regard to how they pay for advice. In the process, the firm said it is cutting commission fees to \$15 across the board, thereby lowering them by 25 percent or more, and eliminating "a whole series of nuisance fees," such as IRA custody and IRA transaction fees.⁶⁰ In addition, it announced it was introducing a new advisory product, the Genesis Series, which gives clients access to institutional strategies from Vanguard, American Funds, and BlackRock, based upon Envestnet research, and requires only a \$5,500 minimum investment.⁶¹ According to the firm, adoption of this platform "was swift," with more than 800 advisers opening nearly 5,700 accounts on the platform, totalling

⁵⁷ See CONFLICT OF INTEREST FAQs (PART I- EXEMPTIONS) U.S. Department of Labor Employee Benefits Security Administration October 27, 2016, Question 9, <http://bit.ly/2dMctqQ>.

⁵⁸ Greg Iacurci, *DOL fiduciary rule: Edward Jones changing stance on mutual fund commissions in IRAs*, INVESTMENTNEWS, June 7, 2017, <http://bit.ly/2t2ZGax>.

⁵⁹ Press Release, Advisor Group, "Advisor Group Unveils Platform Enhancements to Create Competitive Advantages for its Advisers in 'Fiduciary Era,'" January 10, 2017, <http://bit.ly/2iHcQBf>.

⁶⁰ Brooke Southall, *Why Valerie Brown is doing 19-whistlestop tour with her new CEO to sell -- ironically -- deep price cuts and a TAMP-for-millennials*, RIABIZ, January 10, 2017, <http://bit.ly/2hzzjEm>.

⁶¹ *Advisor Group Leaps into 'Fiduciary Era'*, BARRON'S, January 12, 2017, <http://bit.ly/2vcl2k4>.

\$200 million in assets, in the first five months. The firm predicted those totals would quickly double.⁶²

In addition, Advisor Group announced in July further enhancements to its advisory platform that will allow advisers to seamlessly onboard new clients and open new accounts through an entirely digital process, thereby eliminating most paperwork.⁶³ The platform will include data aggregation and a fully digital advice solution by Jemstep that will be delivered by the adviser rather than digitally.⁶⁴ Therefore, the relationship will continue to be a personal one between the adviser and the investor.⁶⁵ Also noteworthy, Jemstep provides advisers with the flexibility to set the minimum account, which “will enable the firm’s advisers to effectively serve a broader range of account sizes.”⁶⁶ Advisor Group said it expects to roll out the new platform during the fourth quarter of 2017.⁶⁷

8. Cetera

Cetera, a network of seven broker-dealers with more than \$218 billion in client assets, is among the many firms that plan to continue to offer commission-based retirement accounts. The company also recently announced that it was making broad upgrades to its technology platform.⁶⁸ As part of these upgrades, Cetera developed a digital advice platform with Envestnet, with an account minimum of just \$1,000, that will be available for use by Cetera’s more than 8,000 advisers by the end of this year.⁶⁹

9. More investor-friendly annuities, including fixed-indexed annuities, are being developed

In our April comment, we discussed in some detail how the rule has prompted the development of more investor-friendly annuities, just as experts predicted it would.⁷⁰ We quoted Scott Stolz, a senior vice president with Raymond James, who had predicted shortly before the rule was finalized that it would result in commission compression and the elimination of long surrender periods and high surrender charges, as companies develop products designed to ease compliance with the rule.⁷¹ And we provided evidence that Stolz’s prediction was being borne out, with the introduction of new annuities featuring shorter surrender periods and lower surrender charges, to the benefit of retirement savers.

⁶² Press Release, Advisor Group, “Advisor Group Hosts 2017 Wealth Management Symposium on “The Future of Advice,” July 6, 2017, <http://prn.to/2wkH4kW>.

⁶³ Press Release, Advisor Group, “Advisor Group Announces Comprehensive Digital Onboarding, Advice and Data Aggregation Platform for Financial Advisors and Retail Investors,” July 11, 2017, <http://prn.to/2wla8bV>.

⁶⁴ *Id.*; Jemstep, by Invesco, FAW, <http://bit.ly/2uevAhp> (last visited August 6, 2017).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Liz Skinner, *Cetera to integrate robo for advisers*, INVESTMENTNEWS, May 11, 2017, <http://bit.ly/2r0ocIJ>;

Bradley Saacks, *Cetera to unveil Robo to Network of 8,000 Reps*, IGNITES, May 22, 2017, <http://bit.ly/2v9Qa5l>.

⁶⁹ *Id.*

⁷⁰ See CFA April 2017 letter at 33-36.

⁷¹ Scott Stolz, *How Annuities Will Be Transformed by DOL Fiduciary Rule*, THINKADVISOR, February 1, 2016, <http://bit.ly/2pGn5Jd>.

Additional evidence since then confirms that the rule is resulting in the sale of annuities that have shorter surrender periods and lower surrender charges, largely driven by the fact that annuity recommendations must be made in the client's best interest and that the compensation for the services provided must be reasonable.⁷² As Bob Quinlan of Quinlan Insurance & Financial Services in Winona, Minnesota, reportedly told *InsuranceNewsNet.com*, "Shorter term surrender charge products are in our future, whether it's fixed, indexed or variable, that's what I've heard."⁷³ Recent market data from Wink's Sales & Market Report seems to confirm this assessment. For example, in the first quarter of 2017, sales of fixed-indexed annuities (FIAs) with a seven-year surrender period made up 22.1 percent of FIA sales, according the Wink's data, up from 17 percent in the first quarter of 2016. Similarly, 42.8 percent of all FIA sales in the first quarter of 2017 were for products with a surrender period of less than 10 years, up from 36.8 percent in the first-quarter of 2016.⁷⁴

Similarly, surrender charges on fee-based variable annuities "seem to be disappearing faster than the polar ice caps," according to an *InsuranceNewsNet.com* article published just days after the first phase of implementation began.⁷⁵ The article quoted a Morningstar report that nearly two dozen new contracts were filed between December and May, "shatter[ing] records."⁷⁶ Lincoln Financial, Voya Financial, AIG, Jackson National, Transamerica, Nationwide, Pacific Life and Great West Life have all recently launched variable annuities with no surrender charges, according to the article. "These advisor-sold contracts typically have no surrender or a very short surrender (periods) with very low penalties," said Kevin Loffredi, senior product manager, Annuity Solutions, for Morningstar.⁷⁷ Advisors can expect insurance companies to release more short-term surrender products in the coming months, according to Sheryl J. Moore, president and CEO of Moore Market Intelligence and Wink.⁷⁸

There's also been a wave of fee-based FIAs being created. For example, in July, Nationwide launched its first fee-based FIA. This product, known as New Heights, offers uncapped earning potential, a rarity in the fixed indexed annuity industry, according to Eric Henderson, senior vice president of Life Insurance and Annuities for Nationwide Financial.⁷⁹ This product was expected to be available to Nationwide's exclusive agents, independent

⁷² The *InsuranceNewsNet* article, below, also attributes the shift in sales of annuities with shorter surrender periods to the fact that banks and broker-dealers, which typically sell annuities with shorter surrender periods, captured a larger portion of market share. The fact that banks and broker-dealers typically sell annuities with shorter surrender periods is likely explained by the fact that they exercise more rigorous oversight over their employees than IMOs exercise over independent agents. This is further evidence for why it is critical that a financial institution be required to exercise supervisory authority over its advisers or the advisers it contracts with to ensure compliance with the rule. See Section VI, below, for further discussion.

⁷³ Cyril Tuohy, *Rise in Shorter-Term Surrender FIAs Means Commission Declines*, INSURANCENEWSNET, June 20, 2017, <http://bit.ly/2sLxrwu>.

⁷⁴ *Id.*

⁷⁵ Cyril Tuohy, *Surrender Charges' Great Disappearing Act*, INSURANCENEWSNET, June 12, 2017, <http://bit.ly/2snXj1c>.

⁷⁶ Cyril Tuohy, *Fee-Based VA Filings Shatter Records*, INSURANCENEWSNET, May 30, 2017, <http://bit.ly/2qDhkw0>.

⁷⁷ Cyril Tuohy, *Surrender Charges' Great Disappearing Act*, INSURANCENEWSNET, June 12, 2017, <http://bit.ly/2snXj1c>.

⁷⁸ *Id.*

⁷⁹ Cyril Tuohy, *Nationwide Launches its First Fee-Based FIA*, INSURANCENEWSNET, July 17, 2017, <http://bit.ly/2fkfwIn>; Press Release, Annexus, "Nationwide Announces Its First Fee-based Fixed Indexed Annuity," July 11, 2017, <http://bit.ly/2uggOuR>.

distributors and bank and wirehouse channels in August. It will also be available through the Annexus network of IMOs, a positive development in light of concerns that have been raised regarding IMOs' ability to comply with the rule. Last year, following the rule's finalization, however, Annexus's Chief Operating Officer and General Counsel David Rauch stated, "We're full steam ahead,"⁸⁰ referring to the company's plan to comply with the rule. Here again we see evidence that companies that make good faith efforts to comply with the rule are finding ways to do that, and benefiting retirement savers in the process.

Another annuity producer, Symetra, also recently introduced two new fee-based fixed indexed annuities. Kevin Rabin, vice president of Retirement Products, said these new products "offer advisors greater choice and aligns with our commitment to providing transparent, flexible options that add value and fit the needs of today's retirement marketplace."⁸¹ He added, "Expanding our lineup of commissionable FIAs to include these new fee-based products allows advisors and their clients to decide which planning model best suits their retirement objectives."⁸²

Pacific Life also launched a new fee-based FIA, which according to the company, "offers even more straightforward, easy-to-understand ways to earn interest, and shorter withdrawal charge periods."⁸³ Unlike many other fixed-indexed annuities, "rates and caps will not change throughout the entire withdrawal charge period, a longer guarantee than a typical fixed indexed annuity provides," said Christine Tucker, vice president of marketing for Pacific Life's Retirement Solutions Division.⁸⁴ According to Tucker, the product was designed based on financial professionals' and clients' desire for simpler products that are easier to understand, with shorter surrender periods.⁸⁵

Great American is also offering a fee-based product,⁸⁶ Index Protector 7, which has been available through advisors affiliated with the Commonwealth Financial Network since March.⁸⁷ A comparison of this no-commission product with similar products that do have commissions clearly shows that, when commissions are stripped out, these products can offer much better terms for customers, including shorter surrender periods, lower surrender charges, and significant increases in upside potential. (See chart below.) As Raymond James' Scott Stolz, a frequent writer about annuity products, explained, "When you take the commissions out of a fixed and indexed annuity, all of the commission savings can go into the rates and caps."⁸⁸

⁸⁰ Greg Iacurci, *Indexed annuity distributors weigh launching B-Ds due to DOL fiduciary rule*, INVESTMENTNEWS, June 23, 2016, <http://bit.ly/2oemBtA>.

⁸¹ Press Release, Symetra, "Symetra Introduces New Fee-Based Fixed Indexed Annuities—Symetra Advisory Edge and Symetra Advisory Income Edge," July 24, 2017, <http://bit.ly/2ugNu76>.

⁸² *Id.*

⁸³ Press Release, Pacific Life, "Pacific Life's New Fixed Indexed Annuity with Simple Interest-Crediting Options and Shorter Withdrawal Charge Schedules," July 17, 2017, <http://bit.ly/2vcwWKi>.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Great American Insurance Group, Annuities, Current Rates, <http://bit.ly/2uh06LB>.

⁸⁷ Press Release, Great American Life Insurance Company, "Great American Life's Fee-Based Annuity Now Available Through Commonwealth Financial Network," March 1, 2017, <http://bit.ly/2oCwiER>.

⁸⁸ Scott Stolz, *Do Fee-Based Annuities Have a Future?*, THINKADVISOR, July 3, 2017, <http://bit.ly/2uxeekK>.

	Index Protector 7 (fee-based, no commission)	Custom 10 (commission)
Surrender period	7 year surrender period	10 year surrender period
Surrender charge	Max 7% surrender charge	Max 9.5% surrender charge
Declared rate	3% with purchase payment of \$250,000 or more 2.9% with purchase payments of less than \$250,000	1.5% with purchase payment of \$150,000 or more 1.4% with purchase payment of less than \$150,000
S&P 500 Risk Control annual point-to-point with participation rate	75% with purchase payment of \$250,000 or more 70% with purchase payments of less than \$250,000	55% with purchase payment of \$150,000 or more 50% with purchase payment of less than \$150,000
S&P 500 annual point-to-point with cap	7% with purchase payment of \$250,000 or more 6.75% with purchase payments of less than \$250,000	4.25% with purchase payment of \$150,000 or more 4.00% with purchase payment of less than \$150,000

While this comparison is between a commission product and a no-commission product, it does suggest that insurance companies wouldn't have to completely eliminate commissions in order to significantly improve products. Reducing commissions, perhaps in conjunction with some of the positive approaches that have been adopted in the mutual fund market, would allow for significant product improvements while retaining the benefits of commission-based advice.

Stolz has written that he sees a promising future for fee-based annuities and that he believes previous assumptions about market dynamics will soon be proven wrong. He stated, for example, "Those who believe the commissionable annuity net of fees is more cost effective are

typically assuming a 1.00%-plus asset fee in their analysis. Technology and fee compression will increasingly make it difficult for advisors to justify a 1.00%-plus fee if all they are doing is managing money. Utilize a 0.50% fee rather than a 1.00% fee in your cost analysis, and you reach a completely different conclusion. That may not be today's reality, but it very well could be in the not-too-distant future."⁸⁹ Recognizing the challenges ahead for the annuity industry, Stolz predicts that, while overall annuity sales will drop dramatically over the next 12 to 24 months as advisers adjust to the new paradigm, once proper adjustments are made, annuities sales have the potential to rise again, particularly as baby boomers retire and the need for guaranteed lifetime income is greater than ever.⁹⁰

In short, despite industry rule opponents' predictions to the contrary, it is becoming increasingly clear that annuities, including fixed-indexed annuities, will continue to be available under the rule and that innovative new annuities are rapidly being introduced. These products will offer more and better choices for investors and promote competition. Retirement savers and innovative companies will be the beneficiaries.

10. More tech compliance tools are being developed

In our April comment letter, we described dozens of technology-based compliance tools that have been developed to aid with implementation of the rule.⁹¹ Advances in this area have continued with the start of implementation.

In June, eMoney Advisor, which has already rolled out several compliance solutions, announced that it plans to enhance its platform later this year with new features provided by CapitalROCK's RightBRIDGE.⁹² Included in the RightBRIDGE suite of solutions is its Annuity Wizard, which scans the best available products across all annuity types and helps advisers determine which available annuities are best suited to meet a client's needs and preferences, thereby helping advisers meet their best interest obligations. John Hyde, CEO and founder of CapitalROCK, said, "Providing a holistic solution from financial planning through product selection on one platform provides streamlined and well-documented process to support the best interest standard. eMoney's Fiduciary Framework and CapitalROCK's product selection technology dovetail together to provide a complete solution for the best interest standard."⁹³

Also in June, Redhawk Wealth Advisors launched FiduciaryShield, a set of tools designed to help advisers meet their fiduciary responsibilities on behalf of Individual Retirement Account (IRA) holders.⁹⁴ Redhawk CEO Dan Hunt said it was natural for Redhawk to apply the comprehensive fiduciary process the firm developed for ERISA plans to the IRA space. "We've

⁸⁹ Scott Stolz, *Do Fee-Based Annuities Have a Future?*, THINKADVISOR, July 3, 2017, <http://bit.ly/2uxeevK>.

⁹⁰ *Id.*

⁹¹ See CFA April 2017 letter at 118-140.

⁹² Javier Simon, *eMoney Enhancing Platform with Annuity Wizard*, PLAN ADVISER, June 28, 2017, <http://bit.ly/2sS0DkK>.

⁹³ *Id.*

⁹⁴ Javier Simon, *Redhawk Brings ERISA Fiduciary Services to IRA Space*, PLAN ADVISER, June 21, 2017, <http://bit.ly/2vanvx0>.

been serving as an ERISA investment fiduciary for so many years and now advisers can leverage this proven process for their individual IRA clients.”⁹⁵

11. Increased due diligence and research means better products

In order to comply with the rule’s best interest standard, firms are also increasing their due diligence and research to ensure that they are recommending only the best products. In a recent article describing how the rule is likely to benefit actively managed funds, financial planner and blogger Michael Kitces described how the process brokers are going through, as part of their implementation plans, to decide which funds to keep on their platforms is improving the quality of fund offerings.⁹⁶ “[W]ith major broker-dealers and wirehouses now rationalizing which funds to keep on their platforms and eliminating a lot of higher cost and lower performing funds, I think a lot of the weakest funds actually will die from the lack of flows in the coming years,” Kitces wrote. “These funds probably should’ve gone away in the first place, but that means the surviving funds going forward, on average, are going to be even better, right?”⁹⁷

For example, it was recently reported that Ameriprise was cutting more than 1,500 funds that no longer meet the firm’s due diligence standards.⁹⁸ However, that does not mean that there won’t be sufficient selection from which to choose going forward. The firm will still have more than 2,000 different funds from hundreds of firms available for advisers to recommend to clients. Similarly, Voya announced that it will trim its mutual fund menu by roughly half by the end of the year, taking it down from 4,000 products to roughly 2,000, still a considerable menu of products from which to recommend.⁹⁹ Other broker-dealers, including Morgan Stanley and Merrill Lynch, are trimming funds with poor performance, high fees, or few assets from their menus.¹⁰⁰ Tom Halloran, Voya Financial Advisors’ president, stated that this culling of funds is long overdue. “We have needed to get this done for a bit,” he reportedly told *Ignites*.¹⁰¹

A number of firms, including RBC, Merrill Lynch, Ameriprise, and Wells Fargo, are also investing more in research to improve their offerings.¹⁰² Some firms are combining teams that have previously been independent of each other and served different clientele. As a result, retail investors will gain access to the same research teams and analysis that only high-net-worth individuals had access to previously. According to Kevin McDevitt, director of RBC’s Global Manager Research team, “Now that we have combined the teams, they’re going to be able to source and find names that we would never have known about.”¹⁰³

⁹⁵ *Id.*

⁹⁶ Michael Kitces, *Why Actively Managed Mutual Fund Performance Is About To Improve*, NERD’S EYE VIEW, June 15, 2017, <http://bit.ly/2vDUKtc>.

⁹⁷ *Id.*

⁹⁸ Bruce Kelly, *Ameriprise slashes number of funds available to advisers ahead of DOL fiduciary rule*, INVESTMENTNEWS, June 6, 2017, <http://bit.ly/2vEVj6U>.

⁹⁹ Bradley Saacks, *Voya B-D Unit Begins Chopping Down Fund Menu*, Ignites, July 19, 2017, <http://bit.ly/2wkQKvB>.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Grace Jennings-Edquist, *New Standards Push Big BDs to Reshape Research Teams*, IGNITES, June 20, 2017, <http://bit.ly/2v9OV6c>.

¹⁰³ *Id.*

B. Firms' public statements continue to provide evidence the rule is workable and not unduly costly.

We realize that the Department has heard from naysayers in the industry who describe the rule as “unworkable,” too burdensome, or harmful to investors. But the Department needs to weigh the statements industry groups make when they are seeking to roll back the rule against the very different statements many firms make to their investors and the public regarding the rule’s benefits. Time and again in earnings calls and statements to the press, leading firms have affirmed that the rule is manageable and that implementation is going smoothly. Many acknowledge that the rule is not only better for their clients, but also better for the firms, such as theirs, that are willing and able to compete based on the quality of their services, and better too for advisers who want to offer high quality, competitive products to a broad swath of the investing public.

Our April comment letter included extensive examples of such statements from both news articles and earnings calls. More recent statements as the first phase of implementation began send a similarly positive message, including in some cases from firms that have been vocal opponents of the rule in their comment letters. For example, in a message on its website headlined, “We’re ready for any change,” Janney declared that its “years of experience in offering fiduciary relationships to clients” had enabled it “to efficiently implement the necessary steps to ensure our compliance with the new regulatory requirements that will be affecting retirement accounts ... Our financial advisors are well equipped to discuss and review retirement account options at Janney to be sure that not only regulatory obligations are being met but, also, that we continue to align any solution to the unique needs and goals of each of our clients.”¹⁰⁴

Wells Fargo expressed a similar sentiment on its website.¹⁰⁵ The DOL rule, with its best interest requirement, “simply means we do what we’ve always believed in – helping our clients succeed financially and investing in tools and technology to serve them better,” the firm declared. “Our Financial Advisors are committed to building enduring relationships on a foundation of client-first, objective advice.”¹⁰⁶ Shortly before initial implementation began, Schwab published a statement in which they declared their commitment, “through any regulatory changes,” to “continue to offer clients the same breadth of choice in our product and service offerings that we have today” and to “continue to act in our clients’ best interest. We’ve worked hard to align our interests with theirs,” they stated.¹⁰⁷

After the initial compliance date had passed, Heather Hunt-Ruddy, head of client experience and growth at Wells Fargo Advisors, indicated that, “It went very smoothly. I would liken it to Y2K: We did a lot of preparation and a lot of work for a day that ended up feeling a lot like any other day,” she said.¹⁰⁸ Similarly, Alliance Bernstein’s second quarter earnings

¹⁰⁴ Janney, Resources and Education, Department of Labor (DOL) Fiduciary Ruling, <http://bit.ly/2hAs3YP> (last visited August 6, 2017).

¹⁰⁵ Wells Fargo, What You Can Expect as Our Client, <http://bit.ly/2fksBkZ> (last visited August 6, 2017).

¹⁰⁶ *Id.*

¹⁰⁷ Press Statement, Schwab, “Schwab Statement on Retirement Advice: Schwab’s Position on Department of Labor Fiduciary Rule Regarding Retirement Advice,” May 23, 2017, <http://bit.ly/2vcupAn>.

¹⁰⁸ David Nicklaus, *Despite complaints, fiduciary rule phase-in is going smoothly*, ST. LOUIS POST-DISPATCH, June 18, 2017, <http://bit.ly/2vuIA6o>.

presentation includes a slide on implementation stating that, while the firm had “updated its documentation and product procedures to ensure best practices,” no significant product or structural changes had been necessary. Implementation of the rule “hasn’t been a distraction for advisors or clients,” according to the presentation.¹⁰⁹

As compliance with the rule got its initial kick-off in June, other firms also signaled that implementation of the rule was going smoothly. Schwab’s Summer Business Update for the company’s investors included a slide dedicated to the rule which stated: “We are taking the necessary steps to ensure compliance with the DOL Fiduciary Rule. Even though there is still uncertainty as to the final details of the regulation, we are actively preparing for the January 2018 ‘Full Compliance’ deadline: Our strategy is built around operating with our clients’ best interests in mind, which positions us well in a fiduciary landscape. We planned for this new regulation in our project budget and anticipate staying within that allocation. Work to comply involves modifications - not significant overhauls.”¹¹⁰ It further stated that the rule “will have industrywide effects, all of which have the potential to play to Schwab’s strengths in the future.”¹¹¹

Ameriprise’s Chairman and CEO James Michael Cracchiolo offered a similar outlook in his firm’s second quarter earnings presentation in July, stating: “In terms of the regulatory environment, we’re managing well through an ongoing period of change. Regarding the Department of Labor Fiduciary Rule, Ameriprise and our advisors were well prepared for the June 9th implementation.”¹¹² Cracchiolo said the firm had a comprehensive plan in place to prepare both the firm and its advisers for implementation. “As part of our comprehensive advisor support plan, including the series of webcasts and more than 100 training sessions over the last few months, we continue to provide clear direction and extensive training for our advisors so that they are well supported and able to continue serving clients and building their practices through this time,” he stated.¹¹³ “We eliminated 12b-1 fees in advisory accounts earlier this year as we highlighted, and we’ve also streamlined our fund range like others. We’re currently working to be ready for any further requirements that may be necessary on January 1 and continue to have appropriate resources devoted to this work.”¹¹⁴

John Clendening, the CEO of Blucora, which recently acquired HD Vest, expressed a similar reaction in the firm’s second quarter earning call. “On DOL - we saw no adverse impacts to the business of any note following the initial June 9 change and remain on-track for a full implementation on January 1, if the Fiduciary Rule goes into effect in its current form.”¹¹⁵ Clendening also stated that the firm had revised its estimated implementation costs downward. Clendening added that both the industry and the firm were well-positioned to compete in this new environment: “[I]ndustry has a long track record of adapting to regulatory change, and we

¹⁰⁹ Alliance Bernstein, Second Quarter 2017 Review, slide 10, July 27, 2017, <http://bit.ly/2vDfSQw>.

¹¹⁰ Schwab, Summer Business Update, Slide 14, July 21, 2017, <http://bit.ly/2ux2j0F>.

¹¹¹ *Id.*

¹¹² Ameriprise Financial (AMP) Q2 2017 Results - Earnings Call Transcript, July 26, 2017, SEEKING ALPHA, <http://bit.ly/2uf2kXO>.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Blucora's (BCOR) Q2 2017 Results - Earnings Call Transcript, July 27, 2017, SEEKING ALPHA, <http://bit.ly/2vF2xbj>.

are encouraged by a lot of the insight we saw coming out of the – especially mutual fund industry to find a way to adapt their products, be able to deal with DOL. From our standpoint, we're encouraged by the offering that we have today. We've got offerings that can go down to accounts of the \$10,000 level and would be fully compliant with DOL.”¹¹⁶

Statements such as these contrast sharply with claims made in comment letters by industry rule opponents that firms are dropping large numbers of customers because of the rule. Presumably, if large numbers of customers were in fact being dropped by well known firms, it would receive national attention and widespread consumer outcry. So far, that has not happened, suggesting that the positive message in firms' earnings reports and in public statements more accurately reflect the rule's real impact.

Similarly, while some firms and trade associations may claim in their comment letters that coming into compliance with the rule is prohibitively expensive, when talking to investors they tell a different story, suggesting that compliance costs are manageable and haven't undermined their ability to make record profits. For example, while Raymond James CEO Paul Reilly told analysts in the company's recent quarterly earnings call that, “This is a challenging time for the firm with the DOL rule,” the firm still was able to report record revenue and profit growth.¹¹⁷ Ameriprise also reported that, during this period of change, the firm's “wealth profits surge[d],” with pretax earnings rising 32% and total net income rising 17%.¹¹⁸ And, the value of LPL's stock has nearly doubled over the past 12 months.¹¹⁹ Clearly, the rule's implementation costs are not preventing these companies from delivering enhanced value to their investors. Instead, the rule appears to be benefiting both customers and investors.

Recent surveys also confirm, as they have in the past, that investors and advisers can both be well-served by a fiduciary standard. The third annual Advisor Authority Study, commissioned by Jefferson National, shows that investors and advisers agree on the importance of a fiduciary standard. In releasing the survey, the company acknowledges that the “new DOL Fiduciary Rule has been a catalyst for change across the industry and creates opportunity.”¹²⁰ Like others who have conducted surveys on this topic, they found that investors value the fiduciary standard, already believe their advisers are required to serve their best interest, and are troubled when they learn that this is not the case. They found, for example, that more than half of investors (59%) incorrectly believed that all financial advisers are already required by law to put their clients' best interests first, and nearly half (48%) say they would stop working with their financial adviser if they learned the adviser is not required by law to serve their clients' best interest. A

¹¹⁶ *Id.*

¹¹⁷ Press Release, Raymond James, “Raymond James Financial reports third quarter fiscal 2017 results,” July 26, 2017, <http://bit.ly/2vadMai>.

¹¹⁸ Ameriprise Financial, Inc. 2017 Q2 - Results - Earnings Call Slides, July 26, 2017, <http://bit.ly/2fk48fi>; Diana Britton, *Ameriprise Rolls With DOL Changes, Profits Up 17 Percent*, WEALTH MANAGEMENT, July 26, 2017, <http://bit.ly/2hB6CqE>; Tobias Salinger, *Ameriprise wealth unit absorbs costly fiduciary changes as client assets hit record*, FINANCIAL PLANNING, July 26, 2017, <http://bit.ly/2vaenbW>.

¹¹⁹ See LPLA stock quote, Marketwatch, <http://on.mktw.net/2vDNmOv>.

¹²⁰ Press Release, Jefferson National, “Third Annual Advisor Authority Study Shows Investors and Advisors Aligned on Importance of Fiduciary Standard--Regardless of DOL Fiduciary Rule,” June 27, 2017, <http://prn.to/2valhhr>.

large majority of advisers surveyed (83%) agreed that a fiduciary standard, by aligning investors' belief with reality, can benefit advisers' business and benefit the growth of their practice.

II. All of the pro-investor innovation resulting from the rule proves we don't need new exemptions, and there are considerable risks associated with creating new exemptions.

The Department asks in the RFI whether it can build upon innovations in the financial services industry to create new and more streamlined exemptions and compliance mechanisms as an alternative to the BIC. In our view, the Department has gotten it backwards. The wide array of innovative market developments that have occurred and continue to occur as firms refine their implementation plans clearly demonstrate that firms are capable of coming up with compliance solutions to fit neatly within the BIC and other PTEs. These developments, including those discussed above and in our April comment letter, provide compelling evidence that the rule contains sufficient flexibility to accommodate a variety of approaches to implementation, suited to a range of business models and compensation structures. The most innovative firms who approach compliance with the rule in good faith will not only make the rule work for them and their customers, but thrive under this new paradigm.

It is therefore unnecessary, and it would be a mistake, for the Department to respond to these market developments by inventing a new regulatory approach based on a particular investment product or implementation model. This would put the Department in the untenable position of picking winners and losers before the various implementation options have had a chance to be fully tested under real world conditions and to demonstrate their relative strengths and weaknesses. Moreover, doing so now risks freezing efforts that might lead to other equally good, or even better, approaches to compliance within the existing BIC framework. A better approach, in our view, would be for the Department to highlight through guidance several of the best approaches that have been developed to date, giving firms that are still finalizing their implementation plans several options to consider that carry the assurance of meeting the Department's standards for compliance with the rule. A plan based on clean shares could and should be among them, but it need not be the only option.

The assumption behind the RFI request appears to be that new investment products, in particular "clean shares," could form the basis for a more streamlined exemption as an alternative to relying on the BIC to implement the rule. While we agree that clean shares are among the most positive developments attributable to the rule, the fact remains that these products are as yet largely untested in the broker-dealer space. If brokerage firms are given too much leeway under a new, streamlined exemption -- and, in particular, if any such exemption lacks an effective mechanism to ensure compliance -- there is a risk that even these seemingly benign investment products could be used in a way that evades the protective purposes of the rule and is ineffective at mitigating conflicts in financial advice.

Among the primary issues affecting a clean share approach, the definition of "clean share," is already the subject of considerable debate. While early adopters, led by the Capital Group, developed an approach that is consistent with the "clean" label, there is leeway within the SEC's no action opinion for fund companies to adopt less pristine versions of this new share

class. Furthermore, a lot of questions remain regarding how clean shares might be used. If the Department is intent on developing a product-specific exemption based on clean shares, it should wait until it has additional real world experience regarding how these shares are being used to implement the rule before doing so. Adopting a more measured approach would help to ensure that any such exemption appropriately protects against potential conflicts or other questionable uses of these shares.

In Capital Group's request for interpretive guidance regarding Section 22(d) of the Investment Company Act of 1940, it made clear that the point of its request was to create a share class that could be used (though not exclusively) to comply with the DOL requirement to mitigate conflicts and that "would allow for a brokerage model where funds, ETFs, individual securities and other 'like' investment options could compete on returns and fees."¹²¹ In making its case, Capital Group made clear that a key goal of the proposal was to "put funds, ETFs and individual securities on equal footing on brokerage platforms."¹²² It noted that, "A fund share class that **does not pay any compensation to third parties** looks very much like ETF shares. It should be noted that ETFs **do not typically pay any compensation to third parties** (other than fees paid to its investment adviser) out of fund assets, including rule 12b-1, sub-transfer agency and record-keeping fees." (bold added for emphasis) It added that, "[W]e believe that the activities performed by brokers when using each of these structures is consistent in a way that warrants equivalent treatment for Section 22(d) purposes."¹²³ Capital Group further emphasized this point when it stated, "This type of Clean Share class is more closely aligned with an ETF share and should be treated the same. This would allow funds to exist on the same brokerage platform with ETFs and individual securities."¹²⁴ In short, Capital Group made crystal clear in its request that it contemplated a share class with the same distribution characteristics as these other investments (ETFs, individual securities, and other like securities) and that could therefore be distributed from the same platform for the same compensation.

Capital Group also made clear that its proposed "clean" approach would apply, not only to distribution-related payments from the fund, but also to payments from its underwriter, investment adviser, and affiliates. It stated, "The requested guidance would also apply only to fund shares that did not have any compensation for distribution payable to the broker-dealer firm, further demonstrating that the broker is not associated with the fund in connection with these type of fund shares. The receipt of distribution payments from the fund by the selling broker-dealer or its affiliates or payments from the fund's underwriter, investment adviser or their affiliates to the selling broker-dealer for distribution based on transactions under this model would raise questions about whether the selling broker was acting as a broker solely on an agency basis for the customer."¹²⁵ Capital Group had exactly the right approach.

Unfortunately, the SEC staff's response effectively granting approval of Capital Group's request opened the door to brokers' receipt of revenue sharing payments and potentially other

¹²¹ Letter from Michael J. Downer, Paul F. Roye, and Michael Treissl, Capital Research and Management Co, to the SEC Division of Investment Management, January 6, 2017, <http://bit.ly/2vbYobG>.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

payments from the fund or its adviser.¹²⁶ Specifically, the SEC letter leaves open the possibility that restrictions on “any form of distribution-related payment to the broker” might not encompass revenue sharing, or at least certain uses of revenue sharing. That leaves open the question of whether all forms of clean shares developed in reliance on this staff letter will be so free from conflicts that brokerage models based on those shares would merit a special PTE. As the Department noted in the RIA, “compensation paid one way today might be paid another tomorrow. If new rules or market developments were to reduce load sharing, revenue sharing might increase to take its place, and increased revenue sharing might have larger (and more easily detected) effects on investment results.”¹²⁷

“Revenue sharing can be for a combination of purposes,” says David Hearth, partner at Paul Hastings.¹²⁸ “Often it’s for sales, and so that would be problematic under this letter, but not always. Sometimes revenue sharing is intended for shareholder services,” he added.¹²⁹ If the SEC staff was distinguishing revenue sharing that is distribution-related and revenue sharing that is not distribution-related, it raises a whole host of questions relating to how one properly determines the subjective intent of those involved. Such an approach could allow fund advisers and broker-dealers to disguise payments as non-distribution related, despite their intent and how they actually function. Even more worrisome, if the SEC staff’s position is that revenue sharing is not distribution-related per se, then that suggests the staff’s position is at odds with how the market actually functions. In practice, revenue sharing ensures that the fund has shelf space to be sold from the broker-dealer’s platform. It is paying for access to the platform and to be recommended by advisers, which is inherently distribution-related.¹³⁰ In a world in which third-party payments are the norm, if the adviser refused to make revenue sharing payments to a broker-dealer, its products simply would not be distributed by that broker-dealer.

The SEC staff’s response letter is also silent on whether various other third party payments that can create conflicts of interest would be permissible for funds carrying the “clean share” label, including shareholder servicing fees and sub-transfer agency fees, according to David Sullivan, a partner at Ropes and Gray.¹³¹ Sullivan suggested that 12b-1 service fees and sub-TA fees would seem permissible so long as they are not distribution-related, “but it is not entirely clear,” adds Sullivan.¹³² Diane E. McCarthy, a partner in Drinker Biddle’s Investment Management Group, apparently shares Sullivan’s view, writing, “The guidance does not prohibit

¹²⁶ Response of the Office of Chief Counsel, Division of Investment Management, at FN 8, January 11, 2017, <http://bit.ly/2ihls0z> (“This letter does not address the effect under section 22(d) of a broker receiving revenue sharing payments from the fund’s adviser.”)

¹²⁷ RIA at 177.

¹²⁸ Beagan Wilcox Volz, ‘Clean Shares’ Raise Questions, Operational Hurdles for Shops, IGNITES, January 30, 2017, <http://bit.ly/2hAftc9>.

¹²⁹ *Id.*

¹³⁰ See Letter from Mercer Bullard, Fund Democracy, to DOL, July 21, 2016, <http://bit.ly/2uxfc1f> (describing how revenue sharing can create conflicts of interest, encouraging and rewarding recommendations that are not in the customer’s best interest. Additional compensation or payments provide “greater access to registered representatives,” “additional training, educational presentations, and other product support” [aka travel, lodging, meals, entertainment, and merchandise]...“this greater level of access could influence a registered representative’s product recommendation...”)

¹³¹ Beagan Wilcox Volz, ‘Clean Shares’ Raise Questions, Operational Hurdles for Shops, IGNITES, January 30, 2017, <http://bit.ly/2hAftc9>.

¹³² *Id.*

sub-transfer agency or shareholder servicing payments (together, “Servicing Fees”). However, many fund complexes charge a combined Rule 12b-1 distribution and service fee, and it is not clear how a Rule 12b-1 service fee would be treated under the guidance.”¹³³ Just as with revenue sharing payments, if the distinction is based on whether the payment is “distribution-related,” there is considerable risk that payments that are distribution-related in effect will be disguised as non-distribution-related, rendering such a distinction virtually impossible to enforce consistently and rationally because divining different parties’ intent will itself be virtually impossible. This could add anywhere from 5 to 25 bps of costs for the investor and re-introduce, just in a different form, third-party conflicts that clean shares were intended to eliminate in the first place.

Even if we assume that all clean shares are truly clean, with no third party payments of any sort, they still may not fully cure the potential for conflicts without the full protections of the BIC. For example, an adviser may still be able to increase his compensation, regardless of whether it’s in the client’s best interest, by recommending new transactions. For example, unless free or very low cost exchanges among funds are provided, brokers would have an incentive to encourage trading to generate a new commission. That could encourage them to turn a buy and hold investor into someone who trades with regularity. While FINRA’s churning or quantitative suitability rules, like its other suitability rules, provide a floor against which the most extreme cases can provide investors with recourse, FINRA’s rules are not designed to guard against more subtle cases. For example, a buy and hold investor might be encouraged to trade every couple of years in order to trigger payment of a new commission to the adviser. That trading pattern would be unlikely to trigger an enforcement action for churning, but it would still expose the investor to unnecessary costs that are not in the investor’s best interests.

The fact is that these products remain largely untested in the broker-dealer space. We don’t yet know how clean shares are going to be distributed as the market develops. It’s not clear, for example, how different broker-dealers are going to structure their platforms. Some may charge a one-time onboarding fee and allow for free or very low cost exchanges among funds. Others may charge ongoing payments to cover the cost of servicing the account, and those payments may vary in form and degree. If brokerage firms are given too much leeway under a new, “streamlined” exemption, there is a risk that even these seemingly benign investment products could be used in a way that evades the protective purposes of the rule and is ineffective at mitigating conflicts in financial advice. To protect against that possibility and avoid unintended consequences, use of clean shares and other innovative investment products should be left to develop within the contours of the BIC.

The reality is that compliance with the BIC based on clean shares can, in and of itself, be “streamlined.” Assuming there are no third party payments to create incentives to recommend one fund company or fund over another, the compensation to the broker is reasonable and level, and the broker-dealer doesn’t provide any incentives that encourage and reward recommendations that violate the Impartial Conduct Standards, clean shares should easily and efficiently comply with the BIC without additional changes to the exemption. Because there would be no third party payments and the compensation to the firm and adviser would be level and transparent, the disclosures, data collection, and recordkeeping as well as oversight of

¹³³ Diana E. McCarthy, SEC Approves New Mutual Fund Share Class Sales Arrangements for Brokers, Drinker Biddle, January 19, 2017, <http://bit.ly/2nITj6Q>.

advisers' recommendations to ensure compliance would be simple and straightforward. Without any incentives for the adviser to recommend inferior products, only the best products that are able to compete based on cost and quality are likely to be sold, ultimately benefiting the firm's customers. And, assuming a firm adopted such an approach along these lines, it likely would be exceedingly difficult for an investor to prove a violation of the BIC, providing the firm with comfort that its potential liability is limited.

On the other hand, if clean shares were to get their own exemption, it would be essential for the Department not to simply rely on the SEC interpretation regarding what constitutes a clean share in developing such an exemption. Instead, it would need to build into any such exemption strict limits on all third-party payments needed to justify the "clean" label and to fulfill the rule's purpose of limiting conflicts. Given the lack of clear restrictions on any and all third-party payments in the SEC decision, so-called clean shares could end up loaded with third party payments that create new, and perhaps more opaque, conflicts that influence adviser behavior. For example, if revenue sharing is allowed and incentives are not otherwise mitigated and policed, those payments could be used to fund advisers' trips, encouraging and rewarding recommendations of the preferred product providers that pay higher amounts of revenue sharing. This reinforces our view that, if the Department removes any components of the BIC in fashioning a "streamlined" exemption, it makes it all the more important to ensure that firm and adviser incentives are properly aligned. Even so, without the full protections of the BIC -- including the contract's enforcement mechanism to ensure compliance with and enforcement of the Impartial Conduct Standards and the requirement that firms implement effective anti-conflict policies and procedures to carefully police conflicts -- the Department risks creating a loophole firms can and will exploit.

Moreover, much as we admire clean shares and view them as one of the real, positive developments attributable to the rule, we question the wisdom of granting new exemptions based on specific products. If the Department grants a new exemption too narrowly -- for example, for specific classes of products -- that could unduly favor distributors of those products relative to others. Not only would that put the Department in the inappropriate position of picking winners and losers, it could freeze further innovations that might otherwise be developed in response to the rule. And once the Department starts down this road of granting exemptions for specific classes of products, it likely will be saddled with a never-ending backlog of individual requests from product manufacturers and distributors, seeking their own "streamlined" exemptions.

The hallmark of the BIC is that it was designed to flexibly accommodate a range of business models, compensation structures, and implementation plans. We think that was the prudent approach and one that the Department should preserve. Indeed, the very fact that firms have developed a variety of approaches to compliance confirms the wisdom of DOL's principles-based approach to key features of the rule, such as enforcement mechanisms and anti-conflict policies and procedures. While adjustments can be made in the future depending on how the rule works in practice, now is not the time. In the meantime, the Department can and should monitor compliance and market developments to assess whether the rule is achieving its goals. What it learns based on that real world experience should inform possible future refinements to the rule or the PTEs' scope or conditions.

We understand that, during the transition, firms may value an indication that their approaches to compliance generally satisfy the conditions of the PTEs. We therefore urge the Department to focus on providing additional guidance, based on the positive examples already available in the marketplace, for how the rule can be implemented efficiently and effectively under the existing PTEs. Such an approach would reward the firms that have moved forward in good faith to develop innovative implementation plans and consumer-friendly investment products while providing those that have fallen behind in their implementation plans with greater clarity regarding the variety of acceptable options they have for coming into compliance with the rule. It would also be consistent with the Department's "compliance-first" approach.

III. All of this pro-investor innovation to comply proves the Department got the balance right, particularly the critical components that ensure compliance. The Department can't simply walk away from its analysis and conclusions. If the Department decides to pursue an alternative approach, it must provide a compelling justification for doing so.

The call for a revised approach to compliance with the rule -- either through weakening amendments to the existing rule and PTEs or through development of alternative PTEs -- is based on the false claims about the workability of the rule and false allegations that the Department failed to adequately assess the rule's impact in developing its regulatory approach. The previous discussion provides clear real world evidence disproving claims that the rule is unworkable, overly burdensome, or harmful to retirement savers. A careful review of the record demonstrates that claims that the Department failed to adequately weigh the rule's impact are equally unfounded. On the contrary, the Department has already carefully considered all of the issues that are still being debated today and made thoughtful decisions based on the best available evidence. The Department's own analysis and conclusions are summarized and quoted below:

- The Department's Regulatory Impact Analysis (RIA): The Department based its estimates and analysis in the RIA on reasonable, obtainable scientific, technical, and economic information. The Department strived to present its estimates and analysis in an accurate, clear and unbiased manner. The data, sources, and methods used were cited and described in the RIA and its Technical Appendix, which allowed the regulated community, researchers, and other interested parties to replicate the results of the Department's analysis. The Department quantified and monetized the gains to investors the regulatory action is anticipated to deliver, including economic efficiency gains and transfers from the financial services industry, and qualitatively described the benefits that will be derived in the plan market. The Department quantified and monetized the anticipated costs of the final rule and concluded that the final rule and exemptions' positive social welfare and distributional effects together justified their costs. The Department also assessed potentially effective and reasonably feasible alternatives to the regulation and explained why the regulation was preferable to the identified potential alternatives.¹³⁴

¹³⁴ See RIA at 17-18.

- The Department determined, based on the best available evidence, that existing protections, including relevant securities and insurance regulations, have proven inadequate to prevent adviser conflicts from inflicting excessive losses on investors. In contrast to ERISA and the Tax Code, which impose strict limits on conflicts, existing securities and insurance rules generally do too little to mitigate advisers’ conflicts. Adviser compensation arrangements permissible under existing rules sometimes create strong incentives for advisers to make recommendations that are not in their customers’ best interest. Moreover, existing requirements that recommendations be “suitable” leave some room for advisers to subordinate their customers’ interests to their own.¹³⁵
- While the Department clearly demonstrated an understanding of and respect for the roles of the SEC and other federal and state agencies in the regulation of financial advice provided to retail investors, it also recognized its own unique and critical role as the sole agency responsible for interpreting ERISA as well as the prohibited transaction provisions in the Internal Revenue Code, which specifically apply to IRA investment advice. The Department properly determined that, given its unique role, it was incumbent on the Department to protect IRA investors from harmful adviser conflicts.¹³⁶
- In designing the BIC, the Department was mindful of its statutory mandate. ERISA and the Code are skeptical of the dangers posed by conflicts of interest, and generally prohibit conflicted advice. Before granting exemptive relief, the Department has a statutory obligation to ensure that the exemption is in the interests of plan and IRA investors and protective of their rights. This includes attaching conditions to the PTE that are intended to ensure transparency, impartiality, accountability, and to protect plan participants, beneficiaries, and IRA investors. In order to meet its statutory obligation to make findings here, the Department concluded that firms and advisers that provide retirement investment advice and receive conflicted compensation must adhere to fundamental fiduciary norms and other basic protective conditions that help to ensure that investment recommendations are driven by the interest of the retirement investor, not adviser conflicts. The Department further concluded that, if advisers choose to rely upon conflicted payment structures, they should be prepared to make an enforceable commitment to safeguard retirement investors from biased advice that is not in the investor’s best interest. The conditions of the PTEs were carefully crafted to protect retail investors, including small, participant-directed plans.¹³⁷
- The Department appropriately concluded that the contract requirement of the BIC was critical to its enforceability. Indeed, the word “critical” is used 26 times in the BIC, referring to the contract and its enforceability. For example:
 - “To appropriately offset these conflicts, the Department has determined that the enforceable right to adherence to the Impartial Conduct Standards is a **critical** safeguard with respect to investments in IRAs and non-ERISA plans.”¹³⁸ (bold added for emphasis)

¹³⁵ See RIA at 96.

¹³⁶ See RIA at 106.

¹³⁷ See BIC at 21009, RIA at 22.

¹³⁸ See BIC at 21020.

- “In the Department’s view, these contractual rights serve a **critical** function for IRA owners and participants and beneficiaries of non-ERISA plans.”¹³⁹ (same)
- “The exemption’s enforceability, and the potential for liability, are **critical** to ensuring adherence to the exemption’s stringent standards and protections, notwithstanding the competing pull of the conflicts of interest associated with the covered compensation structures.”¹⁴⁰ (same)
- “When Financial Institutions and Advisers breach their obligations under the exemption and cause losses to Retirement Investors, it is generally **critical** that the investors have a remedy to redress the injury.”¹⁴¹ (same)
- “As described above, the Department has revised the exemption to facilitate implementation and compliance with the exemption, without diluting its core protections, which are **critical** to reducing the harm caused by conflicts of interest in the marketplace for advice.”¹⁴² (same)
- “Making all the Impartial Conduct Standards required contractual promises for dealings with IRAs and other non-ERISA plans creates the potential for contractual liability, incentivizes Financial Institutions to comply, and gives injured Retirement Investors a remedy if those Financial Institutions do not comply. This enforceability is **critical** to the safeguards afforded by the exemption.”¹⁴³ (same)
- “In order to ensure compliance with its broad protective standards and purposes, the exemption gives special attention to the enforceability of its terms by Retirement Investors. When Financial Institutions and Advisers breach their obligations under the exemption and cause losses to Retirement Investors, it is generally **critical** that the investors have a remedy to redress the injury. The existence of enforceable rights and remedies gives Financial Institutions and Advisers a powerful incentive to comply with the exemption’s standards, implement policies and procedures that are more than window-dressing, and carefully police conflicts of interest to ensure that the conflicts of interest do not taint the advice.”¹⁴⁴ (same)
- Even where the Department didn’t use the word “critical,” it clearly demonstrated the essential nature of the contract and its enforcement mechanism, which allowed it to make the necessary findings to issue a PTE. For example:
 - “Thus, for investors in IRAs and plans not covered by Title I of ERISA, the contractual requirement creates a mechanism for investors to enforce their rights and ensures that they will have a remedy for misconduct. In this way, the exemption creates a powerful incentive for Financial Institutions and Advisers alike to oversee and adhere to basic fiduciary standards, without requiring the imposition of unduly rigid and prescriptive rules and conditions.”¹⁴⁵

¹³⁹ See BIC at 21021.

¹⁴⁰ *Id.*

¹⁴¹ See BIC at 21008.

¹⁴² See BIC at 21009.

¹⁴³ See BIC at 21033.

¹⁴⁴ See BIC at 21008.

¹⁴⁵ See BIC at 21021.

- “The contractual commitment provides an administrable means of ensuring fiduciary conduct, eliminating ambiguity about the fiduciary nature of the relationship, and enforcing the exemption’s conditions, thereby assuring compliance. The existence of enforceable rights and remedies gives Financial Institutions and Advisers a powerful incentive to comply with the exemption’s standards, implement effective anti-conflict policies and procedures, and carefully police conflicts of interest. The enforceable contract gives clarity to the fiduciary nature of the undertaking, and ensures that Advisers and Financial Institutions do not subordinate the interests of the Retirement Investor to their own competing financial interests. The contract effectively aligns the interests of Retirement Investor, Advisers, and the Financial Institution, and gives the Retirement Investor the means to redress injury when violations occur.”¹⁴⁶
- “Without a contract, the possible imposition of an excise tax provides an additional, but inadequate, incentive to ensure compliance with the exemption’s standards-based approach. This is particularly true because imposition of the excise tax critically depends on fiduciaries’ self-reporting of violations, rather than independent investigations and litigation by the IRS. In contrast, contract enforcement does not rely on conflicted fiduciaries’ assessment of their own adherence to fiduciary norms or require the creation and expansion of a government enforcement apparatus. The contract provides an administrable way of ensuring adherence to fiduciary standards, broadly applicable to an enormous range of investments and advice relationships.”¹⁴⁷
- “The enforceability of the exemption’s provisions enables the Department to grant exemptive relief based upon broad protective standards...”¹⁴⁸
- “Ensuring that fiduciary investment advisers adhere to the Impartial Conduct Standards and that all Retirement Investors have an effective legal mechanism to enforce the standards are central goals of this regulatory project.”¹⁴⁹
- Similarly, the Department explained the critical importance of requiring firms to have anti-conflict policies and procedures and a supervisory structure to ensure compliance with the Impartial Conduct Standards. For example:
 - “The Financial Institution’s role in supervising individual Advisers and overseeing their adherence to the Impartial Conduct Standards is a **key safeguard** of the exemption. The exemption’s success **critically** depends on the Financial Institution’s careful implementation of anti-conflict policies and procedures, avoidance of Adviser incentives to violate the Impartial Conduct Standards, and broad oversight of Advisers.”¹⁵⁰ (bold added for emphasis)
 - “The anti-conflict policies and procedures will safeguard the interests of Retirement Investors by causing Financial Institutions to consider the conflicts of interest affecting the provision of advice to Retirement Investors and to take action to mitigate the impact of such conflicts....Mitigating conflicts of interest by

¹⁴⁶ See BIC at 21022.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ See BIC at 21033.

¹⁵⁰ See BIC at 21025.

requiring greater alignment of the interests of the Adviser and Financial Institution, and the Retirement Investor, **is necessary for the Department to make the findings** under ERISA section 408(a) and Code section 4975(c)(2) that the exemption is in the interests of, and protective of, Retirement Investors.”¹⁵¹ (same)

- “The Department concurs with commenters who view the policies and procedures requirement as an important safeguard for Retirement Investors, and as a **necessary condition for the Department to make the findings** under ERISA section 408(a) and Code section 4975(c)(2) that the exemption is in the interests of, and protective of, Retirement Investors. This provision will require Financial Institutions to take concrete and specific steps to ensure that its individual Advisers adhere to the Impartial Conduct Standards, and in particular, forego compensation practices and employment incentives (quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation or other actions or incentives) that are intended or would reasonably be expected to cause Advisers to make recommendations that are not in the Best Interest of the Retirement Investor. Strong policies and procedures reduce the temptation (conscious or unconscious) to violate the Best Interest standard in the first place by ensuring that the Advisers’ incentives are appropriately aligned with the interests of the customers they serve, and by ensuring appropriate monitoring and supervision of individual Advisers’ conduct. While the Department views the Best Interest standard as **critical** to the protections of the exemption, the policies and procedures requirement is **equally critical** as a means of supporting Best Interest advice and protecting Retirement Investors from having to enforce the Best Interest standard after the advice has already been rendered and the damage done.”¹⁵² (same)
- “The policies and procedures requirement is a **critical** part of the exemption’s protections. The risk of liability associated with a non-exempt prohibited transaction gives Financial Institutions a strong incentive to design protective policies and procedures in a way that is consistent with the purposes and requirements of this exemption.”¹⁵³ (same)
- “The warranty, and potential liability associated with that warranty, gives Financial Institutions both the obligation and the incentive to tamp down harmful conflicts of interest and protect Retirement Investors from misaligned incentives that encourage Advisers to violate the Best Interest standard and other fiduciary obligations and ensures that there is a means to redress the failure to do so.”¹⁵⁴
- “Most important, however, the enforceable obligation to maintain and comply with the policies and procedures as set forth herein, and to make relevant disclosures of the policies and procedures and of Material Conflicts of Interest, should create a powerful incentive for Financial Institutions to carefully police conflicts of interest, reducing the need for litigation in the first place.”¹⁵⁵

¹⁵¹ See BIC at 21034.

¹⁵² See BIC at 21034-21035.

¹⁵³ See BIC at 21041.

¹⁵⁴ See BIC at 21041.

¹⁵⁵ See BIC at 21041.

- The Department scrupulously balanced the goals of enhancing safeguards for savers while ensuring firms have sufficient flexibility and discretion to determine how best to meet the rule’s conditions. The conditions of the BIC were “carefully calibrated” to permit a wide variety of compensation structures, while protecting retirement investors’ interest in receiving sound advice on vitally important investments. Responsive to public comments, the Department made significant accommodations to ease implementation concerns and make the exemption less burdensome and costly for firms, including eliminating some of the proposed conditions that were not critical to the exemption’s protective purposes, while still maintaining the protective nature of the exemption.¹⁵⁶
- According to the Department’s analysis, the quantified investor gains more than outweigh the compliance costs to industry. And, the RIA’s estimated compliance costs were based on estimates provided by the major securities industry trade groups.¹⁵⁷ These organizations had an interest in over-estimating the costs their members expected to incur in order to show the costs of the rule exceeded its benefits. In addition, according to the Department’s analysis, these groups’ cost estimates were based on a “relatively static view” of the market and compliance costs, which were belied by the innovation that was already underway in the market. In making these arguments, industry trade associations badly under-estimated their members’ ability to innovate and adapt in creative ways that benefit their own businesses and their customers. Moreover, the Department’s quantified investor gains also dramatically understate the total gains (quantified and unquantified) expected under the final rule and exemptions, albeit by an uncertain amount.¹⁵⁸ We also discussed this extensively in our April comment letter.¹⁵⁹
- The Department considered a large variety of important regulatory alternatives in finalizing the rule and new and amended PTEs, including several identified by commenters. These included:
 - Populating asset allocation models and interactive investment materials with designated investment alternatives;¹⁶⁰
 - Extending the counterparty exception to include smaller plans, participants and beneficiaries;¹⁶¹
 - Treating appraisals, fairness opinions, or similar statements as fiduciary investment advice;¹⁶²
 - Basing exemptive relief on disclosure alone;¹⁶³
 - Not providing a Best Interest Contract Exemption;¹⁶⁴
 - Requiring ERISA-covered plans to enter into the Best Interest Contract;¹⁶⁵

¹⁵⁶ See BIC at 21009, RIA at 70-71, 273-279.

¹⁵⁷ See RIA at 306.

¹⁵⁸ See RIA at 303-305.

¹⁵⁹ See CFA April 2017 letter at 20-24, 84-91.

¹⁶⁰ See RIA at 263-264.

¹⁶¹ See RIA at 264-267, 295.

¹⁶² See RIA at 267-268.

¹⁶³ See RIA at 268-271.

¹⁶⁴ See RIA at 271-272.

¹⁶⁵ See RIA at 272-273.

- Leaving the Best Interest Contract Exemption unchanged from the 2015 proposal;¹⁶⁶
- Altering the treatment of arbitration and class action waivers under the Best Interest Contract Exemption;¹⁶⁷
- Considering whether the Best Interest Contract Exemption should be limited to specific assets;¹⁶⁸
- Allowing fixed-indexed annuities to be covered under PTE 84-24;¹⁶⁹
- Waiting for SEC Action;¹⁷⁰
- Adopting alternative “Best Interest” Conduct Standard formulations;¹⁷¹
- Issuing a Streamlined, “Low-Cost Safe Harbor” PTE;¹⁷²
- Delaying the applicability date of the Rule and PTEs;¹⁷³ and
- Providing streamlined conditions in the Best Interest Contract Exemption for “level-fee fiduciaries.”¹⁷⁴

In each case, the Department concluded that the qualitative and, where possible, quantitative assessments of these alternatives suggested that none would protect plan and IRA investors as effectively as the Department’s chosen alternatives.¹⁷⁵

- In particular, the Department already considered and rejected alternative “Best Interest” conduct standard formulations, including one that did not include a meaningful enforcement mechanism. The Department carefully explained the rationale behind its determination that such an approach would not adequately protect retirement investors.
 - “A number of commenters suggested they could abide by a best interest standard but at the same time objected to the enforcement mechanisms that the Department proposed, particularly in the IRA market. As stated in the Section 7.12 above, the Department does not believe that these alternatives will adequately protect retirement investors, particularly those in the IRA market, from harmful conflicts of interest, or that financial institutions and their advisers will be properly incentivized to comply with a best interest standard, if there is no enforceable mechanism for retirement investors to enforce adherence to that standard or to obtain redress when they’ve been injured by violation of the standards. From the perspective of retirement investors, **a right without a remedy is scarcely a right at all.**”¹⁷⁶ (bold added for emphasis)
 - “As a general matter, the Department adopted its best interest formulation because none of the suggested alternative approaches incorporated all the components that **the Department views as essential to making the required findings for granting an exemption**, or provided alternatives that included conditions that

¹⁶⁶ See RIA at 273-279.

¹⁶⁷ See RIA at 279-281.

¹⁶⁸ See RIA at 281-282.

¹⁶⁹ See RIA at 282-286.

¹⁷⁰ See RIA at 286-288.

¹⁷¹ See RIA at 288-290.

¹⁷² See RIA at 290-291.

¹⁷³ See RIA at 291-294.

¹⁷⁴ See RIA at 294-296.

¹⁷⁵ See RIA at 296.

¹⁷⁶ See RIA at 289.

would appropriately safeguard the interests of retirement investors in light of the exemption's broad relief from the conflicts of interest and self-dealing prohibitions under ERISA and the Code. **The Department remains convinced of the critical importance of the core requirements of the exemption, including an up-front commitment to act as a fiduciary, enforceable adherence to the impartial conduct standards, the adoption of policies and procedures reasonably designed to assure compliance with the impartial conduct standards, a prohibition on incentives to violate the best interest standard, and fair disclosure of fees, conflicts of interest, and material conflicts of interest.** In addition, in contrast to many of the proposed alternatives, the Department's approach generally prevents firms and advisers from contracting out of these basic obligations or waiving them through disclosure. As discussed above and in the preambles to the Rule and Best Interest Contract Exemption, the Department has concluded that the ability to disclaim these obligations would result in a large loophole that would largely negate the consumer-protection purposes of this regulatory initiative."¹⁷⁷ (same)

The Department can't simply walk away from its analysis and the conclusions it reached based on a careful review of the record. To do so would be arbitrary and capricious. If the Department decides to pursue an alternative approach, it must provide a compelling explanation as to why that proposed approach will be effective at ensuring compliance with the Impartial Conduct Standards and will provide an administrable means to redress injury when violations of the Impartial Conduct Standards occur. More broadly, the Department must provide a compelling justification as to why an alternative approach ensures sufficient transparency, impartiality, accountability, and therefore is in the interests of plan participants, beneficiaries, and IRA investors and protective of their rights. Failing to do so would be arbitrary and capricious and would subject the Department to considerable litigation risk.

IV. We strongly disagree with the Department's abandoning its defense of the BIC's and Principal Transactions Exemption's condition on the disuse of class action waivers. However, given the Department's new position, the threat of increased litigation is no longer a subject of debate.

We strongly disagree with the Department's sudden and unwarranted decision in the 5th Circuit and Minnesota legal challenges to abandon its defense of the BIC provision regarding disuse of class action waivers. The Department's previous position, that the BIC's and Principal Transactions Exemption's condition on the disuse of class action waivers was fully consistent with the Federal Arbitration Act (FAA), was correct. As the Department previously explained, conditioning a PTE on the preservation of an investor's right to participate in a class action does not interfere with the purposes of the FAA. The class action condition "does not purport to render invalid, revocable, or unenforceable an arbitration provision in a contract between a financial institution and a retirement investor. Nor does it prohibit such waivers. Both Institutions and advisers remain free to invoke and enforce arbitration provisions, including provisions that waive or qualify the right to bring a class action in court. Instead, such a contract simply does not meet the conditions for relief from the prohibited transaction provisions of

¹⁷⁷ See RIA at 288-290.

ERISA and the Code.”¹⁷⁸ The District Court in Texas agreed with the Department’s analysis, concluding that “Plaintiffs’ [Chamber et al’s] argument is without merit, as the exemptions’ contract requirements do not render arbitration agreements between a financial institution and investor invalid, revocable, or unenforceable. The exemptions, therefore, do not violate the FAA’s primary purpose, which is to ‘ensure that private arbitration agreements are enforced according to their terms.’ ”¹⁷⁹

It is important to note, however, that as a result of the Department’s new position that the BIC’s and Principal Transactions Exemption’s provisions regarding disuse of class action waivers are inconsistent with the FAA, rule opponents’ already overblown claims that the rule is likely to lead to a flood of litigation have been rendered totally baseless. Instead, firms will be allowed to require their customers to arbitrate any claims on an individualized basis and waive their right to participate in class actions. Thus, the Department cannot reasonably rely on liability costs or the threat of market disruptions related to liability risk to justify revisions to the rule or adoption of new PTEs to substitute for compliance with the BIC.

Rule opponents have gone to great lengths to blame what they see as the rule’s harmful impact on the threat of frivolous or outsized class action litigation. As we have discussed at length elsewhere, we remain convinced both that the threat of litigation and the associated liability costs have been greatly exaggerated.¹⁸⁰ Regardless of the merits of their arguments, however, industry rule opponents have consistently identified the threat of class action liability as chief among their concerns and the primary reason why investors’ costs would, in their view, increase under the rule and access to advice for small savers would decrease. The Presidential Memorandum raised the issue of an increase in litigation, and rule opponents have been quick to seize on the issue to justify their calls for changes to weaken the rule. For example:

- According to SIFMA’s April comment on the reexamination: “[T]he BIC exemption provides an open invitation (a veritable ‘hook,’ as described by Barbara Roper of the Consumer Federation of America) to private plaintiffs’ lawyers to take advantage of the retirement system by bringing lawsuits in an effort to drive defendants to settle, while exacting large legal fees, generally more than a third of the total recovery, without proving any violation and without changing or improving the offerings available to the retirement investor. This skewed incentive for class action plaintiff’s lawyers will certainly benefit those lawyers, while the individual consumers will not be better served.”¹⁸¹
- According to ACLI’s April comment: “Many in the financial services industry have expressed and continue to express grave concerns that the conditions of the BIC Exemption, when applied to a transaction-based distribution model, are so challenging to comply with and carry with them so great an exposure to class action claims, as to

¹⁷⁸ BIC at 21044; Defendant’s Memorandum in Support of Defendants’ Consolidated Opposition to Plaintiffs’ Motion for Summary Judgment and Defendants’ Consolidated Cross-Motion for Summary Judgment, at 92-94. Civil Action No. 3:16-cv- 1476-M.

¹⁷⁹ Memorandum Opinion and Order at 79, citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011).

¹⁸⁰ See CFA July 2015 letter at 65-69; see also CFA April 2017 letter at 91-101.

¹⁸¹ Letter from Lisa J. Bleier, SIFMA, to DOL, April 17, 2017, at 14, <http://bit.ly/2uxjPIL>.

effectively albeit indirectly arrive at the same place.”¹⁸² (inappropriately and inaccurately analogizing to the UK’s Retail Distribution Review, which banned commissions)

ACLI continued: “Class action litigation brought against ERISA fiduciaries will undoubtedly increase, given that the Department deliberately promotes class action litigation as a BICE enforcement tool.”

...

“It is reasonable to expect that, in an attempt to quantify the unknown liability risks resulting from the Department’s decision to enforce the BICE through the private plaintiffs’ bar and class action litigation, there will be resulting upward pressure on product pricing.”¹⁸³

- According to FSI’s comment: “[I]t is unmistakable that there will be a significant increase in both class action and other private litigation....the standards adapted by DOL will invite class action lawsuits....Ambiguities inherent in the Rule and the launching of a brand-new cause of action will create an environment ripe for further class action abuse....Enforcement through class action litigation frequently has negative consequences for retirement investors. The problem of class action settlements where the attorneys make millions, yet each of the class members receives a few dollars, if that, is well-documented.”¹⁸⁴

To prove its case, FSI commissioned Oxford Economics to conduct a “study” based on confidential interviews with FSI members detailing their perceptions of the rule’s effects. According to the study, “the greatest concern of broker-dealers concerning the Fiduciary Rule is the potential costs of litigation...The most pervasive concern expressed during all interviews conducted was that the Fiduciary Rule, if implemented, would invite class-action lawsuits and the resulting increase of costs for plan participants.”¹⁸⁵

- The Chamber stated in its comment that this is “a new regulatory regime that imposes massive new class action liability risks...” The Chamber continued, claiming that, “[C]ompanies are especially concerned about the exposure to new class action lawsuits under the BIC Exemption. The perceived liability risk generated by the Fiduciary Rule is especially harmful to the interests of smaller savers, whose accounts are too small to justify the costly litigation risks and ongoing compliance costs needed to mitigate litigation risks.”¹⁸⁶
- In an NPR story, top lobbyist for the FSR, Francis Creighton, said that the rule will make firms vulnerable to too many lawsuits and the cost of dealing with them will get passed

¹⁸² Letter from James H. Szostek and Howard M. Bard, ACLI, to the DOL, April 17, 2017, <http://bit.ly/2uelhdi>.

¹⁸³ *Id.*

¹⁸⁴ Letter from David T. Bellaire, FSI, to the DOL, April 17, 2017, <http://bit.ly/2ugcZpv>.

¹⁸⁵ *Id.*

¹⁸⁶ Letter from Randel K. Johnson and David Hirschmann, Chamber of Commerce, to the DOL, April 17, 2017, <http://bit.ly/2vchYEG>.

on to their customers. “The problem with litigation is a court can essentially have unlimited damages,” Creighton said. “We don’t want things enforced by trial lawyers.”¹⁸⁷

- According to ICI’s President and CEO Paul Schott Stevens, investment providers will be “under the constant threat of strike-suit lawyers and class-action litigation.”¹⁸⁸
- SEC Commissioner Michael Piwowar has joined in on this attack, stating, “To me, that rule, it [is] about one thing...enabling trial lawyers to increase profits.”¹⁸⁹
- Many rule opponents have seized on a study authored by Michael Wong of Morningstar purportedly showing increased “costs” to firms as a result of class action liability, and ignoring his discussion of both the beneficial effects of potential liability in encouraging compliance and the affordability of the associated costs. As we discussed in our April comment, providing investors with the ability to restore their money when the Bernie Madoffs of the world steal from them should not be considered a “cost” of the rule, but rather an appropriate transfer.¹⁹⁰

While we believe the dire predictions above to be grossly exaggerated, the rule opponents’ concerns about excessive litigation have now been put to rest. By abandoning its defense of the BIC and Principal Transactions Exemption provisions regarding disuse of class action waivers, the Department has relieved the industry of their primary concern about the rule. The devastating consequences they predicted would flow from this “flood of litigation” can no longer reasonably be taken into account either in the Department’s reconsideration of the rule more generally or in its immediate consideration of alternatives for compliance.

It is inevitable that many instance in which retirement savers are harmed in real ways by advisers and their firms will go unenforced as a result of this change. As the Department previously acknowledged, “Often the monetary effect on a particular investor is too small to justify an individual claim, even in arbitration.”¹⁹¹ Without the exposure to class claims, firms won’t have as powerful incentive to carefully supervise individual advisers and ensure adherence to the Impartial Conduct Standards. Perversely, firms may have renewed incentives to design compensation structures that result in the overcharging of large segments of their client base by small amounts, knowing that they will be largely immune from accountability in the absence of class actions as an available enforcement mechanism.

It’s simply not economical for most investors to bring individual arbitration claims for a few hundred or even a few thousand dollars. Where investors do decide to bring very small claims in arbitration, they are likely to find it extremely difficult, if not impossible, to prove that a violation occurred. This is because the discovery rules that apply in court as well as to

¹⁸⁷ Chris Arnold, *Trump Moving To Delay Rule That Protects Workers From Bad Financial Advice*, NPR, February 17, 2017, <http://n.pr/2lVwtb5>.

¹⁸⁸ Paul Schott Stevens, *Welcome and Opening Remarks: Assessing the New DOL Fiduciary Rule: Policy and Practical Challenges*, May 10, 2016, <http://bit.ly/2vDnd2H>.

¹⁸⁹ Acting Chairman Michael S. Piwowar, *Remarks at the “SEC Speaks” Conference 2017: “Remembering the Forgotten Investor,”* February 24, 2017, <http://bit.ly/2lNnc7d>.

¹⁹⁰ See CFA April 2017 letter at 95-99.

¹⁹¹ BIC at 21043.

traditional FINRA claims do not apply to FINRA’s Simplified Arbitration process, which covers claims for \$50,000 or less.¹⁹² As a result, the investor likely would not be able to receive discovery of the adviser’s compensation related to the claim, for example, or the firm’s incentive programs that may have influenced the adviser’s investment recommendations. But while \$50,000 may seem like a small claim to the firms that force their customers to arbitrate disputes in an industry-run forum, it represents a sizeable sum to millions of “small savers” affected by the rule.

This is an unfortunate result of the Department’s new litigation position. However, having handed rule opponents this victory, the Department cannot reasonably point to rule opponents’ claims regarding the threat of excessive or frivolous litigation in its reconsideration of the rule. The potential legitimate claims that will no longer be brought as the result of this policy change, to the industry’s benefit, will dwarf the individual arbitrations that are brought. And, the only individual arbitrations that will be brought will be for significant losses. As a result, small savers are disproportionately likely to be denied redress for any harms they suffer as a result of rule violations.

V. The Department cannot reasonably base a PTE on an “enhanced” SEC standard that does not yet exist or on existing securities and insurance regulations.

Recently, SEC Chairman Jay Clayton restarted that agency’s long-stalled efforts to update the regulations that apply to broker-dealers who offer, or hold themselves out as offering, investment advisory services. Far from advancing a policy proposal, however, Chairman Clayton has begun again at square one, asking a series of questions that the SEC has been considering for more than a decade without reaching consensus on a regulatory response. Meanwhile, the National Association of Insurance Commissioners has directed its Annuity Suitability Working Group to consider updating the suitability standard governing insurance annuity sales to include a “best interest” standard. Industry rule opponents have made no secret of their hopes to use these initiatives to provide an end-run around the BIC exemption. They have advanced proposals before the SEC and the NAIC that purport to apply a best interest standard to brokers and insurance producers, but without any obligation to avoid or even appropriately manage conflicts of interest, and without any accountability for actually seeking to identify the best available investment options for their customers.¹⁹³

With these activities as a backdrop, the RFI asks whether a streamlined exemption could be developed for “advisers that comply with or are subject to securities law standards” if the SEC or other regulators were to adopt updated standards of conduct applicable to the provision of investment advice to retail investors. It is frankly disturbing that the Department would even raise this possibility at this time, before the SEC or NAIC have demonstrated that they can and will adopt an enhanced standard and without any means to assess whether such a standard, if

¹⁹² “[T]he Document Production Lists in the Discovery Guide and described in Rule 12506 will not apply to these arbitrations. The arbitrator may, in his or her discretion, choose to use relevant portions of the Document Production Lists in a manner consistent with the expedited nature of simplified proceedings.” FINRA, Simplified Arbitrations, <http://bit.ly/2wkxa2A> (last visited August 6, 2017).

¹⁹³ See Letter from Kevin M. Carroll, SIFMA, to the Securities and Exchange Commission, July 21, 2017, <http://bit.ly/2uRtdUA>; see also ACLI framework for a uniform standard of care, to the NAIC, <http://bit.ly/2vEVXBC>.

adopted, would be sufficiently protective of the interests and rights of plan participants, beneficiaries, and IRA owners to qualify as an adequate basis for providing a PTE. The Department cannot reasonably rely on a non-existent standard as the basis for a PTE.

Even more disturbing is the RFI's suggestion that the existing regulatory regime for IRAs might provide consumer protections that could serve as a basis for additional relief from the prohibited transaction rules. As we discussed in some detail in our original comment letter on the Department's 2015 rule proposal,¹⁹⁴ neither existing securities regulation nor existing insurance regulation adequately protects investors from the harmful impact of conflicted advice. The Department concurred with that assessment in its RIA.¹⁹⁵ On the contrary, these regulatory regimes permit the conflicted advice by transaction-based advisers that is the target of the conflict of interest rule. In the RIA, the Department extensively documented the very real financial harm that retirement investors have suffered as a result of those regulatory regimes' inadequate protections. For the Department to turn around now and adopt an approach that relies either on an SEC or NAIC rule that does not yet exist or on existing securities or insurance regulation as the basis for a PTE would be arbitrary and capricious and would subject the Department to significant litigation risk.

The suggestion that the Department should defer to SEC leadership on this issue is based on a false narrative. This narrative incorrectly attributes to the SEC greater expertise with regard to the standard of conduct that should apply to investment advice. But the SEC's expertise is limited to advice about securities, while DOL's authority extends to the full range of investments that might be recommended to retirement plan and IRA investors. Nor does the SEC have any expertise with regard to the heightened fiduciary standard Congress applied to investment advice to retirement accounts. This preference for SEC leadership ignores clear congressional intent to set a higher standard of protection for retirement accounts than is provided under either securities or insurance regulations for non-retirement accounts. It also ignores the extent to which the Department has already consulted with the SEC and FINRA and incorporated key securities law principles in the BIC.

Finally, the suggestion that DOL should defer to the SEC also ignores the SEC's long record of inaction in addressing the very issues the DOL rule is intended to address -- the ability of brokers to avoid a fiduciary obligation under the securities laws even when offering services that investors clearly and reasonably perceive and rely on as fiduciary investment advice, and the harmful impact that conflicts of interest have on recommendations by brokers to their retail customers. While we have no reason to doubt the sincerity of Chairman Clayton's commitment to finally bring this issue to resolution, it is a commitment that has been shared by every SEC chair beginning with Christopher Cox, chair of the SEC from 2005-2009. Despite years of study and repeated assurances that an updated standard is just around the corner, the Commission's only concrete actions in recent decades have made the problem worse, not better, by expanding

¹⁹⁴ See CFA July 2015 letter at 8-21.

¹⁹⁵ RIA at 96, stating, "Existing protections, including relevant securities and insurance regulations, have proven inadequate to prevent adviser conflicts from inflicting excessive losses on investors. Such existing rules generally do too little to mitigate advisers' conflicts. Adviser compensation arrangements permissible under existing rules sometimes create strong incentives for advisers to make recommendations that are not in their customers' best interest. Moreover, existing requirements that recommendations be 'suitable' leave some room for advisers to subordinate their customers' interests to their own."

the ability of brokers to hold themselves out as advisers without being regulated accordingly. Given this record, we and other supporters of a strong fiduciary standard for all investment advice have concluded that investors would be best served if the SEC were to adopt a standard for investment advice under the securities laws that is modeled on the strong and effective DOL rule, rather than the other way around.

A. Congress intentionally set a higher standard of conduct for investment advice to retirement accounts than it did for non-retirement accounts.

Looking to securities laws to set the standard of conduct for investment advice to IRA investors ignores the fact that Congress clearly intended a higher standard of conduct to apply for retirement accounts than is afforded by securities regulations. This reflects both the special purpose to which those accounts are directed -- funding a secure and independent retirement -- and the fact that these accounts receive tax advantages subsidized by American taxpayers. As the Department argued persuasively in the RIA, “IRAs warrant special protections in addition to those applicable to other retail accounts because of their importance to retirement security, their preferential tax treatment, and IRA investors’ vulnerability to abuse. Congress recognized this when, in 1974, it amended the IRC to give fiduciary status to advice on the investment of IRA assets under the IRC’s new prohibited transactions provisions.”¹⁹⁶ We concur that “the public interest in tax-subsidized employee benefit plans and IRAs is far greater than for securities investments in general. Investment regulation takes on greater importance in the context of retirement benefits, where losses resulting from misconduct have greater adverse individual and societal consequences than losses associated with securities investments generally.”¹⁹⁷

It was for precisely this reason that Congress intentionally set a higher standard for advice under ERISA and the Tax Code -- a “sole interest” standard that stresses the strict avoidance of conflicts -- than the approach adopted under the Investment Advisers Act, which is based primarily on the disclosure and appropriate management of conflicts. Similarly, it is presumably for the same reason that the executive branch has long looked to the Department of Labor, rather than the SEC, to set the prohibited transaction rules under the Tax Code for IRAs.¹⁹⁸ As the Department noted in the RIA, “When Congress enacted ERISA, it provided that all investment advisers to plan and IRA investors would be subject to the ERISA and/or [Internal Revenue Code] fiduciary regime. Importantly, compared with securities laws, ERISA and the IRC are generally less tolerant of fiduciary conflicts of interest, and in that respect provide a higher level of protection to plan participants and IRA investors, reflecting the importance of plans and IRAs to retirement security, and the tax subsidies they enjoy.”¹⁹⁹ Further, “the IRC

¹⁹⁶ RIA at 106.

¹⁹⁷ Joint letter from Fund Democracy, CFA, AARP, AFR, and Public Citizen’s Congress Watch, to OMB, October 18, 2013, <http://bit.ly/2fjjaSZ>.

¹⁹⁸ Executive Order 12108, also known as Reorganization Plan No. 4 of 1978, delegates responsibility for regulations, rulings, opinions, and exemptions under section 4975 of the Tax Code. *See* Reorganization Plan No. 4 § 102. Congress ratified the plan in 1984. *See* Pub. L. No. 98-532, 98 Stat. 2705 (codified at 5 U.S.C. App. 1, 29 U.S.C. § 1001 note). That delegation of authority went unchallenged for decades until industry rule opponents began objections in the context of this rulemaking. The belated nature of their objections suggests that their concerns had less to do with the legitimacy of the Department’s authority and more to do with how the Department has chosen to exercise that authority in this particular case.

¹⁹⁹ RIA at 287.

prohibited transactions provisions, as enacted by Congress as part of ERISA in 1974, specifically apply to IRA investment advice, and the Department is solely responsible for interpreting these provisions.”²⁰⁰

In light of this difference in mission, it is inappropriate to expect the Department to conform its regulations to the securities laws.²⁰¹ This would be true, even if the SEC had dealt effectively with the issues addressed in the DOL rule’s revised definition of fiduciary investment advice and accompanying PTEs. After all, there is a considerable risk in developing a PTE based on regulations over which the Department has no authority regarding how they are interpreted and enforced. This is particularly troubling in the context of the RFI’s suggestion that such an exemption might apply to anyone who is “subject to” an enhanced SEC standard, regardless of whether they were actually in compliance. Under such an approach, violations of the SEC standard would not constitute violations of the PTE, leaving the Department powerless to ensure that retirement savers are adequately protected. Another risk of relying on securities regulations for this purpose is that doing so could have the effect of freezing those regulations in place, undermining efforts by securities regulators to ensure that their rules and requirements keep pace with changing market conditions. The alternative is just as problematic, having standards for compliance with Department rules change and evolve based on the actions of other regulators over whom the Department may have little influence and less control. To adopt such an approach would constitute a reckless abandonment of the Department’s authority and responsibility.

B. The SEC has failed to adopt appropriate standards to protect investors from the harmful impact of conflicted investment advice.

For the above reasons, there would be no reasonable basis for relying on compliance with an SEC rule to satisfy the PTEs under ERISA and the Tax Code, even if an effective SEC standard existed that one could point to as providing an appropriate regulatory approach. But no such standard exists. Instead, the SEC continues to struggle with issues the DOL has already effectively addressed in its revised definition of fiduciary investment advice and its PTEs governing conflicted advice. First, just as the five-part test in the previous regulatory definition of fiduciary investment advice made it all too easy for transaction-based advisers, such as brokers and insurance agents, to avoid their fiduciary obligations when advising retirement accounts, brokers’ “solely incidental to” exception from the Investment Advisers Act has been interpreted so loosely by the SEC that it has enabled broker-dealers virtually unlimited ability to identify themselves as advisers, and market their services accordingly, without being held to the fiduciary standard appropriate to that role.

Nor has the SEC updated its approach to dealing with conflicts of interest to address identified problems that put investors at risk. It has been seven years, for example, since Congress directed the SEC to examine conflicts of interest in the broker-dealer and investment adviser business models and authorized the agency to limit or ban practices that create

²⁰⁰ *Id.*

²⁰¹ It would be even less appropriate for the Department to rely on insurance regulations to provide an alternative to compliance with the BIC for insurance producers. Whereas securities laws at least have a framework for the regulation of investment advice, insurance recommendations are treated as simply sales recommendations under insurance regulations, with nothing approaching even the weak, disclosure-based fiduciary standard applied under the securities laws as enforced by the SEC.

unacceptable risks of investor harm.²⁰² But the SEC has conducted no such examination, nor has it taken even the most basic action to address the toxic web of financial incentives that encourage and reward advice based on brokers' financial interests rather than their customers' best interests. The SEC has failed to act despite mounting evidence that the disclosure and management approach to conflicts that it has adopted under the Advisers Act is inadequate outside the context of fairly transparent and straightforward conflicts associated with a fee-based wealth management business model. Such an approach cannot be expected to adequately address the conflicts that arise under the broker-dealer business model, which are both less transparent and far more complex.

A recent SEC enforcement action perfectly illustrates the inadequacy of this disclosure-based approach for any but the most basic conflicts. In December of 2015, the SEC settled an enforcement action against J.P. Morgan Chase & Co. for failing to provide adequate disclosures to customers regarding conflicts of interest in its advisory business.²⁰³ The settlement, in which J.P. Morgan acknowledged wrongdoing, resolved allegations that the firm's advisers were recommending proprietary mutual funds and hedge funds and, in some cases, higher cost share classes, when options were available that better suited customers' needs. The *New York Times* has been reporting for years that J.P. Morgan advisers complained that they were under heavy pressure from the firm to push the higher cost products.²⁰⁴ The *Times* quoted one former adviser as saying: "I was selling JPMorgan funds that often had weak performance records, and I was doing it for no other reason than to enrich the firm ... I couldn't call myself objective."

While J.P. Morgan ended up paying more than \$300 million to the SEC and CFTC to settle the case, all the firm had to do to come into compliance with their fiduciary obligations under the Advisers Act was improve their disclosures. In other words, the SEC did not object to J.P. Morgan's pressuring advisers to recommend proprietary and higher cost funds that weren't in clients' best interests, as long as they disclosed those conflicts to customers in their ADV Form. J.P. Morgan has since updated its ADV Form to reflect these practices.²⁰⁵ Six pages into J.P. Morgan Investment Management's discussion of conflicts of interest in its ADV Form, and 60 pages into the 139-page document, it finally gets around to discussing, in dense and legalistic terms, the particular conflicts associated with recommendations or allocations of client assets to JP Morgan affiliated funds. While the disclosures provided might be meaningful to a securities attorney, we question whether anyone who reviewed the document could reasonably conclude that the average investor had received any significant new protections, as a result of the SEC's action, against the harmful impact of practices that encourage and reward advice that is not in customers' best interests.

²⁰² Section 913(1)(2) of the Dodd-Frank Wall Street Reform and Consumer Protection Act directs the SEC to "examine and, where appropriate, promulgate rules prohibiting or restricting certain sales practices, conflicts of interest, and compensation schemes for brokers, dealers, and investment advisers that the Commission deems contrary to the public interest and the protection of investors."

²⁰³ Press Release, Securities and Exchange Commission, "J.P. Morgan to Pay \$267 Million for Disclosure Failures," December 18, 2015, <http://bit.ly/1PKkkjO>.

²⁰⁴ Susanne Craig and Jessica Silver-Greenberg, *Former Brokers Say JPMorgan Favored Selling Brank's Own Funds Over Others*, NEW YORK TIMES DEALBOOK, July 2, 2012, <http://nyti.ms/2hAnjTl>.

²⁰⁵ J.P. Morgan Investment Management Inc., Form ADV Part 2A Firm Brochure, June 30, 2017, <http://mgstn.ly/2wxQEA6>.

The SEC itself has found, in one study after another, that disclosure alone simply isn't adequate to protect investors from the harmful impact of those conflicts.

- In 2005, for example, the SEC commissioned Siegel & Gale, LLC and Gelb Consulting Group, Inc. to conduct focus group testing on a proposed disclosure intended to alert investors to differences between fee-based brokerage accounts and advisory accounts. Even after reading the proposed disclosure, however, investors remained “confused as to the differences between accounts and the implications of those differences to their investment choices.”²⁰⁶ Based on its findings, the Commission abandoned its efforts to develop a disclosure solution and commissioned the RAND Corporation to conduct a study that would lay the groundwork for future rulemaking.
- Among the findings of the RAND Study was that investors not only fail to understand the differences between broker-dealers and investment advisers, but that most cannot identify what type of financial professional they themselves work with, even after the characteristics of each are explained to them.²⁰⁷
- A 2012 SEC study of disclosure effectiveness included a survey by Siegel & Gale that tested both investors' understanding and use of disclosures. Siegel & Gale found, for example, that: among online survey respondents who recalled receiving a conflict of interest disclosure, just over half reported that they fully understood the potential impact on their advisory relationship and only a little over half of respondents who said they understood the conflicts of interest fully or even somewhat actually took action to protect their interests. There was also confusion about how different advisers charge and the unique conflicts that accompany different advisers' compensation models.²⁰⁸
- When investors' ability to comprehend actual disclosures was tested, the results were even more troubling. For example, having reviewed a sample disclosure that begins as follows, “In addition to sales loads and 12b-1 fees described in the prospectus, we receive other compensation...,” just over half (54.8 percent) correctly answered a question about whether the firm gets compensation other than sales loads and 12b-1 fees. After reviewing a sample chart providing information on additional payments the firm receives from mutual fund companies, only 31.8 percent indicated they definitely knew what the term “annual asset fees” means, and another 46.2 percent indicated they thought they knew what it means. But survey respondents were generally unable to determine the significance of the information provided.²⁰⁹

²⁰⁶ Siegel & Gale, LLC and Gelb Consulting Group, Inc., Results of Investor Focus Group Interviews About Proposed Brokerage Account Disclosures, Report to the Securities and Exchange Commission, March 10, 2005, <http://1.usa.gov/1MkdujW>.

²⁰⁷ Angela A. Hung, et al., Investor and Industry Perspectives on Investment Advisers and Broker-Dealers. Santa Monica, CA: RAND Corporation, 2008, <http://bit.ly/1OrrZ3v>.

²⁰⁸ Siegel & Gale, LLC, Investor Research Report, Submitted to the Securities and Exchange Commission on July 26, 2012, <http://1.usa.gov/1MfBbss>.

²⁰⁹ *Id.*

These SEC studies are consistent with the findings of research by academics and others that reach similar conclusions about the ineffectiveness of disclosure alone as a remedy for conflicts.²¹⁰ The Department reached the very same conclusion in its RIA. The Department stated:

- “Disclosure alone has proven ineffective to mitigate conflicts in advice. Extensive research has demonstrated that most investors have little understanding of their advisers’ conflicts of interest, and little awareness of what they are paying via indirect channels for the conflicted advice. Even if they understand the scope of the advisers’ conflicts, many consumers are not financial experts and therefore, cannot distinguish good advice or investments from bad. The same gap in expertise that makes investment advice necessary and important frequently also prevents investors from recognizing bad advice or understanding advisers’ disclosures. Some research suggests that even if disclosure about conflicts could be made simple and clear, it could be ineffective – or even harmful.”²¹¹
- “Additional or different disclosure alone is unlikely to help much if at all.”²¹²
- “For all of the[] reasons the Department believes that a rule that relies on disclosure alone to mitigate adviser conflicts would be ineffective and would therefore yield little or no investor gains and fail to justify its compliance cost. The Department therefore attache[d] additional investor protections to its PTEs.”²¹³

We also discussed this issue at length in our April comment letter.²¹⁴

This research demonstrates that the Investment Advisers Act fiduciary duty, as currently enforced by the SEC, fails to provide effective protections against conflicts of interest of the type common in the broker-dealer business model. Thus, even if the SEC were to adopt an “enhanced” standard of conduct for brokers by regulating them under the Advisers Act or by applying a comparable regulatory standard under the ‘34 Act and FINRA rules, the Department could not reasonably rely on that standard as adequately protecting the interests and rights of IRA investors. Meanwhile, it is far from certain that the SEC will take even this modest step to raise the standards that apply when broker-dealers provide investment advice to financially unsophisticated retail customers. While we hope to be proven wrong, it seems even less likely that the SEC will adopt a strong and effective rule that requires real mitigation of conflicts.

²¹⁰ See, e.g., Robert A. Prentice, *Moral Equilibrium: Stock Brokers and the Limits of Disclosures*, *Wisconsin Law Review* 2011, <http://bit.ly/2vs8XKm>; Nick Chater et al., *Consumer Decision-Making in Retail Investment Services: A Behavioral Economics Perspective*, *Decision Technology Ltd*, November 2010, <http://bit.ly/1MfFaVW>; Christopher Tarver Robertson, *Biased Advice*, *Emory Law Journal*, April 12, 2011, <http://bit.ly/1MfFhkC>; Jeremy Burke et al., *Impacts of Conflicts of Interest in the Financial Services Industry*, *Rand Corporation*, February 2015, <http://bit.ly/1MfFjJ9>.

²¹¹ RIA at 8.

²¹² RIA at 144.

²¹³ RIA at 271, concluding, after an extensive discussion at 268-271, that a disclosure-only approach would be ineffective and appropriate.

²¹⁴ See CFA April 2017 letter at 13-18.

We say this not because we question the sincerity of SEC Chairman Clayton's pledge to address the issue. But the SEC's RFI itself gives cause for concern. Despite extensive evidence that disclosure is ineffective in addressing conflicts -- much of it compiled at the direct request of the SEC itself -- the SEC's RFI continues to ask whether disclosure might provide an adequate solution to the problem. SEC Commissioner Michael S. Piwowar's recent letter to the Department, in which he chided the Department for being "dismissive of the efficacy of conflict of interest disclosure," sends a strong signal that the Commission is likely to continue to rely on an approach its own research has shown to be ineffective.²¹⁵ After all, contrary to the claim made in Commissioner Piwowar's letter, Congress has not signaled that it supported a disclosure-based solution. Instead, it has indicated that the appropriate standard of conduct for investment advice under the securities laws is to act "in the best interest of the investor without regard to" the financial or other interests of the adviser, precisely the standard the Department adopted in its Impartial Conduct Standards. Moreover, Congress has specifically directed the SEC to examine the sales practices and compensation structures of broker-dealers and investment advisers and authorized the agency to limit or ban practices it finds to be inconsistent with the public interest and the protection of investors. An SEC Commissioner who would characterize that as a preference for a disclosure-based approach seems unlikely to consider an enhanced standard that requires brokers to avoid and appropriately manage conflicts or to act in the best interests of their customers regardless of their conflicts. But, given the high fiduciary standard that Congress applied under ERISA and the Tax Code for advice to retirement accounts, the Department cannot reasonably defer to an SEC standard that falls so far short of the protections Congress intended.

C. DOL's rule already reflects extensive consultation and incorporates securities law concepts where appropriate.

The argument that the Department should defer to the SEC also fails to take into account the degree to which DOL has consulted with the SEC and FINRA and relied on securities law principles, where appropriate, in crafting the BIC. As has been well-documented, including in the RIA and rule preamble, the DOL collaborated extensively with the SEC and other regulators both in the drafting of the rule and PTEs and in conducting the RIA. One goal of that collaboration was to ensure that compliance with the DOL rule would not result in the violation of any existing SEC or FINRA rule. Toward that end, the Department shared drafts of the rule, the PTEs, and the economic analysis as they were being drafted and sought the input of SEC staff on those drafts. As further documented in the RIA and rule preamble, the Department also sought and received input from the National Association of Insurance Commissioners, FINRA staff, and the North American Securities Administrators Association.

This collaboration was thoroughly detailed in the RIA. In discussing the purpose of the collaboration, the RIA noted that, despite the agencies' "different statutory responsibilities, both agencies recognize the importance of working together on regulatory issues in which our interests overlap, particularly where action by one agency may affect the community regulated by the other agency. To that end, the Department has sought technical assistance from the SEC on the development of this rule. The technical assistance that the SEC staff has provided has

²¹⁵ Statement, Commissioner Michael S. Piwowar, Comment Letter in Response to the Department of Labor's "Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions," July 25, 2017, <http://bit.ly/2uuUN9X>.

helped the Department in its efforts to ensure that the rule achieves the goal of striking a balance between protecting individuals looking to build their savings and minimizing disruptions to the many good practices and good advice that the financial services industry provides today. The SEC staff provided technical assistance on all aspects of the Department's Proposal, including the regulatory impact analysis. The Department has made numerous changes in response to observations and issues raised by the SEC staff and is grateful for the staff's technical assistance."²¹⁶

The RIA similarly documents the extent to which the Department sought input from the SEC and other regulators and designed its rule not to conflict with or impair other applicable rules.²¹⁷ Toward that end, the Department took care "to adhere to ERISA's and the IRC's specific text and purposes" while also seeking "to understand the impact of the final rule and exemptions on firms subject to the securities laws and other federal or state laws, and to take the effects into account by appropriately calibrating the impact of the rule on those firms. In the Department's view, the final regulation neither undermines nor contradicts the provisions or purposes of the securities laws or other federal or state laws. Instead, the regulation has been designed to work in harmony with other federal laws, and the Department has consulted – and will continue to consult – with other federal agencies to ensure that, to the extent possible, the various legal regimes are appropriately harmonized."²¹⁸

This extensive consultation with the securities regulators is reflected in the details of both the revised definition and in the Impartial Conduct Standards that are central to the PTEs governing conflicted advice. For example, the definition of "recommendation" which is central to determining when the fiduciary duty applies is modeled on FINRA guidance. The best interest standard itself is drawn directly from the most recent congressional action in this area, which specifies that the appropriate standard for investment advice under the securities laws is "to act in the best interest of the customer without regard to the financial or other interest of the broker, dealer, or investment adviser providing the advice."²¹⁹ Consistent with the approach outlined by Congress and supported by industry groups, the DOL rule allows for the receipt of commissions and other transaction-based payments subject to appropriate limits, sales from a limited menu of products, principal transactions, and sale of proprietary products. Even the liability provision that has stirred so much controversy is modeled directly on FINRA rules. Indeed, the entire regulatory framework provided in the Impartial Conduct Standards reflects a compromise between ERISA's sole interest standard and the less protective best interest standard applied under the securities laws.

While the DOL has gone further than the SEC has to date in reining in harmful conflicts, it has nonetheless achieved its goal of developing a rule that doesn't conflict with or impair application of the securities laws. This, rather than development of identical rules, is the appropriate goal for a harmonized approach given the heightened standard that Congress intentionally applied to advice to retirement accounts. As a result, those firms that think applying a consistent standard across accounts is beneficial, either because it is more cost-effective for

²¹⁶ RIA at 286.

²¹⁷ RIA at 288.

²¹⁸ *Id.*

²¹⁹ Section 913(g)(1) of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

them or less confusing for their customers, can do that now simply by complying with the DOL standard across all their accounts. As noted above, some firms have already indicated that they plan to do just that. LPL's mutual fund only platform, for example, will be available for retirement and non-retirement accounts alike, as will PNC's clean share approach. This has the effect of extending the benefits of the DOL rule to a broader array of customers. For the Department to make further concessions toward the securities law regulatory approach -- either by deferring to a not-yet-existing "enhanced" standard or by relying on existing regulations to satisfy compliance with the DOL rule -- would be inconsistent with the purpose of the ERISA and Tax Code fiduciary standard and insufficiently protective of plans, plan participants, and IRA investors.

VI. The Department should not expand PTE 84-24 to cover all annuity products; the recommendation of these products merit the enhanced protections of the BIC exemption.

The Department asks in the RFI whether it should consider providing an exemption for insurance intermediaries to serve as Financial Institutions under the BIC or whether it should expand the scope of PTE 84-24 to cover all types of annuities. Assuming insurance intermediaries are prepared to meet the conditions of the rule, the first option offers a reasonable approach. To do so, the insurance intermediary would need to be willing and able to effectively exercise supervisory authority over its advisers or the advisers it contracts with, ensuring their adherence to the Impartial Conduct Standards. And the intermediary would need to be willing and able to implement effective anti-conflict policies and procedures and carefully police conflicts of interest to ensure that the conflicts do not taint advisers' advice. If insurance intermediaries meet these conditions, we see no reason why insurance intermediaries should not be able to qualify as Financial Institutions under the rule. Fred Reish, partner in Drinker Biddle's Employee Benefits & Executive Compensation Practice Group, has indicated that insurance intermediaries are prepared to fulfill this function. "Based on our representation of a number of IMOs and BGAs, many of those types of organizations would be willing to serve in the financial institution role, if that was available. If properly done, that solution would work," he stated.²²⁰

However, we strongly object to the idea of moving all annuities to PTE 84-24. According to the Department's own analysis, PTE 84-24 is insufficiently protective to cover the recommendation of variable and fixed-indexed annuities. This analysis included a review of fixed-indexed, variable, and fixed-rate annuity products and their features, the distribution of these products, the conflicts of interest that exist in the annuity market, and the harms to retirement savers that can result from those conflicts. The Department found that there is ample qualitative and in some cases empirical evidence that losses affect retirement savers who invest in annuities, and that these losses are "large both in instance and on aggregate."²²¹ Certain annuities, such as fixed-indexed and variable annuities, at least as they've historically been structured and sold, have been particularly complex, opaque, conflict ridden, and susceptible to

²²⁰ Fred Reish, *DOL's RFI and Recommendation of Annuities- Interesting Angles on DOL's Fiduciary Rule #55*, THE NATIONAL LAW REVIEW, July 18, 2017, <http://bit.ly/2wkcQOZ>.

²²¹ RIA at 9, 326.

abuse, according to the Department's analysis.²²² We further elaborated on that point in our April comment letter.²²³

When annuities are considered within the context of the broader range of investment products, a financial professional may have an incentive to recommend an annuity over other alternatives, such as mutual funds, because annuity commissions are often substantially higher than the commissions broker-dealers receive for recommendations of mutual funds, ETFs, or securities. Conflicts of interest are thus likely more pronounced in the annuity market than in the mutual fund market. Therefore, the Department's own analysis, based on a variety of independent, high-quality evidence, proves that: 1) conflicts in the annuity market are significant and result in material harm to retirement investors; and 2) these conflicts demand the enhanced protections that the BIC provides.

If the Department were to allow annuities to be recommended under the relaxed conditions of PTE 84-24, it would restore the perverse incentive for advisers to recommend these annuities over mutual funds and other investments, thus giving these potentially more complex, opaque, and conflict-ridden products a competitive advantage relative to investment products, such as plain vanilla mutual funds, that are less susceptible to abuse. Instead, as we proposed in our April comment, the Department should regulate all conflicted annuity sales under the BIC.²²⁴ Doing so would put all products on equal footing, not preferencing any particular product over another, while ensuring sufficient and equal protections for retirement investors across the market.

VII. The Department should not extend the seller's carve-out to the small plan or retail markets; rather, it should narrow the seller's carve-out by raising the threshold.

The Department asks in the RFI whether it should make changes to the rule's specific exclusion for communications with independent fiduciaries who have financial expertise. As we discussed in both our April comment and previous comments on the rule proposal, it would be totally unjustified and inappropriate to extend a seller's carve-out to either the small plan or retail markets.²²⁵ This includes extending such a carve-out to individuals based on financial or net worth thresholds, as in the "accredited investor" definition, or other tests that use wealth as a proxy for investor sophistication.²²⁶ As we have discussed at length in our previous comments, and as the Department itself has discussed in the rule preamble and RIA, there is no reasonable basis for concluding that such individuals are sufficiently financially sophisticated that they do not need the rule's protections.

In its RIA, the Department stated that, it "does not believe it would be consistent with the language or purposes of ERISA Section 3(21) to extend this exclusion to small retail employee benefit plan investors or IRA owners."²²⁷ It then gave considerable attention to all the reasons

²²² See RIA at 39-42, 101-103, 117-119, 122-126, 131-132, 138-140, 282-286, 302-303.

²²³ See CFA April 2017 letter at 24-41.

²²⁴ See CFA April comment at 40-41.

²²⁵ See CFA July 2015 comment at 35-42; CFA Sept 2015 comment at 5-9; CFA April 2017 comment at 43-44.

²²⁶ See CFA April 2017 comment at 43-44.

²²⁷ RIA at 63.

supporting its position.²²⁸ To reverse course on this fundamental issue would be arbitrary and capricious. If the Department did err, it was in setting the \$50 million threshold for the rule's protections in the plan market too low. Based on all of our research of 401(k) costs, which we discussed in our April comment, the Department should consider expanding the rule to cover a broader swath of the retirement plan market. At a minimum, it should raise the threshold for the seller's carve-out to \$100 million, and it should consider whether a higher threshold is appropriate.

As we discussed in our September 2015 comment letter on the rule proposal, a seller's carve-out could only work in the retail market, even in theory, if broker-dealers, insurance agents and other transaction-based financial services providers were prohibited from holding themselves as advisers, either through the titles they use or through the way in which they market their services.²²⁹ However, as SIFMA's comment responding to the SEC's RFI makes clear, they are not interested in a seller's carve-out that doesn't also allow them to continue to masquerade as advisers.²³⁰ Specifically, in their Appendix 2, SIFMA strenuously objects to a regulatory approach that relies on "[b]eefing up disclosures about the titles and duties of BDs and IAs." In other words, they want to continue to use the title "advis(o)(e)r" with impunity, regardless of what services they are providing, the duties that they owe to their clients, and how they are regulated. SIFMA seeks to continue to use the title "adviser" for these "sellers" even as they are insisting in court that they are not true advisers, but rather salespeople "merely selling product." It is crystal clear that the only seller's carve-out that SIFMA would support would be one that allows them to sell products, under a compensation system that is rife with conflicts and a standard that permits them to profit as customers' expense, all while calling themselves "trusted advis(o)(e)r." In short, they want to preserve the very problem the Department intended to solve with this regulatory project. For the Department to simply open the very loopholes it closed, re-enabling this farce would be arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law.

Conclusion

The rule is just beginning to deliver the dramatic, tangible benefits that proponents of the rule have long predicted. Financial firms have come up with a variety of innovative approaches to comply with the rule under a variety of business models. Their innovative approaches have not only achieved the rule's goal of reducing the conflicts of interest that bias retirement investment advice, they've done so while preserving access to advice at an affordable cost for even the smallest accountholders. Indeed, as firms and product sponsors compete under a best interest standard, costs for investors are coming down in many cases, particularly for investment products, and the quality of available investment options is on the rise. In short, experience since the rule was finalized proves that the much-maligned BIC is eminently workable, and that financial firms are far more innovative and adaptable than their lobbyists would have you believe. Investors and high-quality products and providers all stand to benefit from invigorated competition where the best products and advice providers win.

²²⁸ See RIA at 61-65.

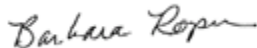
²²⁹ See CFA September 2015 letter at 5-7.

²³⁰ See Letter from Kevin M. Carroll, SIFMA, to the Securities and Exchange Commission, July 21, 2017, <http://bit.ly/2uRtdUA>.

By reopening the rule, sending the message that further changes and delays may be on the horizon, the Department risks undermining those market innovations. It is understandable, after all, that even some firms that have been working in good faith to come up with positive and innovative compliance plans wouldn't want to comply with more rigorous conditions than previously existed if they can avoid it. After all, the conditions that prevailed before the rule was finalized were highly profitable for firms, but not for their customers. But nostalgia for a past in which firms could profit at their customers' expense without repercussions is not a proper driver for reexamination and should not influence the Department's decision about whether to pursue sweeping changes to the rule and its exemptions. It is particularly inappropriate that the Department is considering such changes without ever allowing the rule to be fully implemented and is doing so based on speculation about the rule's ultimate impact, unsupported by real world evidence, from sources with a strong financial interest in weakening the rule's investor protections. In the absence of real world evidence, rule opponents continue to rely on the same rhetorical arguments they have been making for six years -- arguments thoroughly rejected by Department in the 2016 final rule and RIA.

For these reasons, we urge the Department to implement, without further delay, the full protections of the rule so that working families and retirees can finally benefit from the meaningful legally enforceable best interest standard they so desperately need and deserve.

Respectfully submitted,



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