



National Association of Insurance
and Financial Advisors

September 11, 2017

VIA ELECTRONIC FILING – www.regulations.gov

Office of Exemption Determinations
Employee Benefits Security Administration
Attention: D-11712, 11713, 11850
U.S. Department of Labor
200 Constitution Ave., NW
Suite 400
Washington, DC 20210

**RE: RIN – 1210-AB82
Proposed Extension of PTE Transition Period and Delay of Applicability Dates**

To Whom It May Concern:

The National Association of Insurance and Financial Advisors (“NAIFA”)¹ appreciates this opportunity to comment on the Department of Labor’s (“Department”) proposed extension of the current transition period² for certain obligations under the Best Interest Contract (“BIC”) Exemption and Prohibited Transaction Exemption (“PTE”) 84-24.³ For all of the reasons

¹ Founded in 1890 as The National Association of Life Underwriters (NALU), NAIFA is the oldest, largest and most prestigious association representing the interests of insurance and financial services professionals from every Congressional district in the United States. NAIFA’s legacy of leadership and vision has a lasting impact as the founder of multiple organizations now serving the industry. Its mission – to advocate for a positive legislative and regulatory environment, enhance business and professional skills, and promote the ethical conduct of its members – is the reason NAIFA has consistently and resoundingly stood up for agents and advisors and called upon members to grow their knowledge while following the highest ethical standards in the industry.

² See Department of Labor, Final Rule; extension of applicability date, 82 Fed. Reg. 16902 (April 7, 2017) (extending the transition period until January 1, 2018, and revising the conditions for transition relief to include only adherence to the impartial conduct standards).

³ Department of Labor, Notice of Proposed Amendments to PTE 2016-01, PTE 2016-02, and PTE 84-24, 82 Fed. Reg. 41365 (Aug. 31, 2017) (hereinafter “Proposed Delay”).

identified by the Department,⁴ NAIFA fully supports a time-certain delay of the current January 1, 2018 applicability date until at least July 1, 2019. We agree with the Department that without such a delay, regulated businesses will incur undue expense.⁵ Moreover, absent a delay and substantial revisions to, or withdrawal of, the current fiduciary rule and PTEs, Main Street savers will continue to be harmed.

Attached as **Exhibit A**—and incorporated by reference herein—is NAIFA’s comment letter submitted to the Department on July 12, 2017, which addresses the need for a 24-month delay of the January 1st applicability date for all PTEs associated with the DOL’s fiduciary rule.⁶ The justifications for delay set forth in our earlier letter still are applicable:

- (1) The Department needs adequate time to complete its review pursuant to the President’s February 2nd memorandum and to evaluate and analyze thousands of comment letters submitted in response to its July 6, 2017 request for information on the substance of the fiduciary rule and related PTEs;
- (2) To the extent the Department decides to amend the Obama Administration’s rule and/or PTEs following its review, regulated businesses should not have to spend *vast* resources trying to comply with the old structure;
- (3) The Department should have the opportunity to coordinate—per Secretary Acosta’s stated intentions—with the SEC on any new proposals and/or requirements in this space; and
- (4) Perhaps most importantly, Main Street retirement investors must be protected from further harm.

In support of the above and our long-held contention that a significant delay is warranted, **Exhibit B** provides a summary of information and data showing, *inter alia*:

- (1) That since the Obama Administration issued its final fiduciary rule and PTEs, consumers are losing access to retirement advice and products;

⁴ See *generally* discussion of the reasons for the Department’s Proposed Delay (e.g., the need for additional time to complete a thorough examination of the rule and PTEs pursuant to the President’s February 2017 memorandum and to review comment letters submitted in response to the Department’s March 2017 request for information on the substance of the rule and PTEs, as well as sufficient time for the Department—in coordination with the SEC—to craft an alternative rule and/or new PTEs, should it decide such changes are necessary), 82 Fed. Reg. at 41370-71.

⁵ See Proposed Delay, 82 Fed. Reg. at 41365 (“The Department is particularly concerned that, without a delay in the applicability dates, regulated parties may incur undue expense to comply with conditions or requirements that it ultimately determines to revise or repeal.”).

⁶ See Department of Labor, Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions, 82 Fed. Reg. 31278, 31279 (July 6, 2017) (Question 1).

- (2) The real cost impact, including increased litigation exposure, of the rule and PTEs on businesses and consumers; and
- (3) Serious procedural and analytical flaws underlying the current structure, which justify withdrawal—or at the very least substantial revision—of the rule and PTEs by the Department.

With January 1st fast approaching, the need to address these issues is even more pressing. Accordingly, NAIFA urges the Department to finalize a delay of the upcoming applicability date as soon as possible.

NAIFA also encourages the Department to extend its current enforcement policy to cover the extended transition period.⁷ As the Department’s current enforcement guidance notes, temporary enforcement relief for regulated businesses working diligently and in good faith to comply with the new fiduciary rule and PTE requirements is appropriate, particularly given the Department’s ongoing study and analysis of the current regime.⁸

Finally, NAIFA strongly opposes some commenters’ suggestion that the Department implement a delay for some firms but not others (based on whether a firm has taken steps to “harness recent market developments”).⁹ Such an approach would amount to the Department picking winners and losers among firms based on a highly ambiguous and biased “standard,” forcing some firms to incur tremendous compliance expense because they have opted—based on their business model, products offered, customer needs and demands, etc.—to not take their business or products in a particular, mandated direction. The Department should reject this proposal and finalize a delay until at least July 1, 2019 for all regulated businesses.

Thank you for your consideration.

Sincerely,



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

⁷ See Department of Labor, Employee Benefits Security Administration Field Assistance Bulletin 2017-02 (May 22, 2017); see also Proposed Delay, 82 Fed. Reg. at 41370 n. 32.

⁸ *Id.*

⁹ See Proposed Delay, 82 Fed. Reg. at 41369 (quoting Comment Letter #238 by Consumer Federation of America).



National Association of Insurance
and Financial Advisors

EXHIBIT A

July 12, 2017

VIA ELECTRONIC FILING – www.regulations.gov

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

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

To Whom It May Concern:

The National Association of Insurance and Financial Advisors (“NAIFA”) appreciates this opportunity to comment on the Department of Labor’s (“Department” or “DOL”) request for information (“RFI”) regarding the fiduciary rule (Conflict of Interest Rule—Retirement Investment Advice (the “Rule”)) and related Prohibited Transaction Exemptions (“PTEs”);¹⁰ specifically, the Department’s RFI with respect to a potential delay of the January 1, 2018 applicability date (“applicability date”).¹¹

EXECUTIVE SUMMARY

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

¹⁰ Department of Labor, Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions, 82 Fed. Reg. 31278 (July 6, 2017) (hereinafter “Department RFI”).

¹¹ Department RFI, 82 Fed. Reg. 31278, 31279 (Question 1).

- (1) Facilitate completion of the Department’s economic and legal analysis of the Rule/PTEs pursuant to the President’s February 3 Memorandum and review of comments submitted in response to the current RFI, as well as any rulemaking to rescind or make changes to the Rule/PTEs based on the Department’s evaluation of all input gathered;
- (2) Allow for coordination and collaboration between the Department and the Securities Exchange Commission (“SEC”), which also is soliciting public comment on a standard of care and related requirements for financial institutions and advisors; and
- (3) Prevent further harm to Main Street retirement investors.¹²

Notably, the Department’s RFI solicits additional public comments on *numerous* potential changes to the Rule and PTEs, and states that the Department is still reviewing comments on issues raised in the President’s February 3, 2017 Memorandum.¹³ We applaud the Department’s continued evaluation of the substance of the Rule/PTEs and urge you to take sufficient time and care to complete your review. Of course, should the Department determine that rescission or revision of the Rule/PTEs is warranted, absence of an adequate extension of the applicability date would cause multiple major disruptions to the regulatory environment and the marketplace, and needless consumer confusion and harm.

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

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

¹² Of course, the Rule also continues to be challenged in litigation, and some or all of the requirements currently set to take effect on January 1, 2018 could be rendered unnecessary by forthcoming court rulings. Although we will not repeat them at length here, we do respectfully submit that the Rule raises a host of serious legal problems. Indeed, the Department itself has recently acknowledged in its legal briefing that the Exemptions’ restrictions on class-litigation waivers, which are among the requirements set to take effect January 1, are improper and should be vacated. A postponement of the January 1 deadlines is thus warranted to allow the courts additional time to consider these issues before further requirements take effect.

¹³ Presidential Memorandum, *Fiduciary Duty Rule* (Feb. 3, 2017), available at: <https://www.whitehouse.gov/briefing-room/presidential-actions/presidential-memoranda>.

tremendous resources are being spent to comply with the counterproductive Rule/PTEs (including building new websites, disclosures, auditing processes for new documentation requirements, and new policies and procedures and related front- and back-office training).

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

BACKGROUND & IMPACT OF THE RULE/PTEs ON NAIFA MEMBERS

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

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

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

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

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

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

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

Second, beyond the ongoing analysis called for by the President, the Department itself has invited additional comments on a plethora of technical and conceptual issues underlying the Rule/PTE. Again, to the extent those comments justify changes to the prior Administration’s rule—as NAIFA believes they will—the Department will need ample time to recreate its own approach. As experience tells us, a thorough rulemaking process on such complex topics can take several months. Under a best case scenario, any such process would run right up to the existing applicability date of January 1, 2018, at which point impacted parties are expected to be in *full* compliance with the Rule/PTEs and will have expended tremendous resources on those compliance efforts.¹⁴

There is clear precedent for a delay of the applicability date to provide the Department with sufficient time to consider the merits of the Rule/PTEs and public comments thereon. In fact, earlier Department rules regarding fiduciary investment advice (issued by the George W. Bush Administration) were delayed for 60 days in 2009 by the Obama Administration, following public notice and comment, “in order to afford the Agency the opportunity to review legal and policy issues relating to the final rules.”¹⁵ Ultimately, to give the Department “additional time to consider the issues raised by commenters” regarding the merits of rescinding, modifying or

¹⁴ Notably, the more onerous PTEs (e.g., the BIC Exemption) were designed in the first instance to include an adequate transition period prior to the full compliance deadline on January 1, 2018. *See* Final BIC Exemption, 81 Fed. Reg. 21069 (Apr. 8, 2016) (explaining that the April 10, 2017 applicability date “is appropriate for plans and their affected service providers to adjust to the basic change from non-fiduciary to fiduciary status” while being “subject to more limited conditions;” and the transition period between then and January 1, 2018 “is intended to give Financial Institutions and Advisers time to prepare for compliance with the [full set] of conditions” under the exemption) (emphasis supplied). By the same rationale, and anticipating that at least some changes will be made to the Rule/PTEs over the coming months, any applicability date should be commensurately prolonged to account for adjustments to the compliance scheme.

¹⁵ *See* Department of Labor, Withdrawal of final rule, *Investment Advice—Participants and Beneficiaries*, 74 Fed. Reg. 60156 (Nov. 20, 2009) (background discussion of steps taken prior to ultimate withdrawal of the rule).

retaining the rules, the Department delayed the effective and applicability dates of those rules twice more (two successive six-month periods) before ultimately withdrawing the rules and formulating its own proposal.¹⁶

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

Finally, delay of the applicability date is warranted to avoid further harm to retirement savers. The President's February Memorandum appropriately focuses on the Rule's/PTEs' potential impact on retirement savers, including savers' access to investment advice and products, and market dislocations. It is clear from market reactions to date that these are serious concerns, which must be addressed.¹⁷

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

Additionally, according to a recent survey of NAIFA members (with 1,084 respondents), 91% of respondents have already experienced or expect to experience restrictions on product offerings to their clients, nearly 90% believe consumers will pay more for professional advice services, and 75% have seen or expect to see increases in minimum account balances for the clients they serve. And 78% of NAIFA members say that although they continue to offer professional advice to clients, general confusion about the complex Rule and PTEs is impeding their ability to serve clients. Further, a survey of 552 U.S. financial advisors conducted in October 2016 found that 71% “plan to disengage from some mass-market investors because of the DOL rule,” and 94% of advisors say that small clients “orphaned” by advisors will have to turn to robo-advice.¹⁸

¹⁶ *Id.*

¹⁷ NAIFA and other industry groups are working to collect additional data on the market impact of the Rule/PTEs since they partially went into effect on June 9, 2017.

¹⁸ CoreData Research London, Press Release, *Fiduciary Rule to Leave US Mass-Market Investors Stranded, Study Shows* (Nov. 2016); see also, e.g., Wall Street Journal, *Edward Jones Shakes up Retirement Offerings Ahead of Fiduciary Rule* (Aug. 17, 2016) (Edward Jones announces it will limit mutual fund access for retirement savers in accounts that charge commissions); Crain's, *Why State Farm agents are getting out of the investment game* (Sep. 3, 2016) (State Farm directs 12,000 securities-licensed agents to no longer provide their clients with mutual funds, variable annuities and other investment products); Maxey, Daisy, Wall Street Journal, *New Rule Helps No-Loan Funds—But Investors*

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

- Many advisors plan to exit the business entirely, which will restrict consumers' access to much-needed professional advice;¹⁹
- Firms have restricted product offerings to certain clients, thereby limiting consumer choice, and have abandoned traditional, lower-cost compensation arrangements for advisors (e.g., commissions, rather than high upfront management fees that small and first-time savers cannot afford) in order to avoid the cost of complying with the BIC Exemption and mitigate the threat of costly class action lawsuits;²⁰ and
- Firms are cutting back on hiring and R&D, and are foregoing investments in growth opportunities in anticipation of the cost of complying with the Rule and PTEs.²¹

Still Need to Watch for Other Fees (Nov. 7, 2016) (Charles Schwab stops selling fund share classes with front-end sales loads in May 2016). See, e.g., Benjamin, Jeff, *Fiduciary Focus, DOL Fiduciary Rule Class-Actions Costs could Top \$150M a Year* (Feb. 9, 2017) (“Some firms, including Merrill Lynch, Capital One, and Commonwealth Financial Network, have already announced plans to use a streamlined [BIC exemption] that does not include a contract or variable commission rate, making them exempt from class-action lawsuits. Other firms will be rolling the dice.”); AdvisorHUB, *Merill to End Commission-Based Retirement Business on Retail Accounts* (Oct. 6, 2016) available at <https://advisorhub.com/exclusive-merrill-end-commission-based-retirement-business-retail-accounts/> (Merrill Lynch announces, in response to the fiduciary rule, that its 14,000 brokers cannot receive commissions for advice on retirement accounts and will have to shift clients who remain with the firm to fee-based advisory accounts).

¹⁹ See, e.g., ThinkAdvisor, *DOL Fiduciary Has Many Advisors Mulling Career Change: Fidelity Survey* (Nov. 3, 2016) (in a blind online poll of 459 advisors conducted by Fidelity Clearing & Custody Solutions from August 18 to 26, 2016, 10% of advisors reported they are planning to leave or retire from the field earlier than expected because of the rule, and another 18% said they are “reconsidering their careers as advisors”).

²⁰ See, e.g., Wall Street Journal, *Edward Jones Shakes up Retirement Offerings Ahead of Fiduciary Rule* (Aug. 17, 2016) (Edward Jones announces it will limit mutual fund access for retirement savers in accounts that charge commissions); Crain's, *Why State Farm agents are getting out of the investment game* (Sep. 3, 2016) (State Farm directs 12,000 securities-licensed agents to no longer provide their clients with mutual funds, variable annuities and other investment products); Maxey, Daisy, Wall Street Journal, *New Rule Helps No-Loan Funds—But Investors Still Need to Watch for Other Fees* (Nov. 7, 2016) (Charles Schwab stops selling fund share classes with front-end sales loads in May 2016). See, e.g., Benjamin, Jeff, *Fiduciary Focus, DOL Fiduciary Rule Class-Actions Costs could Top \$150M a Year* (Feb. 9, 2017) (“Some firms, including Merrill Lynch, Capital One, and Commonwealth Financial Network, have already announced plans to use a streamlined [BIC Exemption] that does not include a contract or variable commission rate, making them exempt from class-action lawsuits. Other firms will be rolling the dice.”); AdvisorHUB, *Merill to End Commission-Based Retirement Business on Retail Accounts* (Oct. 6, 2016) available at <https://advisorhub.com/exclusive-merrill-end-commission-based-retirement-business-retail-accounts/> (Merrill Lynch announces, in response to the fiduciary rule, that its 14,000 brokers cannot receive commissions for advice on retirement accounts and will have to shift clients who remain with the firm to fee-based advisory accounts).

²¹ See, e.g., Skinner, Liz, InvestmentNews, *Outlook 2017 Haze Ahead; With a New Year, a New Government and Old Regulations, Advisers Feel More Optimistic About the Economy than Their Own*

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

* * *

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

Sincerely,

A handwritten signature in black ink, appearing to read "Paul R. Dougherty". The signature is fluid and cursive, with a large, sweeping flourish at the end.

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

Books of Business (Jan. 9, 2017) (“Joshua Mellberg is avoiding long-term contracts with technology providers and others until his advisory firm has judged the financial fallout from the Labor Department’s rule on retirement advice [and has also] cut this year’s research [and has] also cut this year’s research and development expenses and put a freeze on hiring to ensure that the hybrid advisory firm is prepared to handle any extra compliance costs or other ill effects of the fiduciary rule....”).

EXHIBIT B

New Information: Loss of Consumer Access to Retirement Advice

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

- According to a February 2017 survey of more than 1,000 investors conducted by J.D. Power, more than half (59 percent) who pay commissions now say they either “probably will not” (40 percent) or “definitely will not” (19 percent) be willing to stay with their current firm if it meant being forced to move to fee-based retirement accounts.
- A 2017 report indicates that the Rule will result in additional charges to retirement investors of approximately \$800 per account or over \$46 billion in aggregate.^{ix}

New Information: Loss of Consumer Access to Retirement Products

- Some distribution firms and financial professionals have already significantly scaled back their use of commission-based products such as variable annuities because of concerns about the potential implications of the Fiduciary Rule on recommendations of such products. In fact, despite the existence of a rising stock market, which has always led to increased sales of variable annuities, sales declined by 21.6 percent from 2015 to 2016.^x
- Adverse effects on annuities have already occurred. “The variable annuity industry took a beating in 2016, with several of the top sellers inking losses upwards of 25% on the year and some exceeding 40%. The Department of Labor's fiduciary rule, issued in its final form last spring, played a big role in the industry's bruising, observers said.”^{xi}
- In 2015, variable annuities represented 56% of IRA annuity sales and 46% of 2016 IRA annuity sales. LIMRA projects that variable annuity purchases will decrease another 20-25% in 2017 if the Rule goes into effect.^{xii}
- For IRA purchases, sales declined 22% in 2016 compared to the prior year.^{xiii} The ambiguous regulatory structure of the Rule is expected to result in additional decreases in purchases of variable annuities, which represents a significant amount of IRA annuity purchases.
- More than 80 percent of respondents to the 2017 IRI survey have already introduced, plan to introduce, or are considering introducing fee-based variable annuities. However, those products are unlikely to be widely available in the near-term and may not be appropriate for all retirement savers, including some for whom a traditional commission-based variable annuity would be more economical, less costly, and likely in their best interest.^{xiv}
- Several large intermediaries have already announced a variety of changes to service offerings, including firms no longer offering mutual funds in IRA brokerage accounts; others offering no IRA brokerage accounts at all; firms reducing web-based educational tools; and firms raising account minimums for advisory fees.^{xv}
- Recent media reports have highlighted the decisions being made by some firms to change their service models and product availability, including (a) moving clients to fee-based accounts, (b) eliminating commission-based IRAs; (c) raising investment minimums for commission-based IRAs; (d) eliminating variable annuity products; and (e) excluding certain

products from commission-based IRAs (*e.g.*, annuities, mutual funds, and exchange-traded funds).^{xvi}

- Many firms have already determined the BIC Exemption is unworkable for certain products, and the substantial threat of unwarranted litigation cannot be justified for certain accounts.^{xvii}

New Information: Value of Advice

- Reuter updates previous analyses based on data from 1994-2004 with newer data from 2004 – 2012. He finds a statistically significant decline in the apparent underperformance in earnings of commission broker sold, actively-managed mutual funds compared to actively-managed direct-sold funds. Instead of the 110 basis point disparity reported by Del Guercio and Reuter in their 2014 paper on which the Department relied for its regulatory impact analysis, Reuter reports that over the 2004-2014 period the disparity declined to 64 basis points. This decline suggests that the putative benefits estimated by the Department for the Fiduciary Rule and the predicted costs of delaying its implementation are grossly overvalued.^{xviii}
- Studies show that unadvised households tend to hold fewer equities than advised households. The likelihood of owning any stocks or stock-based mutual funds increases by 67% with the use of an advisor and the proportion dedicated to stock positions increases by 39%. Academic work clearly shows that asset allocation, not mutual fund selection, explains, on average, 100% of performance. If the Rule results in a reduction of equity allocations by only 15%, the ICI estimated that would result in a performance decline of 50-100 bps per year, on average, or \$95 billion and \$189 billion over the next 10 years and between \$202 billion and \$404 billion over the next 20 years.
- New economic studies estimate that investors could lose \$109 billion over 10 years because of the Rule’s implementation. This would amount to \$780 million per month in losses to investors. A 60-day delay would thus save investors \$402 million in lost returns over 60 days. A 180-day delay would save more than \$1.2 billion. Even a 60-day delay would amount to \$414 million in lost returns saved for investors over the first year if the Rule ultimately goes forward as now structured and \$542 million over a 10-year period (at a three percent discount rate). These lost returns far exceed the Department’s estimated \$104 million losses in the form of foregone gains—gains that, as shown above, are widely overstated.
- Kinniry, et al., found that having a financial professional can make up to a 300 basis point difference in annual compound returns. They found that the greatest contributing factor of assistance, amounting to 150 basis points in annual compound rate of return, was the “behavioral coaching” element of the interactions between a customer and a financial professional.^{xix}

- A paper casts doubt on the social benefits of the Department’s promotion of passive index fund investing. The paper shows that despite the apparent advantages to some individual investors, widespread and growing adoption of the strategy could distort capital markets in ways that could slow overall economic growth. The author shows how inclusion of a stock in an index fund may artificially raise its internal cost of capital calculations and discourage otherwise profitable investment decisions. He also illustrates how an index fund investor may be exposed to unforeseen risk of loss.^{xx}
- A report finds that many retirement savers are adverse to assistance from call centers or robots. The personal connection with a financial professional is important for educating and motivating savings behavior.^{xxi}

New Information: Increased Litigation

- The increased litigation stemming from the inappropriate use of the private right of action in enforcing the BIC Exemption will result in \$70 and \$150 million in costs to the industry each year.^{xxii}
- Data shows that class action lawsuits like the type that would flow from the Rule provide almost no benefit to the class members of the action, but rather just help their lawyers.^{xxiii}
- Companies interviewed by the Chamber suggest insurance costs could exceed two to three times the cost estimated by the Department. Some respondents to Chamber interviews cited numbers as high as \$10,000 per professional per year for Errors and Omissions coverage.
- Expanded incentive for class action litigation results in defendant’s settling with an extremely litigious plaintiff’s bar instead of spending years tied up in discovery. A survey of lawsuits filed against fiduciaries in recent years demonstrates how plaintiffs use these settlements to fund future lawsuits.^{xxiv}
- In 2016, nearly 4,000 FINRA arbitration cases were filed by consumers alleging broker-dealer wrongdoing (only 158 of those cases were decided in favor of the consumer), meaning that broker-dealers spent a lot of time and money defending these cases.^{xxv}
- A SIFMA survey indicated “. . . more than 60% of the responding firms stated that they anticipate that some or all of the costs resulting from the potential increase in litigation and liability insurance may be passed on to clients.”

New Information: Compliance Costs

- SIFMA estimates that annual compliance costs will range from \$240 million to \$570 million over the next ten years.^{xxvi}
- Small broker-dealers face the greatest financial risk under the Rule, forcing potential consolidation of broker-dealers.^{xxvii}

- One recent study by the American Action Forum found reported compliance costs of at least \$106 million in 2016, representing up-front costs from just four companies.
- The DOL’s RIA grossly underestimated the cost of the rule.^{xxviii}

Procedural Flaws

- An inquiry initiated by Senator Ron Johnson (R-WI) in 2015 found the Department “was predetermined to regulate the industry and sought evidence to justify its preferred action.”^{xxix} In other words, the Department first concluded that it wanted to change the rules governing investment advice fiduciaries, and then sought to justify that conclusion.
- The Department failed to consider how the Rule would likely create an “advice gap” for low- to middle-income families. The Department dismissed concerns of loss of access, and instead found “little evidence” that “financial advisers improve retirement savings.” However, this conclusion is contradicted by the Department’s own assessment in a prior rulemaking that investment mistakes cost investors approximately \$114 billion per year, that access to financial assistance reduced the cost of those mistakes by \$15 billion per year, and that increased access to financial assistance would enable them to save billions more.
- The Department chose to ignore evidence regarding the impact of similar rules established in other jurisdictions. Most notably, following the United Kingdom’s 2013 move to a fee-based compensation model, the U.K. regulator determined that retirement savers—particularly those with lower incomes—were adversely affected and acknowledged that its “high standard of advice is primarily accessible and affordable only for the more affluent in society.” Rather than taking advantage of the opportunity to learn from mistakes made by other countries, the Department simply denied the existence of an “advice gap” in the U.K. and dismissed the possibility that a similar “advice gap” would develop in the U.S. under the Fiduciary Rule.
- Under Executive Order 12866^{xxx} and related guidance issued by OMB,^{xxxi} consideration of viable alternatives is a fundamental element of federal agency rulemaking. However, the lack of consideration given to all relevant costs of the Fiduciary Rule prevented the Department from properly evaluating less burdensome alternatives that would have greatly reduced the costs of the Fiduciary Rule, harmonized the Department’s regulatory regime with that of the SEC and, because they would have applied only to relationships in which the client has no reasonable expectation of fiduciary status, would not have caused any meaningful consumer harm. However, as a result of the Department’s flawed process, it arbitrarily rejected these and other alternatives.
- According to the Johnson Report discussed above, the Department failed to adequately consider comments from expert regulators and professional staffers from the SEC, OIRA, and the Treasury Department expressing concerns and offering recommendations regarding the Rule.

Analytical Flaws

- According to a February 2017 analysis by the American Action Forum, it is unclear how CEA found that \$1.7 trillion of IRA assets involved conflicts of interest. Total affected IRA assets are significantly less. Retirement account assets were \$7.3 trillion in 2013, 86.2 percent of which, by the CEA's own definition, were not "conflicted." That leaves less than \$1 trillion in so-called "conflicted" assets. And even that amount is too large because it represents total "conflicted" assets across all retirement accounts, while the CEA's analysis was limited to IRA assets only. Total "conflicted" IRA assets are some amount less than \$1 trillion. Also, as the CEA stated, the \$1.7 trillion figure is some combination of front-load funds and variable annuity in IRAs. By including the annuity market, the CEA increased total affected assets by approximately \$600 billion, or about 50 percent.
- The Final RIA is deficient because the Regulation is built on two false premises: all commission-based sales are conflicted, and all fee-only advice is always non-conflicted and serves retirement savers' best interest. Neither premise is correct, and neither is supported by the final RIA.
- The Department's Regulatory Impact Analysis only briefly addressed the impact the Rule would have on jobs, noting the Rule could have "some social costs."^{xxxii}
- In projecting the costs of the Rule, the Department did not give due consideration to the costs of the Rule specifically applied to annuity manufacturers and distributors, despite several studies made available to the Department demonstrating the costs.^{xxxiii}
- The Regulatory Impact Analysis overstated the benefits of the Fiduciary Rule, underestimated the Fiduciary Rule's direct and indirect costs to the financial services industry and retirement savers, and, as described above, failed to give meaningful consideration to the costs to retirement savers from lost access to retirement assistance (including assistance with guaranteed lifetime income products such as annuities) and the transaction-based fee model as well as the costs of class action lawsuits arising from the BIC Exemption. The record shows those costs total tens of billions of dollars.
- The Department relied on flawed and problematic factors and data in their Regulatory Impact Analysis projections. Specifically, the Department admitted to basing savers' projected financial gains on research regarding "only one" issue: the purported "conflict that arises from variation in the share of front-end-loads that advisers receive when selling different mutual funds that charge such loads to IRA investors." This research provides no basis for regulating products—such as annuities—that may not invest in mutual funds at all, and was not even a proper assessment of mutual fund performance.
- Additionally, in estimating that the average mutual fund sold by brokers underperformed its benchmark, the Department improperly used performance data on certain unrepresentative funds to draw conclusions about the entire mutual fund market. The Department

compounded this error by relying on data for the period 1993 through 2009 (a cherry-picked sample encompassing the entire global financial crisis and nearly none of the recovery) and basing its underperformance estimate not on actual holding periods, or even over a full market cycle, but rather on the single year in which funds were purchased. A series of comment letters from the Investment Company refuted this data, finding the Rule could cost investors \$109 billion in additional fees.^{xxxiv}

- Vanderbilt Professor and former SEC Chief Economist Dr. Craig Lewis noted the research relied on by the Department did not analyze the performance of mutual funds held in annuities, relied on old data not reflecting the current marketplace, and the author of one of the key studies later revised his work to show the “cost” of conflicts was about 1/6th of the amount originally estimated.^{xxxv}
- The Department was far too optimistic in relying on “robo advisers” to alleviate the potential loss of access to retirement advice for small savers. The Chamber of Commerce is currently unaware of any “robo advisor” that recommends annuity products to generate retirement income, despite the clear need for those products.
- The Department seemingly concludes that “robo advisers” and low-expense passive investment options are the best course of action for retirement investors, while ignoring the reality that there is no “one size fits all” investment strategy and even if some investors would benefit from this development, others would be harmed. The Department failed to address this potential impact in their Regulatory Impact Analysis.
- DOL failed to acknowledge that annuities are governed by a distinct, customized, and comprehensive regulatory framework that was enhanced in 2010 to account for annuities’ unique features. The dated mutual fund studies relied upon by the Department, which focus primarily on investment performance in the historical period 1991 to 2005, do not measure the efficacy of targeted and more rigorous annuity-specific rules.

ⁱ Claude Montmarquette and Nathalie Viennot-Briot, Centre for Interuniversity Research and Analysis on Organizations (CIRANO), *The Gamma Factor and the Value of Advice of a Financial Advisor* (Aug. 2016), available at <https://www.cirano.qc.ca/files/publications/2016s-35.pdf>.

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

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

^{iv} *Id.*

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

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

^{vii} *Id.* at 13.

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

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

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

^{xi} *Id.*

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

^{xiii} *Id.* See also LIMRA Secure Retirement Institute, Fourth Quarter 2016.

^{xiv} Insured Retirement Institute, *March 2017 Survey of IRI Member Companies*.

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

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

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

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

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

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^{xxi} Charles Schwab, *Communicating Retirement Plan Benefits in a World of Skeptics* (2013), available at <http://www.schwab.com/public/file/P-8557214>

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^{xxiv} Multnomah Group, *Class Action Litigation Against Fiduciaries* (Sept. 2016), at 11-14, available at http://www.multnomahgroup.com/hubfs/PDF_Files/Webinar_Presentation_Slides/Class_Action_Litigation_Against_Fiduciaries.pdf.

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^{xxviii} Oxford Economics, *How the Fiduciary Rule Increases Costs and Decreases Choice* (Apr. 15, 2017), available at http://www.financialservices.org/uploadedFiles/FSI/Advocacy_Action_Center/The_Fiduciary_Rule_Increases_Costs_And_Decreases_Choice.pdf.

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^{xxxi} Office of Mgmt. & Budget, Circular No. A-4, Regulatory Analysis (Sept. 17, 2003).

^{xxxii} U.S. Department of Labor, Employee Benefits Security Administration, *Regulating Advice Markets, Definition of the Term "Fiduciary" Conflicts of Interest - Retirement Investment Advice, Regulatory Impact Analysis for Final Rule and Exemptions* (Apr. 2016), at 244, available at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/conflict-of-interest-ria.pdf>.

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

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

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