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January 22, 2018

Submitted Electronically to [jmatthews@naic.org](mailto:jmatthews@naic.org)

The Honorable Dean Cameron  
Director, Idaho Department of Insurance  
Chairman, NAIC Annuity Suitability (A)  
Working Group  
700 West State Street, 3rd Floor  
Boise, Idaho 83720-0043

The Honorable Doug Ommen  
Commissioner, Iowa Insurance Division  
Vice Chairman, NAIC Annuity Suitability (A)  
Working Group  
Two Ruan Center  
601 Locust, 4th Floor  
Des Moines, IA 50309-3738

**Re: Draft Revisions to the Suitability in Annuity Transactions Model Regulation (#275)**

Dear Director Cameron and Commissioner Ommen:

On behalf of our members, the Insured Retirement Institute (“IRI”)<sup>1</sup> appreciates the opportunity to provide these comments regarding the draft revisions (the “Exposure Draft”) to the National Association of Insurance Commissioners (“NAIC”) Suitability in Annuity Transactions Model Regulation (#275) (the “Model Regulation” or the “Model”) exposed for public comment on November 24, 2017, by the NAIC Annuity Suitability (A) Working Group (the “Working Group”). IRI and our members commend you and the Working Group for recognizing the importance of this issue and for seeking public input to help the NAIC as it considers whether and how to amend the Model to incorporate a best interest standard of conduct.

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<sup>1</sup> IRI is the only national trade association that represents the entire supply chain of the retirement income industry. IRI has more than 500 member companies, including major life insurance companies, broker-dealers, banks, and asset management companies. IRI member companies account for more than 95 percent of annuity assets in the United States, include the top 10 distributors of annuities ranked by assets under management, and are represented by more than 150,000 financial professionals serving over 22.5 million households in communities across the country.

IRI and our members have long supported the principle that financial professionals<sup>2</sup> should be required to act in their clients' best interest when providing personalized recommendations. Moreover, IRI members are fully committed to compliance with all applicable laws and regulations. Over the course of more than twenty months since the final DOL Rule<sup>3</sup> was issued, IRI members have undertaken wide-ranging efforts to prepare for implementation. Let there be no confusion, though: this support for "a best interest standard" and this commitment to legal and regulatory compliance should not be interpreted as support for the approach taken in the DOL Rule.

We and other commenters have raised and continue to have serious concerns about the DOL Rule and its harmful impact on retirement savers. For example, the best interest standard articulated by the DOL appears to require a complete disregard for the business and economic reality that firms and financial professionals have to generate enough revenue to cover their costs and earn a reasonable profit in order to stay in business. We are particularly concerned about how this requirement will be applied in the context of proprietary annuity distribution models, which provide consumers with invaluable and irreplaceable sources of knowledge about annuity products and how annuities can be used to provide guaranteed lifetime income to retirees.

Put simply, the DOL Rule is already depriving consumers of access to guaranteed lifetime income products and the professional assistance needed to knowledgeably acquire and use those products. This outcome clearly runs counter to the best interests of working American men and women.

As such, we believe all the interested regulatory bodies should collaborate to develop a new, workable best interest standard. This effort should include the NAIC, the U.S. Securities and Exchange Commission (the "SEC"), the U.S. Department of Labor ("DOL"), the Financial Industry Regulatory Authority ("FINRA") and the North American Securities Administrators Association ("NASAA"). In this letter, we will provide constructive suggestions and recommendations regarding the Exposure Draft to help the NAIC develop a workable best interest standard that will provide meaningful and effective consumer protections without depriving Americans of access to valuable financial products and services. For your convenience, a cumulative markup of the Exposure Draft reflecting all of our specific comments is attached as Attachment A.

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<sup>2</sup> The term "financial professional" is used throughout this letter to refer to any individual who provides advice or recommendations about annuities or other insurance or investment products, including state-regulated insurance producers as well as securities-licensed representatives of broker-dealer or investment adviser firms.

<sup>3</sup> As used in this letter, the term "DOL Rule" means, collectively, the final regulation defining the term "fiduciary" (the "Fiduciary Definition Regulation") under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), the Best Interest Contract Exemption (the "BIC Exemption"), and the amendments to prohibited transaction exemption 84-24 (the "Amended PTE 84-24") issued by the DOL on April 8, 2016.

In addition, attached as Attachment B is a copy of the comment letter<sup>4</sup> we submitted to the SEC on December 13, 2017 (the “SEC Comment Letter”), in response to SEC Chairman Jay Clayton’s request for public comments on possible SEC rulemaking regarding the standards of conduct for investment advisers (“IAs”) and broker-dealers (“BDs”). The SEC Comment Letter provides some context for our views on this critically important issue, and outlines a set of guiding principles to which we believe the SEC should adhere as it works to develop a best interest standard. We believe these guiding principles are generally applicable to the NAIC’s efforts in this space, and therefore respectfully make the same recommendation to the Working Group.

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## **Executive Summary**

The following is an overview of the comments and recommendations set forth in this letter.

### **A. General Comments**

1. The NAIC should collaborate with the SEC, the DOL, FINRA, and NASAA to develop a cohesive and workable best interest standard and should not adopt a revised regulation until this effort is completed.
2. The scope of the Model should not be expanded beyond recommendations.
3. The FINRA safe harbor should be expanded to recognize all substantially similar best interest standards.
4. Insurers and producers will need sufficient time to implement the revised Model.

### **B. Comments on the Formulation and Application of the Best Interest Standard**

1. The best interest standard should apply at the time of the recommendation.
2. Producers should not be required to consider products beyond their expertise and qualifications.
3. The best interest standard should not require absolute certainty.
4. The requirements for exchanges and replacements are too restrictive.
5. The best interest standard should not prohibit producers or insurers from receiving compensation for recommended transactions.

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<sup>4</sup> Comment letter submitted by the Insured Retirement Institute (December 13, 2017), available at <https://www.sec.gov/comments/ia-bd-conduct-standards/cl14-2794386-161686.pdf>.

C. Comments on the Treatment of Compensation

1. The definition of reasonable cash compensation should more closely reflect the legitimate reasons for cash compensation structures that are not related to the time and complexity of the product.
2. The compensation disclosure requirements should focus on providing the information consumers actually need.

D. Comments on the Obligations of Insurers

1. The Exposure Draft should clearly define the responsibilities of insurers when annuities are sold through third-party producers.
2. Insurers should not be responsible for suitability or best interest determinations when circumstances prevent an effective analysis.

\* \* \* \* \*

A. General Comments

**1. The NAIC Should Collaborate With the SEC, the DOL, FINRA, and NASAA to Develop a Cohesive and Workable Best Interest Standard and Should Not Adopt a Revised Regulation Until This Effort is Completed.**

As explained in our SEC Comment Letter, IRI and our members believe it is essential that all of the appropriate regulatory bodies working to develop best interest standards engage in a constructive and collaborative dialogue before adopting any final rules. This effort should include the NAIC, the SEC, the DOL, FINRA, and NASAA. We are encouraged by the sentiments recently expressed by the NAIC,<sup>5</sup> SEC Chairman Jay Clayton, and Secretary of Labor Alexander Acosta acknowledging the need for coordination, and we urge the regulators to follow through on those comments.

As the prudential regulators for the insurance and securities industries, the NAIC and the SEC should lead this effort. They have the the ability to adopt the most broadly applicable rules, and have robust examination and enforcement tools at their disposal to effectively ensure compliance or penalize violators for non-compliance. Unlike the DOL Rule, which applies only to recommendations made with respect to retirement assets, this approach would establish consistent and clear standards of conduct for recommendations made by all licensed financial professionals with respect to any insurance or securities product.

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<sup>5</sup> Comment letter submitted to the SEC by the NAIC (August 7, 2017), available at <https://www.sec.gov/comments/ia-bd-conduct-standards/cl4-2211662-160598.pdf>.

With this in mind, we respectfully urge the Working Group to clearly and publicly clarify that its current work with respect to the Exposure Draft is intended only to help the NAIC develop an initial position for its discussions with its fellow regulators, and that final revisions to the Model will not be adopted before a general agreement is reached among the regulators as to appropriate standards of conduct and regulatory requirements.

To be clear, IRI fully supports a coordinated approach designed to produce a cohesive regulatory framework among all of the interested regulators, but would strongly oppose any effort to finalize revisions to the Model that are not consistent and aligned – both in terms of substance and timing – with corresponding rulemaking by the SEC and DOL.

**2. The Scope of the Model Should Not Be Expanded Beyond Recommendations.**

Section 2 of the Exposure Draft would expand the scope of the Model beyond “recommendations” to also include “solicitation, negotiation,...or sale of an annuity,” possibly in order to conform the Model to the NAIC’s Producer Licensing Model Regulation. IRI believes the applicable standard of conduct should apply only to recommendations for which a producer receives compensation. Unless and until a producer makes an actual recommendation to a consumer for which the producer will receive actual compensation, the producer is acting merely as a salesperson and therefore should not be subject to a suitability or best interest standard. As such, we respectfully oppose the proposed changes in Section 2 of the Exposure Draft. In addition, we respectfully recommend that the terms “solicitation,” “negotiation,” and “sale” be removed from the definition of “cash compensation” in Section 5.C.

**3. The FINRA Safe Harbor Should Be Expanded to Recognize All Substantially Similar Best Interest Standards.**

Section 6.J of the Exposure Draft would replace the references to FINRA’s suitability rules with references to FINRA best interest standards. We note, however, that FINRA does not currently have formal best interest standards. Moreover, best interest standards under the federal securities laws may ultimately reside in SEC rules (or possibly even in Congressional legislation) rather than FINRA rules. In addition, the DOL Rule may ultimately be retained or amended in a manner that preserves a best interest standard. As such, we respectfully request that this section be revised to more broadly reference standards of conduct established under any other laws or regulations that are substantially similar to those included in the revised Model.

**4. Insurers and Producers Will Need Sufficient Time to Implement the Revised Model.**

We will not be able to fully assess the amount of time our members will need to implement the revised Model until all of the details are fully resolved. However, our members have

indicated, based on their past experience with the DOL Rule, that six months will not be sufficient, particularly if systems or operational changes will be necessary. We would encourage the Working Group to revisit this question at the appropriate time later in the process when the actual requirements, and therefore the impact, of the revised Model are known.

## **B. Comments on the Formulation and Application of the Best Interest Standard**

### **1. The Best Interest Standard Should Apply at the Time of the Recommendation**

Generally speaking, the proposed definition of “best interest” in Section 5.B(1) of the Exposure Draft is an appropriate formulation of this key concept. We do, however, have two concerns with this proposed definition, both of which can be easily addressed. First, compliance with the standard should be assessed at the time of the conduct to which it is being applied. As such, the definition should refer to “the time the annuity is recommended” rather than “the time the annuity is issued.” Second, the phrase “first and foremost” is not an established term of art and could easily be interpreted in vastly different ways by different authorities. Given that uniformity is one of the most critical goals of this effort (as discussed in greater detail in Section A.5 above), we would urge the Working Group to use terminology that is more well-defined and/or less susceptible to differing interpretation.

In addition, IRI and our members support the inclusion of the clarifying provisions included in Section 5.B(2). While certain members of the Working Group have expressed opposition to the inclusion of these provisions, we believe they are essential to ensure the standard is applied properly and uniformly across all jurisdictions.

### **2. Producers Should Not Be Required to Consider Products Beyond Their Expertise and Qualifications.**

Proposed new Section 6.B(2) in the Exposure Draft would require a producer or insurer to determine that the product being recommended is appropriately aligned with the consumer’s financial situation and goals. As drafted, however, this provision could be interpreted to require that producers consider all “financial products” available in the marketplace that could be right for the consumer. This interpretation would be particularly problematic for insurance-only producers who do not have the requisite training, knowledge or credentials to address anything other than insurance products. As such, we respectfully recommend that Section 6.B(2) be revised to clarify that producers need only consider those products for which they are appropriately licensed.

### **3. The Best Interest Standard Should Not Require Absolute Certainty.**

The proposed revisions to Section 6.A in the Exposure Draft appear to require absolute certainty that a particular recommendation is suitable and in the client's best interest. This is an impossible standard and would fundamentally change the nature of the regulation. The Model currently requires that producers or insurers have "reasonable grounds for believing that the recommendation is suitable." This formulation appropriately recognizes that suitability is a subjective standard under which reasonable people may reach different conclusions. Producers and insurers who reasonably conclude that a particular recommendation is suitable should not be deemed to be in violation of the Model merely because someone else might disagree with their assessment. Similarly, best interest is not an entirely objective standard under which all producers would necessarily reach the same conclusion. As such, we respectfully request that the Working Group retain the "reasonable grounds" qualifier included in the current Model.

### **4. The Requirements for Exchanges and Replacements Are Too Restrictive.**

We are concerned that Section 6.D(4) in the Exposure Draft would set an inappropriately high bar for producers or insurers to determine whether a potential exchange or replacement would be in the client's best interest. Consumers can have a wide range of reasons for engaging in such transactions. The most obvious, certainly, is where the new product offers "a substantial financial benefit," but there are countless other legitimate reasons to exchange one product for another. A consumer may have had a negative experience with the issuing company or the producer who sold them the original product. Similarly, a consumer might object to the carrier's or producer's actions or views with respect to environmental, social or ethical issues. In these types of situations, we see no justification for depriving a consumer of access to assistance from a producer to select a replacing product.

The Exposure Draft would also increase the look-back period for previous replacements from 36 months to 60 months, but we are unclear as to the reason for this change. In our view, a previous replacement four or five years in the past is far less concerning than a replacement within the past two or three years. Over a longer period of time, it is far more likely that the client's circumstances will have changed such that the new product better aligns with the client's needs and goals.

As such, we respectfully oppose the proposed changes in Section 6.D(4).

## **5. The Best Interest Standard Should Not Prohibit Producers or Insurers from Receiving Compensation for Recommended Transactions.**

Section 8 of the Exposure Draft appears to be intended to incorporate the “impartial conduct standards” included in the DOL Rule into the Model. We are concerned, however, that subsection (3) would inadvertently prohibit a producer or insurer from recommending any annuity where the transaction would result in compensation to the producer or insurer. Clearly, producers and insurers reasonably expect to be paid for their services; these are, after all, businesses operated for profit, not charitable or *pro bono* endeavors. We do not believe this was the Working Group’s intent. Moreover, this formulation is not consistent with the construction of the best interest standard in the DOL Rule or in the Exposure Draft. As such, we respectfully recommend that this subsection be revised to require that producers and insurers put their clients’ interests ahead of their own when making a recommendation.

In addition, we would welcome the opportunity to discuss whether these provisions should be incorporated into Section 6 rather than a standalone section as currently contemplated. We are still assessing the implications of such a move, and would be very interested to hear the Working Group’s thoughts on this question.

### **C. Comments on the Treatment of Compensation<sup>6</sup>**

#### **1. The Definition of Reasonable Cash Compensation Should More Closely Reflect the Legitimate Reasons for Cash Compensation Structures That Are Not Related to the Time and Complexity Of The Product.**

The proposed definition of “reasonable cash compensation” in Section 5.M of the Exposure Draft is highly problematic. Compensation is not typically calculated based on the amount of time it takes a producer to understand and sell the product to a particular consumer, and therefore, we do not believe it is appropriate to assess the reasonability of compensation on such factors. In our view, a multitude of factors must be taken into account when determining whether compensation is reasonable. For example, it is not unreasonable for compensation practices to vary from one part of the country to another. Similarly, we believe it is entirely appropriate for compensation to be higher for products that provide more valuable and/or complex features and benefits. With this in mind, we respectfully recommend that the Working Group provide a more flexible definition of “reasonable cash

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<sup>6</sup> Certain IRI members have noted that FINRA has separate and distinct rules regarding the standard of conduct and the treatment of compensation. These members, while generally supportive of the NAIC’s effort to address compensation, have suggested that the NAIC should consider a similar bifurcated approach. To be clear, this suggestion is intended only to avoid unnecessarily complicating the Model Regulation by combining these two important and challenging issues into a single set of rules. These members would welcome the opportunity to explore this concept further with the Working Group.

compensation.” To that end, we endorse the approach taken in the comment letter submitted by the American Council of Life Insurers, which we have incorporated into the markup attached as Attachment A to this letter.

On a related note, we are unclear as to the intent of several of the terms included in the definition of “cash compensation,” including ‘discount’ and ‘loan.’ We would encourage the Working Group to carefully consider whether those terms are necessary, and if so, whether to provide greater clarity as to their meaning.

## **2. The Compensation Disclosure Requirements Should Focus On Providing the Information Consumers Actually Need.**

As noted above, workable and effective disclosure requirements should be a core element of any best interest standard. However, the compensation disclosure requirement included in Section 6.C(2) is problematic for a number of reasons.

First, we are concerned that setting a threshold below which compensation disclosure is not required could be misleading insofar as a consumer could interpret the lack of disclosure on a particular product to mean the producer is receiving no compensation for the recommendation.

Setting such a threshold is likely to drive the marketplace to artificially set compensation levels as high as possible without crossing that threshold to avoid triggering the disclosure requirement. This would drive higher-compensation products out of the market, even if they might be in the best interest of certain consumers, while also removing an incentive for insurers to develop products with compensation that is even lower than the threshold. In our view, compensation levels should be driven by the marketplace and consumers, not dictated by regulators.

Second, compensation is often based on factors that simply are unknown at the time of the recommendation, such as consumer behavior (e.g., future contributions, withdrawals or surrenders) and the performance of underlying investments. Moreover, the exact amount or percentage of compensation is not likely to be particularly relevant or useful to consumers. Rather, consumers need to understand (a) that compensation will be paid, (b) whether and on what basis the amount of compensation on a particular product might rise or fall, (c) how the amount of compensation could vary among different products, (d) what the consumer will receive in exchange for the compensation, and (e) how to get more information if so desired. Put another way, the disclosure requirements should focus on “how” compensation is determined rather than “how much” compensation is paid.

In addition, we suggest that non-cash compensation disclosure requirements be addressed in the same section of the Exposure Draft as the cash compensation disclosure requirements.

Fortunately, the Working Group need not craft new provisions from whole cloth. New York Regulation No. 194 (Producer Compensation Transparency)<sup>7</sup> already establishes requirements that do not raise these concerns and could serve as the model for this provision. We encourage the Working Group to incorporate similar requirements into the Exposure Draft.

#### **D. Comments on the Obligations of Insurers**

##### **1. The Exposure Draft Should Clearly Define the Responsibilities of Insurers When Annuities Are Sold Through Third-Party Producers.**

Many of IRI's insurance company members distribute their annuities through third party producers over whom they have no direct control. The suitability standard imposed under the current Model is highly process-oriented, and therefore, insurers can readily supervise recommendations of their products by third party producers. By contrast, the best interest standard contemplated by the Exposure Draft will necessarily require subjective and qualitative assessments of each particular client's circumstances, needs and goals. Due to the structure and nature of the arrangements between insurers and third-party producers, insurers will not typically have access to all of the information they would need to make their own best interest determinations. As such, we do not believe insurers should be expected to supervise compliance with the best interest standard in the same way they currently oversee the suitability standard.

To address this concern, we respectfully recommend that the Working Group add a definition for the term "third-party producer" to the Exposure Draft, and clearly delineate reasonable expectations for insurer oversight of recommendations made by such producers. We have included recommended language to address this issue in the markup attached as Attachment A (see new Sections 5.P and 6.H(1)(f)).

On a related note, we believe the proposed addition of "and in the best interest of a consumer" in Section 6.H(d) of the Exposure Draft would require that insurers review every producer-recommended transaction to ensure compliance with the best interest standard. This would be inconsistent with Section 6.E, which expressly states that insurers need only have a "reasonable basis to believe the annuity is suitable based on the consumer's suitability information." We believe Section 6.E sets the appropriate standard for insurers in

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<sup>7</sup> Available at [www.dfs.ny.gov/insurance/r\\_finala/2010/rf194txt.pdf](http://www.dfs.ny.gov/insurance/r_finala/2010/rf194txt.pdf).

such circumstances, and therefore, we respectfully oppose the proposed change in Section 6.H(d).

**2. Insurers Should Not Be Responsible for Suitability or Best Interest Determinations When Circumstances Prevent an Effective Analysis.**

Under the current Model, producers and insurers are generally relieved of their suitability obligations under circumstances beyond their control that impair their ability to conduct an effective suitability analysis, such as where no recommendation is made or the consumer provides false suitability information. Nevertheless, insurers are required to ensure that such transactions are “reasonable under all the circumstances actually known to the insurer at the time the annuity is issued.” Section 6.F in the Exposure Draft reflects a number of changes, but the intent and effect of those changes are unclear. The changes appear to be mere wordsmithing. If this is the case, we would respectfully oppose these changes given that the industry has developed practices and procedures to comply with the existing language.

**E. Other Specific Comments**

**1. *Definition of “Intermediary”***

The proposed definition of the term “intermediary” in Section 5.I is unnecessarily broad. For example, one could argue that a producer contracts with its internet service provider or telephone company in order to facilitate its business. Clearly, this is not the Working Group’s intent. The mark-up of the Exposure Draft includes an alternative formulation that would cover the types of firms we believe the Working Group intended to include.

**2. *Definition of “Material Conflict of Interest”***

The clarifying language in Section 5.J(2) could be interpreted to mean that even *de minimis* financial interests would constitute “material conflict of interest.” We do not believe this was the Working Group’s intent. Our mark-up of the Exposure Draft includes one possible approach to address this concern.

**3. *Definition of “Negotiate”***

Assuming the Working Group agrees with our comments on Section 2 above, the term “Negotiate” would no longer be used in the Exposure Draft and should therefore be deleted from the Definitions section.

**4. Definition of “Recommendation”**

To avoid any uncertainty (and consistent with the DOL Rule), we respectfully recommend that the Working Group expressly state that the definition of “recommendation” does not include general communications to the public, marketing and other product or sales materials, prospectuses, general education information and tools, and general customer service assistance or administrative support.

**5. Definition of “Suitability Information”**

Similar to the concern we noted above with respect to Section 6.B(2), the proposed insertion of the phrase “or financial products” in subsection (8) of the definition of “suitability information” is problematic for insurance-only producers and should be deleted. We believe the term “assets” is broad enough to include any products owned by the consumer.

In addition, the proposed insertion of the phrase “including changes in nonguaranteed elements in an annuity contract” in subsection (11) of the definition of “suitability information” seems out of place. We are not opposed to requiring consideration of the extent to which the annuity includes nonguaranteed elements as part of the best interest analysis, but we think it would make more sense to move this to Section 6.D.

**6. Requirement to Obtain Suitability Information**

We believe the phrase “from the consumer” should be added to the end of Section 6.B(1) to avoid any implication that producers or insurers are required to ask anyone other than the consumer for the consumer’s suitability information.

**7. Insurance Producer Training**

IRI would fully support efforts by the NAIC and the state insurance departments to address the growing problem of financial exploitation of seniors and other vulnerable adults, and we stand ready to assist with such efforts. However, we do not believe annuity suitability training is the appropriate mechanism for this goal. The training requirement, in its current form, has already been adopted in approximately 40 states, meaning that the vast majority of producers across the country have already completed the required training. As such, changes should only be made to the content of the required training if there are clear and well-defined reasons for such changes. We do not believe the changes contemplated by Section 9 of the Exposure Draft satisfy that threshold, and therefore, we respectfully oppose those changes.

\* \* \* \* \*

## Conclusion

In an age when saving and preparing for retirement is squarely on the shoulders of individuals, financial professionals will have an important part in helping their clients develop retirement plans and grow their savings. The DOL Rule is already limiting consumer choice and depriving lower- and middle-income consumers from accessing affordable assistance with retirement planning. We believe the guiding principles and proposals outlined in this letter will enable the NAIC and its fellow regulators to establish a best interest standard while preserving Americans' access to retirement planning products and services.

If you have questions about anything in this letter, or if we can be of any further assistance in connection with this important regulatory effort, please feel free to contact me or Lee Covington, IRI's Senior Vice President and General Counsel.

Sincerely,

A handwritten signature in black ink, appearing to read "Catherine J. Weatherford". The signature is fluid and cursive, with a large loop at the end.

Catherine J. Weatherford  
President & CEO  
Insured Retirement Institute

Cc: The Honorable Julie Mix McPeak, Tennessee Insurance Commissioner, NAIC President  
The Honorable Eric Cioppa, Maine Insurance Superintendent, NAIC President-Elect  
The Honorable Raymond Farmer, South Carolina Insurance Director, NAIC Vice President  
The Honorable Gordon Ito, Hawaii Insurance Commissioner, NAIC Secretary-Treasurer  
Mr. Michael Consedine, NAIC Chief Executive Officer

## Attachment A

Comments are being requested on this draft. The revisions to this draft reflect changes made from the existing model. Comments should be sent only by email to Jolie Matthews at [jmatthews@naic.org](mailto:jmatthews@naic.org).

### MARKED TO REFLECT CHANGES PROPOSED BY IRI.

## SUITABILITY AND BEST INTEREST STANDARD OF CONDUCT IN ANNUITY TRANSACTIONS MODEL REGULATION

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### Section 1. Purpose

- A. The purpose of this regulation is to require insurers to establish a system to supervise recommendations and to set forth standards and procedures for recommendations to consumers that are suitable, in their best interest and result in transactions involving annuity products so that the insurance needs and financial objectives of consumers at the time of the transaction are appropriately addressed.
- B. Nothing herein shall be construed to create or imply a private cause of action for a violation of this regulation.

**Drafting Note:** The language of subsection B comes from the NAIC Unfair Trade Practices Act. If a State has adopted different language, it should be substituted for subsection B.

### Section 2. Scope

This regulation shall apply to any ~~solicitation, negotiation, recommendation or sale of an annuity to purchase, exchange or replace an annuity made to a consumer by an insurance producer, or an insurer where no producer is involved, that results in the purchase, exchange or replacement recommended.~~

### Section 3. Authority

This regulation is issued under the authority of [insert reference to enabling legislation].

**Drafting Note:** States may wish to use the Unfair Trade Practices Act as enabling legislation or may pass a law with specific authority to adopt this regulation.

### Section 4. Exemptions

Unless otherwise specifically included, this regulation shall not apply to transactions involving:

- A. Direct response solicitations where there is no recommendation based on information collected from the consumer pursuant to this regulation;
- B. Contracts used to fund:

- (1) An employee pension or welfare benefit plan that is covered by the Employee Retirement and Income Security Act (ERISA);
- (2) A plan described by sections 401(a), 401(k), 403(b), 408(k) or 408(p) of the Internal Revenue Code (IRC), as amended, if established or maintained by an employer;
- (3) A government or church plan defined in section 414 of the IRC, a government or church welfare benefit plan, or a deferred compensation plan of a state or local government or tax exempt organization under section 457 of the IRC;
- (4) A nonqualified deferred compensation arrangement established or maintained by an employer or plan sponsor;
- (5) Settlements of or assumptions of liabilities associated with personal injury litigation or any dispute or claim resolution process; or
- (6) Formal prepaid funeral contracts.

## Section 5. Definitions

- A. “Annuity” means an annuity that is an insurance product under State law that is individually solicited, whether the product is classified as an individual or group annuity.
- B.
  - (1) “Best interest” means, at the time the annuity is ~~issued~~ recommended, acting with reasonable diligence, care, skill and prudence in a manner that puts the interest of the consumer ~~first and foremost ahead of the financial or other interests of the producer~~.
  - (2) “Best interest” does not mean a resulting recommendation is the least expensive annuity product, or the annuity product with the highest stated interest rate or income payout rate, available in the marketplace at the time of the annuity ~~transaction~~ recommendation. “Best interest” also does not mean the recommendation is the single “best” annuity product available in the marketplace at the time of the annuity ~~transaction~~ recommendation, but based on the insurance producer’s judgment acting with reasonable diligence, care, skill and prudence, the producer believes the recommendation is in the best interest of the consumer
- C. “Cash compensation” means any discount, concession, fee, service fee, commission, sales charge, loan, override or cash benefit received in connection with the ~~solicitation, negotiation,~~ recommendation ~~or sale~~ of an annuity.
- D. “Continuing education credit” or “CE credit” means one continuing education credit as defined in [insert reference in State law or regulations governing producer continuing education course approval].
- E. “Continuing education provider” or “CE provider” means an individual or entity that is approved to offer continuing education courses pursuant to [insert reference in State law or regulations governing producer continuing education course approval].
- F. “FINRA” means the Financial Industry Regulatory Authority or a succeeding agency.
- G. “Insurer” means a company required to be licensed under the laws of this state to provide insurance products, including annuities.
- H. “Insurance producer” or “producer” means a person or entity required to be licensed under the laws of this state to sell or, solicit or negotiate insurance, including annuities.
- I. “Intermediary” means an entity that (1) is required to be licensed under the laws of this state to sell or solicit insurance, including annuities, and (2) has contracted with ~~the an~~ insurance company to facilitate the sale of an annuity the insurer’s annuities by insurance producers.

- J. (1) “Material conflict of interest” means a financial interest of an insurance producer, or the insurer where no producer is involved, that a reasonable person would expect to affect the impartiality of the recommendation.
- (2) For purposes of the definition of “Material conflict of interest,” the phrase “a financial interest of an insurance producer or the insurer where no producer is involved” includes financial incentives or rewards offered to or received by an insurance producer, or a direct interest or ownership in an insurer by an insurance producer or an immediate family member of an insurance producer.
- ~~K.~~ ~~“Negotiate” has the meaning stated in [insert reference to state law equivalent to Section 2K of the *Producer Licensing Model Act* (#218)].~~
- ~~LK.~~ “Non-cash compensation” means any form of compensation that is not cash compensation, including but not limited to, merchandise, gifts and prizes, travel expenses or meals and lodging.
- ~~ML.~~ “Reasonable cash compensation” means cash compensation that ~~reflects the time and is not excessive, based on the facts and circumstances at the time of the recommendation. Relevant factors would include known compensation market ranges, and the complexity, features and benefits of the product. No single factor is dispositive in determining whether cash compensation is reasonable, and the transaction involved and is not connected to volume of production.~~
- ~~NM.~~ “Recommendation” means advice provided by an insurance producer, or an insurer where no producer is involved, to an individual consumer that results in a purchase, exchange or replacement of an annuity in accordance with that advice. “Recommendation” does not include general communications to the public, marketing and other product or sales materials, prospectuses, general education information and tools, and general customer service assistance or administrative support.
- ~~ON.~~ “Replacement” means a transaction in which a new policy or contract is to be purchased, and it is known or should be known to the proposing producer, or to the proposing insurer if there is no producer, that by reason of the transaction, an existing policy or contract has been or is to be:
- (1) Lapsed, forfeited, surrendered or partially surrendered, assigned to the replacing insurer or otherwise terminated;
  - (2) Converted to reduced paid-up insurance, continued as extended term insurance, or otherwise reduced in value by the use of nonforfeiture benefits or other policy values;
  - (3) Amended so as to effect either a reduction in benefits or in the term for which coverage would otherwise remain in force or for which benefits would be paid;
  - (4) Reissued with any reduction in cash value; or
  - (5) Used in a financed purchase.

**Drafting Note:** The definition of “replacement” above is derived from the NAIC Life Insurance and Annuities Replacement Model Regulation. If a State has a different definition for “replacement,” the State should either insert the text of that definition in place of the definition above or modify the definition above to provide a cross-reference to the definition of “replacement” that is in State law or regulation.

- ~~PO.~~ “Suitability information” means information that is reasonably appropriate to determine the recommendation is suitable and in the best interest of the consumer, including the following:
- (1) Age;
  - (2) Annual income;
  - (3) Financial situation and needs;
  - (4) Financial experience;

- (5) Financial objectives;
- (6) Intended use of the annuity;
- (7) Financial time horizon;
- (8) Existing assets ~~or financial products~~, including investment and life insurance holdings;
- (9) Liquidity needs;
- (10) Liquid net worth;
- (11) Risk tolerance, ~~including changes in nonguaranteed elements in an annuity contract~~;
- (12) Financial resources used to fund the annuity; and
- (13) Tax status.

P. "Third-party producer" means a producer representing an insurer on an independent contractor basis and not as an employee of the insurer or an entity controlled by, controlling, or under common control with the insurer.

## **Section 6. Duties of Insurers and of Insurance Producers**

- A. In recommending to a consumer the purchase of an annuity or the exchange of an annuity that results in another insurance transaction or series of insurance transactions, the insurance producer, or the insurer where no producer is involved, shall only make a recommendation ~~that if the insurance producer, or the insurer where no producer is involved, has reasonable grounds to believe the recommendation~~ is suitable and in the best interest of the consumer at the time it is made based on the facts disclosed by the consumer as to his or her investments and other insurance products and as to his or her financial situation and needs, including the consumer's suitability information.
- B. Prior to the recommendation of an annuity, an insurance producer, or an insurer where no producer is involved, shall do all of the following:
  - (1) Make reasonable efforts to obtain the consumer's suitability information from the consumer;
  - (2) Evaluate whether an annuity in general, and the annuity product being recommended in particular, would be appropriate in light of the types of financial products which correspond to the consumer's disclosed suitability information, including whether the annuity being recommended would be consistent with and address the consumer's financial objectives; and
  - (3) Disclose to the consumer any limitations the producer or the insurer has in regard to the following:
    - (a) The type of financial products that can be provided;
    - (b) Whether only specific insurer company products or a limited range of annuity products can be offered;
    - (c) The scope of services provided; and
    - (d) The scope of the producer's licenses.
- C. ~~In making~~ At or prior to the time of a recommendation, the insurance producer, or insurer where no producer is involved, shall disclose to the consumer:
  - (1) Any and all material conflicts of interest;

(2) ~~The percentage or amount of cash compensation above three (3) percent, whether by commission or fee, the insurance producer would receive as a result of a contract for services for advice or for the sale of a recommended annuity; and (a) a description of the role of the insurance producer in the transaction;~~

~~(b) a description of the cash compensation the producer will receive from the selling insurer, intermediary or other third party based in whole or in part on the annuity product being recommended;~~

~~(c) that the cash compensation paid to the insurance producer may vary depending on a number of factors, including (if applicable) the annuity contract and insurance selected by the consumer, the volume of business the insurance producer does with the insurance company or the profitability of the insurance company's products sold by the insurance producer;~~

~~(d) a description of the types of non-cash compensation the producer may receive or be eligible to receive from the selling insurer, intermediary or other third party based in whole or in part on the annuity product being recommended; and~~

~~(e) that the purchaser may obtain information about the compensation expected to be received by the insurance producer based in whole or in part on the recommendation, and the compensation expected to be received based in whole or in part on any alternative quotes presented by the insurance producer, by requesting such information from the insurance producer.~~

(3) The basis or bases of the recommendation.

D. In making a recommendation, the insurance producer, or insurer where no producer is involved, shall have a reasonable basis to believe all of the following:

(1) The consumer has been reasonably informed of various features of the annuity, such as the potential surrender period and surrender charge, potential tax penalty if the consumer sells, exchanges, surrenders or annuitizes the annuity, mortality and expense fees, investment advisory fees, potential charges for and features of riders, limitations on interest returns, potential changes in nonguaranteed elements of the annuity, insurance and investment components and market risk;

**Drafting Note:** If a State has adopted the NAIC Annuity Disclosure Model Regulation, the State should insert an additional phrase in paragraph (1) above to explain that the requirements of this section are intended to supplement and not replace the disclosure requirements of the NAIC Annuity Disclosure Model Regulation.

(2) The consumer would benefit from certain features of the annuity, such as tax-deferred growth, annuitization or death or living benefit;

(3) The particular annuity as a whole, the underlying subaccounts to which funds are allocated at the time of purchase or exchange of the annuity, and riders and similar product enhancements, if any, are suitable and in the best interest of the consumer (and in the case of an exchange or replacement, the transaction as a whole is suitable and in the best interest of the consumer) for the particular consumer based on his or her suitability information; and

(4) In the case of an exchange or replacement of an annuity, the exchange or replacement is suitable and in the best interest of the consumer including taking into consideration whether:

(a) The consumer will incur a surrender charge, be subject to the commencement of a new surrender period, lose existing benefits (such as death, living or other contractual benefits), or be subject to increased fees, investment advisory fees or charges for riders and similar product enhancements;

(b) The consumer would benefit from product enhancements and improvements ~~and the replacing product would provide a substantial financial benefit to the consumer over the life of the product;~~ and

- (c) The consumer has had another annuity exchange or replacement and, in particular, an exchange or replacement within the preceding ~~60~~36 months.
- E. Except as permitted under subsection F, an insurer shall not issue an annuity recommended to a consumer unless there is a reasonable basis to believe the annuity is suitable based on the consumer's suitability information.
- F. ~~An insurer is not obligated to determine an annuity is suitable, but instead, shall determine the annuity is reasonable prior to issuance based on the circumstances actually known to the insurer at the time the annuity is issued if any of the following situations occur~~(1) Except as provided under paragraph (2) of this subsection, neither an insurance producer, nor an insurer, shall have any obligation to a consumer under subsection A or C related to any annuity transaction if:
- ~~(a)~~ (1a) The producer makes no recommendation;
  - ~~(2b)~~ (2b) A recommendation was made and was later found to have been prepared based on materially inaccurate information provided by the consumer;
  - ~~(3c)~~ (3c) A consumer refuses to provide relevant suitability information and the annuity transaction is not recommended; or
  - ~~(4d)~~ (4d) A consumer decides to enter into an annuity transaction that is not based on or conflicts with a recommendation of the insurer or the insurance producer.
- (2) An insurer's issuance of an annuity subject to paragraph (1) shall be reasonable under all the circumstances actually known to the insurer at the time the annuity is issued.
- G. An insurance producer or, where no insurance producer is involved, the responsible insurer representative, shall at the time of sale:
- (1) Make a record of any recommendation and the basis or bases of the recommendation subject to this regulation;
  - (2) Obtain a customer signed statement documenting a customer's refusal to provide suitability information, if any; and
  - (3) Obtain a customer signed statement acknowledging that an annuity transaction is not recommended if a customer decides to enter into an annuity transaction that is not based on the insurance producer's or insurer's recommendation.
- H. (1) An insurer shall establish a supervision system that is reasonably designed to achieve the insurer's and its insurance producers' compliance with this regulation, including, but not limited to, the following:
- (a) The insurer shall maintain reasonable procedures to inform its insurance producers of the requirements of this regulation and shall incorporate the requirements of this regulation into relevant insurance producer training manuals;
  - (b) The insurer shall establish standards for insurance producer product training and shall maintain reasonable procedures to require its insurance producers to comply with the requirements of section 9-8 of this regulation;
  - (c) The insurer shall provide product-specific training and training materials which explain all material features of its annuity products to its insurance producers;
  - (d) The insurer shall maintain procedures for review of each recommendation prior to issuance of an annuity that are designed to ensure that there is a reasonable basis to determine that a recommendation is suitable ~~and in the best interest of a consumer~~. Such review procedures may apply a screening system for the purpose of identifying selected

transactions for additional review and may be accomplished electronically or through other means including, but not limited to, physical review. Such an electronic or other system may be designed to require additional review only of those transactions identified for additional review by the selection criteria;

- (e) The insurer shall maintain reasonable procedures to detect recommendations that are not suitable and are not in the best interest of the consumer. This may include, but is not limited to, confirmation of consumer suitability information, systematic customer surveys, interviews, confirmation letters and programs of internal monitoring. Nothing in this subparagraph prevents an insurer from complying with this subparagraph by applying sampling procedures, or by confirming suitability information after issuance or delivery of the annuity; and
  - (f) Notwithstanding anything to the contrary in this regulation, an insurer will be deemed to have satisfied its obligations under this subsection, and be in compliance with this regulation for purposes of section 9 of this regulation, with respect to recommendations of the insurer's annuity products by a third-party producer if, prior to issuance of the recommended annuity product, the insurer obtains from the third-party producer a written description of the basis for his or her determination that the recommendation is suitable and in the client's best interest, unless the insurer knows of any reason to dispute the third-party producer's best interest determination.
  - ~~(g)~~ The insurer shall annually provide a report to senior management, including to the senior manager responsible for audit functions, which details a review, with appropriate testing, reasonably designed to determine the effectiveness of the supervision system, the exceptions found, and corrective action taken or recommended, if any.
- (2)
- (a) Nothing in this subsection restricts an insurer from contracting for performance of a function (including maintenance of procedures) required under paragraph (1). An insurer is responsible for taking appropriate corrective action and may be subject to sanctions and penalties pursuant to section ~~10-9~~ of this regulation regardless of whether the insurer contracts for performance of a function and regardless of the insurer's compliance with subparagraph (b) of this paragraph.
  - (b) An insurer's supervision system under paragraph (1) shall include supervision of contractual performance under this subsection. This includes, but is not limited to, the following:
    - (i) Monitoring and, as appropriate, conducting audits to assure that the contracted function is properly performed; and
    - (ii) Annually obtaining a certification from a senior manager who has responsibility for the contracted function that the manager has a reasonable basis to represent, and does represent, that the function is properly performed.
- (3) An insurer is not required to include in its system of supervision an insurance producer's recommendations to consumers of products other than the annuities offered by the insurer.
- I. An insurance producer shall not dissuade, or attempt to dissuade, a consumer from:
- (1) Truthfully responding to an insurer's request for confirmation of suitability information;
  - (2) Filing a complaint; or
  - (3) Cooperating with the investigation of a complaint.
- J. (1) Sales made in compliance with any other federal or state law or regulation (including but not limited to any rule promulgated by the U.S. Securities and Exchange Commission, FINRA, the U.S. Department of Labor or the U.S. Department of the Treasury) that establish FINRA requirements

~~pertaining to best interest~~ standards of conduct and supervision of annuity transactions that are substantially similar to the requirements of subsections A-D shall satisfy the requirements under this regulation. This subsection applies to all annuity transactions that satisfy the requirements of such law or regulation even if such law or regulation is not directly applicable to such sales. ~~FINRA broker-dealer sales of annuities if the best interest standard and supervision is similar to those applied to variable annuity sales.~~ However, nothing in this subsection shall limit the insurance commissioner's ability to enforce (including investigate) the provisions of this regulation.

**Drafting Note:** Non-compliance with FINRA requirements means that the broker-dealer transaction is subject to compliance with the suitability requirements of this regulation.

- (2) For paragraph (1) to apply, an insurer shall:
  - (a) Monitor the FINRA member broker-dealer using information collected in the normal course of an insurer's business; and
  - (b) Provide to the FINRA member broker-dealer information and reports that are reasonably appropriate to assist the FINRA member broker-dealer to maintain its supervision system.

#### **Section 7. ~~Non-Cash Compensation Disclosure Requirement~~ [NOTE: MOVED TO SECTION 6.C(2)(D)]**

~~In addition to the disclosures required under Section 6 of this regulation, an insurance producer or an insurer, where no producer is involved, shall disclose to the consumer information regarding the non-cash compensation that exceeds \$100 per producer per year the producer receives from an insurer or intermediary that is tied to the sale of annuities including, but not limited to, gifts, meals, trips, entertainment, prizes, marketing, and advertising.~~

#### **~~Section 8. Prohibited Practices~~**

~~An~~ In recommending an annuity to a consumer, an insurance producer or an insurer where no producer is involved:

- (1) Shall receive no more than reasonable cash compensation ~~in making a recommendation;~~
- (2) Shall not make any materially misleading statements regarding the recommended annuity transaction; and
- (3) Shall put the interests of the consumer ahead of ~~not base a recommendation on~~ the producer's or insurer's own financial interest.

#### **Section ~~9~~8. Insurance Producer Training**

- A. An insurance producer shall not solicit the sale ~~or replacement~~ of an annuity product unless the insurance producer has adequate knowledge of the product to recommend the annuity and the insurance producer is in compliance with the insurer's standards for product training. An insurance producer may rely on insurer-provided product-specific training standards and materials to comply with this subsection.
- B.
  - (1)
    - (a) An insurance producer who engages in the sale of annuity products shall complete a one-time four (4) credit training course approved by the department of insurance and provided by the department of insurance-approved education provider.
    - (b) Insurance producers who hold a life insurance line of authority on the effective date of this regulation and who desire to sell annuities shall complete the requirements of this subsection within six (6) months after the effective date of this regulation. Individuals who obtain a life insurance line of authority on or after the effective date of this regulation may not engage in the sale of annuities until the annuity training course required under this subsection has been completed.
  - (2) The minimum length of the training required under this subsection shall be sufficient to qualify for at least four (4) CE credits, but may be longer.
  - (3) The training required under this subsection shall include information on the following topics:

- (a) The types of annuities and various classifications of annuities;
  - (b) Identification of the parties to an annuity;
  - (c) How product specific annuity contract features affect consumers;
  - (d) The application of income taxation of qualified and non-qualified annuities;
  - (e) The primary uses of annuities;
  - ~~(f) Financial exploitation of seniors and other vulnerable adults; and~~
  - ~~(g) Appropriate sales practices, replacement and disclosure requirements, including the requirements under this regulation.~~
- (4) (a) Providers of courses intended to comply with this subsection shall cover all topics listed in the prescribed outline and shall not present any marketing information or provide training on sales techniques or provide specific information about a particular insurer's annuity products. Additional topics may be offered in conjunction with and in addition to the required outline.
  - (b) A training course that complies with the requirements of FINRA Rule 1250 meets the requirements of Paragraph (3).
- (5) A provider of an annuity training course intended to comply with this subsection shall register as a CE provider in this State and comply with the rules and guidelines applicable to insurance producer continuing education courses as set forth in [insert reference to State law or regulations governing producer continuing education course approval].
  - (6) Annuity training courses may be conducted and completed by classroom or self-study methods in accordance with [insert reference to State law or regulations governing producer continuing education course approval].
  - (7) Providers of annuity training shall comply with the reporting requirements and shall issue certificates of completion in accordance with [insert reference to State law or regulations governing to producer continuing education course approval].
  - (8) The satisfaction of the training requirements of another State that are substantially similar to the provisions of this subsection shall be deemed to satisfy the training requirements of this subsection in this State.
  - (9) An insurer shall verify that an insurance producer has completed the annuity training course required under this subsection before allowing the producer to sell an annuity product for that insurer. An insurer may satisfy its responsibility under this subsection by obtaining certificates of completion of the training course or obtaining reports provided by commissioner-sponsored database systems or vendors or from a reasonably reliable commercial database vendor that has a reporting arrangement with approved insurance education providers.

**Section 109. Compliance Mitigation; Penalties**

- A. An insurer is responsible for compliance with this regulation. If a violation occurs, either because of the action or inaction of the insurer or its insurance producer, the commissioner may order:
  - (1) An insurer to take reasonably appropriate corrective action for any consumer harmed by the insurer's, or by its insurance producer's, violation of this regulation;

- (2) A general agency, independent agency or the insurance producer to take reasonably appropriate corrective action for any consumer harmed by the insurance producer’s violation of this regulation; and
  - (3) Appropriate penalties and sanctions.
- B. Any applicable penalty under [insert statutory citation] for a violation of this regulation may be reduced or eliminated [, according to a schedule adopted by the commissioner,] if corrective action for the consumer was taken promptly after a violation was discovered or the violation was not part of a pattern or practice.

**Drafting Note:** Subsection B above is intended to be consistent with the commissioner’s discretionary authority to determine the appropriate penalty for a violation of this regulation. The language of subsection B is not intended to require that a commissioner impose a penalty on an insurer for a single violation of this regulation if the commissioner has determined that such a penalty is not appropriate.

**Drafting Note:** A State that has authority to adopt a schedule of penalties may wish to include the words in brackets. In that case, “shall” should be substituted for “may” in the same sentence. States should consider inserting a reference to the NAIC Unfair Trade Practices Act or the State’s statute that authorizes the commissioner to impose penalties and fines.

**Section ~~11~~10. Recordkeeping**

- A. Insurers, general agents, independent agencies and insurance producers shall maintain or be able to make available to the commissioner records of the information collected from the consumer, disclosures made to the consumer and other information used in making the recommendations that were the basis for insurance transactions for six (6) years after the insurance transaction is completed by the insurer. An insurer is permitted, but shall not be required, to maintain documentation on behalf of an insurance producer.

**Drafting Note:** States should review their current record retention laws for consistency with Subsection A above.

- B. Records required to be maintained by this regulation may be maintained in paper, photographic, micro-process, magnetic, mechanical or electronic media or by any process that accurately reproduces the actual document.

**Drafting Note:** This section may be unnecessary in States that have a comprehensive recordkeeping law or regulation.

**Section ~~12~~11. Effective Date**

The amendments to this regulation shall take effect ~~six (6)~~ [ ] months after the date the regulation is adopted or on [insert date], whichever is later.

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**Attachment B**



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December 13, 2017

Submitted Electronically to [rule-comments@sec.gov](mailto:rule-comments@sec.gov)

The Honorable Jay Clayton  
Chairman  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

**Re: Public Comments from Retail Investors and Other Interested Parties on  
Standards of Conduct for Investment Advisers and Broker-Dealers**

Dear Chairman Clayton:

On behalf of our members, the Insured Retirement Institute (“IRI”)<sup>1</sup> appreciates the opportunity to provide these comments in response to the public statement you issued earlier this year (the “Public Statement”) regarding the standards of conduct for investment advisers (“IAs”) and broker-dealers (“BDs”). IRI and our members commend you for recognizing the importance of this issue and for seeking public input to help the Securities and Exchange Commission (the “Commission” or the “SEC”) as it considers possible rulemaking in this space. As we will further elaborate below, IRI and our members have long supported the principle that financial professionals should be required to act in their clients’ best interest standard when providing personalized investment advice. We believe the SEC should take the lead in developing this standard, in collaboration with the Department of Labor (“DOL”), the National Association of Insurance Commissioners (the “NAIC”), the Financial Industry Regulatory Authority (“FINRA”) and the North American Securities Administrators Association (“NASAA”).

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<sup>1</sup> IRI is the only national trade association that represents the entire supply chain of the retirement income industry. IRI has more than 500 member companies, including major life insurance companies, broker-dealers, banks, and asset management companies. IRI member companies account for more than 95 percent of annuity assets in the United States, include the top 10 distributors of annuities ranked by assets under management, and are represented by more than 150,000 financial professionals serving over 22.5 million households in communities across the country.

In this letter, we will provide constructive suggestions and recommendations to help the SEC and its fellow regulators formulate a workable and cohesive best interest standard that preserves consumer choice and access to the products and services they need to achieve their financial goals.

## **Executive Summary**

The following is an overview of our comments and recommendations in response to the questions posed in the Public Statement.

### **A. The Context for IRI’s Comments: America’s Retirement Income Challenge and the Need for Retirement Income Products**

1. Americans today are living longer than ever before. A married couple age 65 has more than a 65 percent chance of one or both spouses living to age 90 and a 35 percent chance of one spouse living to age 95. Meanwhile, access to traditional defined benefit pension plans continues to decline, creating a significant risk that many people will outlive their assets. It is critical that the regulatory environment allows consumers to access products that meet their needs to protect against this increased longevity risk.
2. Annuities are the only products available in the private market that can provide retirees and pre-retirees with a guaranteed source of income to ensure they can enjoy a financially secure and dignified retirement.
3. Consumers who receive assistance from financial professionals save more throughout their working years, make better use of available retirement planning products and strategies, and experience better returns on their investments, and therefore are better prepared for retirement than those who do not have access to retirement planning advice. Financial professionals have been shown to help consumers earn 1.59 percent in additional annual returns, which over time leads to 22.8 percent more income in retirement.

### **B. IRI’s Guiding Principles for Development of a Workable Best Interest Standard**

#### **Foundational Principles – Best Interest Standard and Choice**

1. Financial professionals should be held to a best interest standard when providing personalized investment advice to retail clients.
  - a. The vast majority of financial professionals already act in their clients’ best interest.
  - b. The standard should not require financial professionals to completely disregard their own interests or recommend only the “best” or “cheapest” product.

- c. The standard should only apply to recommendations that would reasonably be viewed as a call to take action and are sufficiently individualized.
  - d. The standard should not impair the ability of firms and financial professionals to market, advertise and sell their products.
  - e. The standard should be applied in a manner that is in the best interest of each unique individual investor.
2. Investors are generally capable of looking out for their own interests and should have freedom of access to shop the financial services marketplace for retirement income guarantees.
    - a. The Commission should preserve access to annuities and other valuable financial products and services by rejecting the DOL's paternalistic view of individuals.
    - b. A competitive product marketplace is clearly in the best interests of retirement investors.
  3. Investors should have the right to choose their own financial professional; Regulations should not favor or disfavor financial professionals based on the nature of their compensation (commission or fee) or the scope of their product offerings (proprietary products or limited product shelf).

*Procedural Principles – Coordination with Other Regulators*

4. The DOL Rule is causing consumers to lose access to valuable retirement products and services, and therefore should not serve as the starting point for rulemaking by the Commission.
  - a. A recent survey of IRI's insurance company and distributor members, along with similar research conducted by other organizations, demonstrates the DOL rule is already harming consumers.
5. The Commission should collaborate with the DOL, FINRA, and the state insurance and securities regulators to develop a clear and consistent best interest standard.

*Substantive Principles – Conflicts, Disclosure, Grandfathering, Innovation and Enforcement*

6. A workable best interest standard must include a workable approach to conflicts of interest and disclosure.
  - a. Conflicts should be eliminated when reasonably possible (without requiring leveled compensation; Unavoidable conflicts should be managed through mitigation and disclosure.

- b. Disclosures should help investors understand what they are paying AND what they are getting for their money.
  - c. The Commission should only propose new disclosure requirements if it identifies a gap in existing disclosure requirements.
  - d. The Commission should adopt a rule to allow use of a summary prospectus for variable annuities to help investors better understand these products.
7. The Commission should provide true grandfathering; any new standard of conduct should not retroactively apply to pre-existing accounts or transactions.
  8. The Commission should provide a flexible regulatory environment to facilitate and encourage innovation, but should not pick winners and losers.
  9. The best interest standard should not be interpreted or enforced through private litigation; regulators should control interpretation of the standard, and enforcement should be handled through regulatory actions or arbitration.

\* \* \* \* \*

### **The Context for IRI's Comments: America's Retirement Income Challenge and the Need for Retirement Income Products**

With unprecedented growth in the number of retired Americans, the nation's retirement system is at a crossroads, and policymakers in Washington have clearly taken notice. Numerous retirement-focused bills have been introduced in Congress over the past several years, and federal regulators have been working to make guaranteed lifetime income products more widely available. IRI and our members believe the standards of conduct applicable to financial professionals must be carefully crafted to preserve access to the products and services Americans need to achieve financial security in retirement.

***Longevity Risk*** – *Americans today are living longer than ever before, while access to traditional defined benefit pension plans continues to decline, creating a significant risk that many people will outlive their assets. It is critical that the regulatory environment allows consumers to access products that meet their need to protect against this increased longevity risk.*

Americans today are at risk of outliving their assets. This longevity risk has never been greater. The rapid and continuing shift away from defined benefit plan designs in favor of a defined contribution plan model, increasing life expectancies, and rising health care costs are combining to exert significant pressures on individual consumers, in particular middle-income Americans, seeking a financially secure retirement. These challenges simply did not exist in earlier generations.

At their peak in 1985, over 114,000 private-sector defined benefit plans were in place,<sup>2</sup> but by 2012, less than 26,000 of these defined benefit plans remained.<sup>3</sup> Only 19 percent of private-sector workers had access to a defined benefit plan in 2014.<sup>4</sup>

Individuals today are living longer than in past generations. The population of older Americans continues to increase at a faster rate than the overall population. For example, between 2000 and 2010, the number of Americans aged 85 to 94 grew by 29.9 percent; by comparison the entire U.S. population increased by 9.7 percent during that timeframe.<sup>5</sup> Moreover, according to the Society of Actuaries, a married couple age 65 has more than a 65 percent chance of one or both spouses living to age 90 and a 35 percent chance of one spouse living to age 95.<sup>6</sup>

As a result of these trends, today more than 30 million Baby Boomers are “at risk” for inadequate retirement income; that is, a lack of sufficient guaranteed lifetime income.<sup>7</sup> Just as concerning, nearly half (45 percent) of Generation Xers (ages 36-45) are “at risk” for inadequate retirement income.<sup>8</sup> Alarming, only 40 percent of Americans 30 to 49 years of age have tried to determine how much they need to save by the time they retire.<sup>9</sup> Meanwhile, nearly one-third of Baby Boomers cite having adequate retirement assets as a top concern, while over three-quarters said they will work for income in retirement, meaning true retirement may not be feasible for this cohort.<sup>10</sup> This reality underscores the critical importance of a regulatory environment that allows consumers to access products that meet their need to protect against longevity risk.

***Guaranteeing Lifetime Income with Insured Retirement Products – Annuities are the only products available in the private market that can provide retirees and pre-retirees with a guaranteed source of income to ensure they can enjoy a financially secure and dignified retirement.***

Outside of Social Security and private pensions, annuities are the sole source of guaranteed lifetime income during retirement. Only insurance companies and their distribution partners

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<sup>2</sup> Pension Benefit Guaranty Corporation. *Trends in Defined Benefit Pension Plans*.

<sup>3</sup> Pension Benefit Guaranty Corporation. *Pension Benefit Guaranty Corporation Annual Report 2012*.

<sup>4</sup> Bureau of Labor Statistics. *National Compensation Survey: Employee Benefits in the United States, March 2014*.

<sup>5</sup> United State Census Bureau. *The Older Population 2010*.

<sup>6</sup> Society of Actuaries. *SOA 2012 Individual Annuitant Mortality tables*.

<sup>7</sup> Employee Benefit Research Institute. *EBRI Notes: Retirement Income Adequacy for Boomers and Gen-Xers: Evidence from the 2012 EBRI Retirement Security Projection Model*.

<sup>8</sup> *Ibid.*

<sup>9</sup> Insured Retirement Institute. *Baby Boomers and Generations Xers: Are They on Track to Reach Their Retirement Goals?*

<sup>10</sup> Insured Retirement Institute. *Boomer Expectations for Retirement 2013*.

can provide these products. With proper planning and use, annuities can provide retirees with guaranteed lifetime income and the security of knowing that they will not outlive their savings. Boomers who own insured retirement products, including all types of annuities, have a higher confidence in their overall retirement expectations, with nine out of 10 believing they are doing a good job preparing financially for retirement.<sup>11</sup> Compared to non-annuity owners, Baby Boomers who own annuities are more likely – by more than a two-to-one ratio – to be among those who are most confident in living comfortably throughout all their retirement years.<sup>12</sup> Baby Boomer annuity owners also are more likely to engage in positive retirement planning behaviors than Baby Boomer non-annuity owners, with 68 percent having calculated a retirement goal and 63 percent having consulted with a financial professional.<sup>13</sup>

Annuities appeal to Americans of all income levels and consumers who do not have access to other retirement savings vehicles. In fact, annuity owners are overwhelmingly middle-income. Seven in 10 annuity owners have annual household incomes of less than \$100,000. The standards of conduct for financial professionals should not unreasonably limit consumer access to annuity products at precisely the point in time when these products are most vitally needed.

***Benefits of Working With a Financial Professional*** – Consumers who receive assistance from financial professionals save more throughout their working years, make better use of available retirement planning products and strategies, and experience better returns on their investments, and therefore are better prepared for retirement than those who do not have access to a financial professional.

Financial professionals play a critical role in helping consumers understand the wide variety of annuity products available in the market and how best to utilize them to prepare for retirement. Studies have shown that Americans accumulate more savings when working with a financial professional, saving twice the amount over a seven- to 14-year period.<sup>14</sup> Working with a financial professional has a positive influence on retirement planning behaviors including: increased usage of tax-advantaged savings vehicles, improved asset allocation, greater portfolio diversification and less-speculative investing.<sup>15</sup> Financial professionals have also been shown to help consumers earn 1.59 percent in additional annual returns, which over time leads to 22.8

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<sup>11</sup> Insured Retirement Institute. *Boomer Expectations for Retirement 2011*.

<sup>12</sup> Insured Retirement Institute. *Survey of Americans Aged 51 to 67*.

<sup>13</sup> Insured Retirement Institute: *Tax Policy and Boomer Retirement Saving Behaviors*.

<sup>14</sup> Claude Montmarquette, Nathalie Viennot-Briot. Centre for Interuniversity Research and Analysis on Organizations (CIRANO). *Econometric Models on the Value of Advice of a Financial Advisor*. <http://www.cirano.qc.ca/pdf/publication/2012RP-17.pdf>.

<sup>15</sup> *Ibid.*

percent more income in retirement.<sup>16</sup> Moreover, financial professionals help their clients overcome the emotional aspects of investing, which can add one percent to two percent in net annual returns.<sup>17</sup>

It is also significant to note the particular benefits of retirement planning advice for women and minorities. Women are more than twice as likely to be confident in their outlook on retirement when they work with a financial professional.<sup>18</sup> African Americans are nearly three times more likely to save in an IRA and four times more likely to have an annuity when working with a financial professional.<sup>19</sup> Similarly, nearly 90 percent of Hispanic Americans contribute to a retirement plan when working with a professional, compared to only 54 percent working on their own.<sup>20</sup>

In sum, consumers who receive assistance from financial professionals save more throughout their working years, make better use of available retirement planning products and strategies, and experience better returns on their investments, and therefore are better prepared for retirement than those who do not have access to retirement planning advice.

### **Guiding Principles for Development of a Workable Best Interest Standard**

IRI and its members believe financial professionals should act in the best interest of their clients when providing personalized investment recommendations. Moreover, IRI members are fully committed to compliance with all applicable laws and regulations. Over the course of nearly twenty months since the final DOL Rule<sup>21</sup> was issued, IRI members have undertaken wide-ranging efforts to prepare for implementation. Let there be no confusion, though: this support for “a best interest standard” and this commitment to legal and regulatory compliance should not be interpreted as support for the approach taken in the DOL Rule.

As we will explain further below, we and other commenters have raised and continue to have serious concerns about the DOL Rule and its harmful impact on retirement savers. For example, the best interest standard articulated by the DOL appears to require a complete disregard for

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<sup>16</sup> Morningstar. *Alpha, Beta, and Now...Gamma*.

<http://corporate.morningstar.com/ib/documents/PublishedResearch/AlphaBetaandNowGamma.pdf>.

<sup>17</sup> Vanguard Research. *Putting a Value on Your Value: Quantifying Vanguard Advisor's Alpha*.

<http://www.vanguard.com/pdf/ISQVAA.pdf>.

<sup>18</sup> Prudential Financial, Inc. *Financial Experience & Behaviors Among Women: 2014-2015 Prudential Research Study*. [http://www.prudential.com/media/managed/wm/media/Pru\\_Women\\_Study\\_2014.pdf](http://www.prudential.com/media/managed/wm/media/Pru_Women_Study_2014.pdf).

<sup>19</sup> Prudential Financial. *The African American Financial Experience*.

<http://www.prudential.com/media/managed/aa/AASudy.pdf>.

<sup>20</sup> Prudential Financial. *Hispanic Americans On the Road to Retirement*.

[http://www.prudential.com/media/managed/Hispanic\\_Retirement\\_FINAL\\_3-19-08.pdf](http://www.prudential.com/media/managed/Hispanic_Retirement_FINAL_3-19-08.pdf).

<sup>21</sup> As used in this letter, the term “DOL Rule” means, collectively, the final regulation defining the term “fiduciary” (the “Fiduciary Definition Regulation”) under the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), the Best Interest Contract Exemption (the “BIC Exemption”), and the amendments to prohibited transaction exemption 84-24 (the “Amended PTE 84-24”) issued by the DOL on April 8, 2016.

the business and economic reality that firms and financial professionals have to generate enough revenue to cover their costs and earn a reasonable profit in order to stay in business. We are particularly concerned about how this requirement will be applied in the context of proprietary annuity distribution models, which provide consumers with invaluable and irreplaceable sources of knowledge about annuity products and how annuities can be used to provide guaranteed lifetime income to retirees.

Put simply, the DOL Rule is already depriving consumers of access to guaranteed lifetime income products and the professional assistance needed to knowledgeably acquire and use those products. This outcome clearly runs counter to the best interests of American working men and women.

As the Commission undertakes its own effort to formulate a regulatory proposal to impose a best interest standard of conduct on all financial professionals, IRI respectfully recommends that the Commission adhere to the following guiding principles as it works to develop a standard that will provide meaningful and effective investor protections without depriving Americans of access to valuable financial products and services.

### **Foundational Principles – Best Interest Standard and Choice**

#### **1. *Financial Professionals Should be Held to a Best Interest Standard When Providing Personalized Investment Advice to Retail Clients.***

As noted above, IRI supports the application of a best interest standard when a financial professional provides personalized investment advice or recommendations to their clients. IRI believes the vast majority of financial professionals already act in the best interest of their clients, and recent IRI research found that nearly all consumers agree.<sup>22</sup>

*The standard should not require financial professionals to completely disregard their own interests or recommend only the “best” or “cheapest” product.*

The standard must be carefully crafted, however, to avoid any implication that acting in clients’ best interest requires that financial professionals must completely disregard their own interests in order to recommend the “best product” (which can only be determined with any degree of certainty with the benefit of hindsight years or decades after the recommendation is made) or the cheapest product (which would prevent recommendations of higher-cost products that provide guarantees or other features many consumers want and need).

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<sup>22</sup> Insured Retirement Institute. *January 2014 Survey of Americans aged 51-67.*

We note, for your reference, that the NAIC has released draft revisions to its Suitability in Annuity Transactions Model Regulation<sup>23</sup> for public comment. The draft revisions include the following definition of “best interest”:

“(1) “Best interest” means, at the time the annuity is issued, acting with reasonable diligence, care, skill and prudence in a manner that puts the interest of the consumer first and foremost.

(2) “Best interest” does not mean a resulting recommendation is the least expensive annuity product, or the annuity product with the highest stated interest rate or income payout rate, available in the marketplace at the time of the annuity transaction. “Best interest” also does not mean the recommendation is the single “best” annuity product available in the marketplace at the time of the annuity transaction, but based on the insurance producer’s judgment acting with reasonable diligence, care, skill and prudence, the producer believes the recommendation is in the best interest of the consumer”

IRI and our members are still reviewing the NAIC’s draft revisions, including this definition, and will be providing written detailed comments to the NAIC by their comment deadline of January 22, 2018. We will provide a copy of our comment letter to the Commission following submission to the NAIC.

*The standard should only apply to recommendations that would reasonably be viewed as a call to take action and are sufficiently individualized.*

Similarly, it is important that the Commission establish clear and appropriate triggers for application of the standard. In our view, the standard should only apply when a financial professional makes a recommendation that (a) based on its content, context, and presentation, would reasonably be viewed as a call to take action or to refrain from taking action<sup>24</sup> and (b) is sufficiently individualized as to form a reasonable basis for reliance by the investor as a source of unbiased and impartial advice.

*The standard should not impair the ability of firms and financial professionals to market, advertise and sell their products.*

There is a broad spectrum of financial marketing and sales activities where no reasonable expectation can exist that a financial professional has been engaged by a client to act as an

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<sup>23</sup> Available at [http://www.naic.org/cmte\\_a\\_aswg.htm](http://www.naic.org/cmte_a_aswg.htm).

<sup>24</sup> This would be consistent with FINRA guidance concerning the distinction between recommendations and non-recommendations, which focuses on whether there has been a communication that could be viewed as a “call to action” that might reasonably influence an investor to trade a particular security or group of securities. See NASD Notice to Members 01-23.

unbiased and impartial source of recommendations under a legal obligation to disregard its own interests as a seller of investment products or asset management services.<sup>25</sup>

Advertising and marketing to existing and potential clients is vital to the functioning of the financial marketplace. Without these kinds of communications, investors might never become aware of or learn about products and services that may be a fit for their needs. By the same token, providers and distributors of annuities and other financial services products require the freedom to utilize specifically directed marketing communications to identify consumers with a potential interest in purchasing those products.

The federal securities laws have long recognized the distinctions between sales and advice, and between episodic advice and continuous advice, and we believe any new standard of conduct should similarly recognize these important distinctions. In our view, the regulatory requirements *vis-à-vis* conflicts of interest should reflect the nature of the activity to which they apply. Put another way, reasonable steps to mitigate potential conflicts of interest would be more extensive for a financial professional engaged in providing advice as compared to a financial professional who is merely selling. Similarly, a financial professional who is providing episodic advice should not be expected to exert the same efforts to mitigate conflicts as a financial professional who has an ongoing relationship with a client.

Based on the foregoing, we urge the Commission to avoid impairing the ability of buyers and sellers to find each other in the marketplace or to enter into arms'-length transactions by applying a best interest standard to advertising, marketing or sales activities. The standard should apply only when there is a relationship of trust between the investor and the financial professional and a reasonable expectation by the investor that the financial professional is acting in the investor's best interest.

*The standard should be applied in a manner that is in the best interest of each unique individual investor.*

A rigid, one-size-fits-all approach will not serve investors or financial professionals as well as a standard under which financial professionals can appropriately consider all relevant factors when choosing investments to recommend. Some important examples of the factors that should be taken into account are the investors' needs and goals, financial situation, age/life stage (e.g., young professional, mid-career, pre-retiree, retiree, etc...), and applicable risk factors (e.g., market risk, inflation risk, longevity risk, long-term care and health risk, etc...).

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<sup>25</sup> See the July 2015 Letter for a list of examples of the types of activities commonly engaged in by annuity providers and financial professionals that we believe should not be considered "advice."

## **2. *Investors Are Generally Capable of Looking Out For Their Own Interests and Should Have Freedom of Access to Shop the Financial Services Marketplace for Retirement Income Guarantees.***

IRI believes it is in the best interests of all Americans to have the freedom to shop the financial marketplace for annuity products and to procure a source of secure retirement income. Annuity products, by virtue of the guaranteed lifetime income and other guarantees they provide, are uniquely suited to provide the financial safety and security sought by many retirees. As a result of dramatic declines in defined benefit plan coverage, coupled with the fact that very few defined contribution plans provide lifetime income forms of distribution, individual annuity purchases through IRAs are, on a *de facto* basis, the primary means, other than Social Security, through which retirees procure guaranteed retirement income.<sup>26</sup>

IRI strongly supports recent Congressional and federal regulatory efforts to facilitate retirement savers' access to and use of guaranteed lifetime income products.<sup>27</sup> In particular, we note that Congress and the DOL have separately considered proposals in recent years to require that defined contribution account balances be expressed not only as a lump sum amount, but also as a retirement income stream. This would help transform the way Americans think about the adequacy of their accumulated retirement savings to replace pre-retirement monthly income flows.<sup>28</sup> For this initiative to succeed, however, workers must have the ability to act on the new information they receive. In other words, learning about the importance of retirement income guarantees will make no difference if workers cannot purchase products capable of meeting their guaranteed income needs in the private marketplace.

***The Commission should preserve access to annuities and other valuable financial products and services by rejecting the DOL's paternalistic view of individuals.***

To ensure this freedom of access, we believe the Commission should take a different approach than the DOL Rule. Under the DOL Rule, individual access to annuity products and

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<sup>26</sup> An independent study conducted for the DOL in 2011 reported that only about 1 percent of defined contribution plans offer a deferred annuity. By contrast almost all defined contribution plans offer the option of a lump sum distribution upon job separation, which may be rolled over into an IRA and used to purchase an annuity. The same study noted that although only about 6.1 percent of workers who retire with a defined contribution plan convert their account balance into an annuity "substantial additional annuitization takes place after retirement through conversions of IRAs, often in the form of a deferred annuity." *Annuities in the Context of Defined Contribution Plans, A Study for the U.S. Department of Labor, Employee Benefits Security Administration*, Michael J. Brien, PhD and Constantijn W.A. Panis, PhD, November, 2011.

<sup>27</sup> See Request for Information Regarding Lifetime Income Options for Participants and Beneficiaries in Retirement Plans, 75 Fed. Reg. 5253 (Feb. 2, 2010).

<sup>28</sup> Advance Notice of Proposed Rulemaking, *Pension Benefit Statements*, 78 Fed. Reg. 26727 (May 8, 2013).

other valuable financial products and services is severely constrained based on the assumption that, “as a rule,” individual workers are too uninformed to look out for their own interests.<sup>29</sup> The DOL’s view was made evident in the preamble to its 2015 proposal. The counterparty carve-out (sometimes referred to as a seller’s exception) included in that proposal would not have extended to transactions involving retail investors, including small plans, IRA owners, and plan participants and beneficiaries.<sup>30</sup> While the final DOL Rule recast that carve-out as an exclusion for communications with independent fiduciaries with financial expertise and revised the specific parameters of the carve-out, the DOL clearly continued to believe that, “as a rule,” consumers are incapable of looking out for their own best interests when engaging in arm’s length bargaining with financial service providers.

IRI emphatically disagrees with the DOL’s assessment of American consumers; rather, we believe the vast majority of investors are capable of looking after their own affairs. The DOL’s determination is inconsistent with the position taken by Congress in enacting ERISA § 404(c) and with the views expressed by President Trump<sup>31</sup> and Secretary of Labor Alexander Acosta.<sup>32</sup> The DOL failed to adequately support its conclusion that all individuals and small 401(k) plan fiduciaries are so lacking in financial sophistication as to be incapable of independent thought and choice. As a result, the DOL Rule effectively forces consumers to do business with a fiduciary whether or not a fiduciary is wanted or needed.

*A competitive product marketplace is clearly in the best interests of retirement investors.*

Marketplace competition between and among manufacturers and other investment providers, and between and among affiliated and unaffiliated distributors, fosters innovations and efficiencies that advance consumer interests. The approach taken in the DOL Rule is built upon a “value of services” compensation model, effectively ignoring the intrinsic value consumers derive from insurance guarantees of safety and security. This would stifle marketplace competition and product innovation.

The Commission should instead develop a rule that (a) allows individuals the opportunity to shop the financial services marketplace for the investment arrangements that best fit their needs; (b) accounts for the benefits and costs associated with the guarantees provided by

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<sup>29</sup> 80 Fed. Reg. 21942.

<sup>30</sup> 80 Fed. Reg. 21941.

<sup>31</sup> Fiduciary Duty Rule, Memorandum for the Secretary of Labor, 82 Fed. Reg. 9675 (February 7, 2017) (“One of the priorities of my Administration is to empower Americans to make their own financial decisions.”)

<sup>32</sup> Acosta, Alexander, Wall Street Journal, *Deregulators Must Follow the Law, So Regulators Will Too* (May 22, 2017), available at <https://www.wsj.com/articles/deregulators-must-follow-the-law-so-regulators-will-too-1495494029> (“Americans should be trusted to exercise individual choice and freedom of contract. At a practical level, this means Washington should regulate only when necessary. Limiting the scope of government protects space for people to make their own judgments about what is best for their families.”)

annuity products; and (c) does not inadvertently cut off access to guaranteed income products for most Americans at the exact moment in history when ready access is most urgently needed.

**3. *Investors Should Have the Right to Choose Their Own Financial Professional; Regulations Should Not Favor or Disfavor Financial Professionals Based on the Nature of Their Compensation (Commission or Fee) or the Scope of Their Product Offerings (Proprietary Products or Limited Product Shelf).***

IRI believes in a best interest standard that gives investors the freedom to choose who they receive advice from, whose products their financial professional may offer (i.e., affiliated or unaffiliated), how their financial professional is compensated, and how their retirement savings are invested. In particular, consumers should not be denied access to financial professionals who have acquired in-depth knowledge and expertise by concentrating or dedicating their practices to the products of a single company or a select group of companies. The proprietary distribution model, which emphasizes training and expertise, is vital to a healthy marketplace and therefore must be preserved.

In the current regulatory framework, for example, 86 percent of Baby Boomers say they are better prepared for retirement as a result of their financial professional's help, validating existing distribution models.<sup>33</sup> The DOL Rule includes a bias that favors unlimited product choice over expertise. This bias poses a threat to proprietary annuity distribution models.

**Procedural Principles – Coordination with Other Regulators**

**4. *The DOL Rule is Causing Consumers to Lose Access to Valuable Retirement Products and Services, and Therefore Should Not Serve as the Starting Point for Rulemaking by the Commission.***

IRI and our members do not believe the DOL Rule appropriately balances the interests of consumers in receiving broad-based investment advice. Throughout the DOL's rulemaking process, we and many other interested parties repeatedly cautioned the DOL about the significant adverse impacts we believed were likely to result from adoption of the DOL Rule. Most significantly, we expressed serious reservations about the likelihood that the DOL Rule would deprive low- and middle-income consumers of access to the wide range of products and services they need to help them achieve a financially secure retirement.

Sadly, we now have significant evidence that our fears have been realized. IRI conducted a survey of a representative sampling of IRI's insurance company and distributor members

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<sup>33</sup> Insured Retirement Institute. *Boomer Expectations for Retirement 2015*.

from July 18 to July 31, 2017 (the “IRI Member Survey”). Through this survey, our members reported the following:

- More than 60 percent of the distribution firms that participated in the IRI Member Survey have, are planning to, or are considering exiting or de-emphasizing target markets such as small IRA holders and small retirement plan sponsors.
- Many firms are still assessing the extent to which existing clients will lose access to their financial professional as a result of the DOL Rule. However, a number of our distributor members reported that approximately 155,000 of their clients have already been ‘orphaned,’ and a number of our insurer members told us that both the financial professional and the firm have dissociated from the accounts of hundreds of their annuity contract owners. Far more accounts are expected to be impacted if and when implementation of the DOL Rule proceeds.
- Half of the insurance companies responding to the IRI Member Survey reported that some of their distribution partners have dropped the insurer’s products from their shelf due to product restrictions and other decisions made as part of their efforts to implement the DOL Rule. As a result of these changes to distributors’ product shelves, some of our largest insurer members reported an expected decline in revenue in the hundreds of millions of dollars.
- Nearly 60 percent of the insurance companies that participated in the IRI Member Survey expect that fee-based annuities manufactured in response to the DOL Rule will result in higher overall fees to the consumer.
- To date, implementation costs for our largest distributor members have ranged from \$13 million to more than \$40 million, with remaining expected costs ranging from \$10 million to more than \$25 million. Our largest insurance company members reported expenditures to date ranging from \$10 million to more than \$30 million, and expected future costs ranging from \$5.5 million to \$15 million.

In addition to our own survey, a number of other groups conducted their own research and found evidence that the DOL Rule is depriving consumers of access to retirement products and services. One such group, the Independent Insurance Agents & Brokers of America, surveyed its members in July 2017 and found that 38 percent of respondents (primarily small and medium sized “Main Street” firms) have already stopped or are planning to stop selling and servicing products impacted by the fiduciary rule (primarily annuities) on or before January 1, 2018.<sup>34</sup>

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<sup>34</sup> Comment letter submitted by the Independent Insurance Agents & Brokers of America, Inc. (August 3, 2017)

IRI and other commenters also provided extensive new data and information to the DOL in connection with its review of the Fiduciary Rule pursuant to the Presidential Memorandum. A compilation of this new data and information is attached to this letter as [Appendix A](#). The following are some of the more noteworthy and troubling findings described in that compilation:

- A survey of financial professionals finds 71 percent will stop providing advice to at least some of their current small accounts due to the risk and increased costs of the DOL Rule.
- Other surveys found that 35 percent of financial professionals will stop serving accounts under \$25,000, and 25 percent will raise their client minimum account thresholds.
- A major mutual fund provider reported that the number of orphaned accounts on its books tripled in the first quarter of 2017 due to the DOL Rule. These small accounts averaged \$21,000. It further estimated that roughly 15 percent of its accounts would be orphaned following full implementation of the DOL Rule.
- A survey of insurance service providers shows 70 percent already have or are considering exiting the market for small balance IRAs and small plans, and half are preparing to raise minimum account requirements for IRAs.
- Lack of access to advice hurts retirement savers—a study shows that investors starting with \$25,000 who receive advice save nearly three times more than their non-advised peers. This is due not only to investment recommendations, but to personal assistance in developing better retirement saving habits and other positive financial behaviors.
- Many comments explained that a wide array of financial service providers are responding to the Rule’s new litigation risks by limiting the investment types and products they will recommend.

**5. *The Commission Should Collaborate With the DOL, FINRA, and the State Insurance and Securities Regulators in Developing a Best Interest Standard.***

IRI and our members believe it is essential that the Commission engage in a constructive dialogue with the DOLs as well as the NAIC, FINRA, and NASAA. The NAIC and the state insurance departments have valuable expertise in regulating financial professionals who sell insurance products, and have recently formed a working group to consider possible revisions to the NAIC Suitability in Annuity Transactions Model Regulation (the “[NAIC](#)

Model”), including possible incorporation of a best interest standard into the NAIC Model.<sup>35</sup> FINRA, NASAA and the state securities regulators should also be part of these discussions, as their experience in regulating financial professionals who sell securities products would also be helpful as a supplement to the Commission’s own expertise in that space. We are encouraged by the sentiments recently expressed by Chairman Clayton, Secretary of Labor Alexander Acosta and the NAIC acknowledging the need for coordination among the Commission, the DOL, and the NAIC, and we urge the regulators to follow through on those comments.

As the prudential regulators for the securities and insurance industries, the SEC and the state insurance departments should lead this effort. They have the ability to adopt the most broadly applicable rules, and have robust examination and enforcement tools at their disposal to effectively ensure compliance or penalize violators for non-compliance.

We believe the goal of this collaboration should be to reach general agreement on appropriate standards of conduct and regulatory requirements to be adopted by the Commission, the DOL and the state insurance departments. Unlike the DOL Rule, which applies only to recommendations made with respect to retirement assets, this approach would establish consistent and clear standards of conduct for recommendations made by all licensed financial professionals with respect to any securities or insurance product.

### **Substantive Principles – Conflicts, Disclosure, Grandfathering, Innovation and Enforcement**

#### **6. *A Workable Best Interest Standard Must Include a Workable Approach to Conflicts of Interest and Disclosure.***

One of the most significant and challenging issues facing the Commission in developing a best interest standard is determining how to treat conflicts of interest. SEC and DOL officials have frequently pointed out the distinctions between their statutory structures, with the federal securities laws taking a more disclosure-based approach to conflicts, while ERISA starts from the premise that conflicts should be prohibited. This distinction highlights the flaw in setting standards of conduct for financial professionals under ERISA. While it is reasonable to expect retirement plan sponsors or other plan fiduciaries to completely eliminate potential conflicts, requiring financial professionals to completely disregard their own interest in earning compensation is inappropriate, overly burdensome, and frustrates the goal of increasing access to and utilization of guaranteed lifetime income products. Compensation, whether in the form of a fee or a commission, will always present a possible

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<sup>35</sup> See comment letter submitted by the National Association of Insurance Commissioners (August 7, 2017) (describing the extensive system of state insurance regulation applicable to annuity products and sales practices) (the “[NAIC Comment Letter](#)”).

conflict of interest. Only a financial professional acting in a *pro bono* capacity can fully eliminate all potential conflicts.

*Conflicts should be eliminated when reasonably possibly (without requiring levelized compensation; Unavoidable conflicts should be managed through mitigation and disclosure.*

As such, the Commission must identify an alternative approach that will effectively protect investors without making it impossible to obtain much-needed advice. IRI respectfully suggests that the Commission take a three-pronged approach, under which financial professionals would be required to: (1) eliminate potential conflicts when reasonably possible, (2) take reasonable steps to mitigate potential conflicts that cannot be eliminated, and (3) provide simple, straightforward and meaningful disclosure of those remaining conflicts and the steps taken to mitigate them.<sup>36</sup> To avoid the unintended consequences seen under the DOL Rule, the first prong should be carefully structured to avoid any implication that firms and financial professionals must or should move to levelized compensation structures. As we explained in detail in our past comment letters to the DOL, such structures are appropriate for some investors, but there are also many who benefit greatly from the option to work with a financial professional on a commission basis. The Commission should take steps to preserve both options.

*Disclosures should help investors understand what they are paying AND what they are getting for their money.*

The structure of the disclosure prong will be critical to the workability of this approach. We believe the disclosure requirements should be streamlined to focus investors' attention on the most important information including, for example, general information about how

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<sup>36</sup> For your reference, we note that the NAIC's draft revisions to the Suitability Model includes the following definition of "material conflicts of interest":

(1) "Material conflict of interest" means a financial interest of an insurance producer, or the insurer where no producer is involved, that a reasonable person would expect to affect the impartiality of the recommendation.

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(2) "Material conflict of interest" includes financial incentives or rewards offered to or received by an insurance producer, or a direct interest or ownership in an insurer by an insurance producer or an immediate family member of an insurance producer.

As noted above, IRI and our members are still reviewing the NAIC's draft revisions, including this definition, and will be providing written comments to the NAIC by January 22, 2018. We will provide a copy of our comments to the Commission following submission to the NAIC.

much they will pay<sup>37</sup> and what they will get for their money.<sup>38</sup> This approach would be far better than the exceedingly and needlessly complex disclosure requirements imposed under the DOL Rule, which have been driving plan sponsors to focus almost exclusively on fees.<sup>39</sup> In our view, this myopic focus on fees is inconsistent with the goal of ensuring that financial professionals are acting in their clients' best interest. To achieve this goal, the Commission should require that fee disclosures always be presented in the context of the benefits and services being purchased. Without this context, it is impossible for a financial professional to fully and fairly compare products in order to determine which product should be recommended for a particular client.

*The Commission should only propose new disclosure requirements if it identifies a gap in existing disclosure requirements.*

In the comment letters we submitted to the DOL on July 21, 2015<sup>40</sup> and September 24, 2015,<sup>41</sup> we provided detailed recommendations to help the DOL develop a more effective, efficient and appropriate disclosure regime. Those recommendations relied on the extensive disclosures already being provided to clients under existing regulations.<sup>42</sup> We continue to believe regulators should leverage those existing disclosures rather than simply piling more information in front of investors without meaningfully enhancing their ability to make informed investment decisions. We therefore respectfully encourage the Commission to propose new disclosure requirements only to the extent of any gaps in the existing disclosure regime.

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<sup>37</sup> In many cases, the actual cost to a particular investor will not be knowable at the time of the transaction because those amounts will be calculated based on a number of different factors. As such, this disclosure requirement should not require that such information be presented in dollars; rather, it should permit general disclosure (e.g., the formula for calculation of a particular fee).

<sup>38</sup> See, e.g., Advisory Council on Employee Welfare and Pension Benefit Plans (usually referred to as the ERISA Advisory Council), *Successful Plan Communications for Various Population Segments* (November 2013) (“individuals are overwhelmed by too much information and would benefit from streamlined communication”).

<sup>39</sup> Cerulli Associates, *The Cerulli Report – U.S. Retirement Markets 2016: Preparing for a New World Post---Conflict of Interest Rule*.

<sup>40</sup> Comment letter submitted by the Insured Retirement Institute (July 21, 2015), available at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/00626.pdf> (the “July 2015 Letter”).

<sup>41</sup> Comment letter submitted by the Insured Retirement Institute (September 24, 2015), available at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/03062.pdf>. (the “September 2015 Letter”).

<sup>42</sup> See, e.g., Comment letter submitted by SEC Commissioner Michael S. Piwowar (July 25, 2017) (discussing and emphasizing the effectiveness of the SEC’s disclosure-based regime).

*The Commission should adopt a rule to allow use of a summary prospectus for variable annuities to help investors better understand these products.*

On a related topic, we note that Commission staff has been working for several years to develop a summary prospectus rule for variable annuities, similar to the summary prospectus rule adopted by the Commission in 2009 for mutual funds. In support of this effort, IRI developed and provided the SEC with a proof-of-concept sample variable annuity summary prospectus. Consistent with the views expressed by all five SEC commissioners in a series of meetings held in late 2014, the SEC staff continues to strongly support IRI's proposal. This effort has also had the support of former Chairman Mary Schapiro, as well as former Director David Grim of the Division of Investment Management and all of his predecessors. The variable annuity summary prospectus was also endorsed by the SEC's Office of the Investor Advocate its annual report to Congress in June 2017, and by the Treasury Department in a report it submitted to President Trump in October 2017.

In sum, we believe a variable annuity summary prospectus rule would improve consumers' understanding of their investment choices through more streamlined disclosures, and therefore would be consistent with the goals of the Commission's standard of conduct rulemaking effort. As such, we respectfully urge the Commission to issue a variable annuity summary prospectus rule as soon as practicable.

**7. *The Commission Should Provide True Grandfathering; Any New Standard of Conduct Should Not Retroactively Apply to Pre-Existing Accounts or Transactions.***

In the interest of fairness, and to ensure clarity and avoid confusion, we respectfully recommend that the Commission include a clear grandfathering provision in any rule proposal. In our view, when a client opens an account with a financial professional or executes a transaction, they do so with the understanding that the laws and rules then in place will govern that account or transaction. Retroactively imposing a new set of rules has the potential to create significant confusion in the context of pre-existing accounts and transactions, and could harm the advisor and/or the client if those new rules frustrate the intent of the account or transaction.

The DOL Rule purports to provide grandfathering, but it does so on a strictly transactional basis that does not comport with the way financial professionals and clients typically interact. In the real world, firms and financial professionals generally try to avoid compartmentalizing different aspects of their client relationships. It would be administratively burdensome to put one part of an account or transaction into one bucket (e.g., assets acquired on or prior to June 9, 2017) and another part of the same account or transaction into a separate bucket (e.g., assets acquired after June 9, 2017). More

importantly, we expect many clients would be confused and frustrated by such arrangements.

Put another way, the “grandfathering” provision in the DOL Rule would effectively require firms and financial professionals to ignore the ongoing needs of their clients in order to take advantage of the relief provided by the DOL. This would be contrary to the overall goal of requiring firms and financial professionals to always act in the best interest of their clients. It would also run afoul of FINRA’s regulatory expectations that financial professionals should periodically check back with clients to see if their needs or objectives have changed and if their holdings remain appropriate.

To avoid these adverse consequences, we respectfully recommend that the Commission make clear that any changes to the applicable standards of conduct would apply only to accounts and transactions entered into after those changes take effect, and would not apply to future advice regarding any assets acquired prior to that date.

In addition, we believe the Commission should clearly state that the standard of conduct would not apply to transactions that are not the result of a recommendation or solicitation. In such instances, neither the firm nor the financial professional are engaging in conduct that results in the transaction, and therefore, there is no conduct to which the standard could be applied.

**8. *The Commission Should Provide a Flexible Regulatory Environment to Facilitate and Encourage Innovation, But Should Not Pick Winners and Losers.***

In the Request for Information issued by the DOL on July 6, 2017 (the “DOL RFI”), the DOL asked for public comments on a possible new prohibited transaction exemption designed to encourage innovation as the industry works to comply with the DOL Rule. While we share the DOL’s interest in encouraging innovation, we believe this approach would essentially amount to the DOL picking winners and losers. In our view, this would actually discourage innovation rather than encouraging it, as many product manufacturers would naturally seek to develop products that would qualify for this preferred treatment, and many financial professionals would only recommend those products even if other products would actually be in a particular client’s best interest (a result that would clearly be at odds with the overarching goal of the DOL Rule). We believe innovation should be driven by consumer need and other marketplace forces, not by the need to conform to regulatory requirements.

Fee-based annuities are one example of the type of innovation regulators should seek to encourage. These products, which do not embed compensation to the financial professional in the form of an up-front or trail commission, would provide value for some investors but might be inappropriate for others. Fees for the annuity itself are lower, but total compensation and costs to consumers will depend on various factors, including the length

of ownership and specific fee structure. Fee-based products may be appropriate for some consumers, but commission-based products may be more appropriate and less expensive for others, depending on their arrangement with their financial professional and their approach to retirement savings. According to the 2017 IRI Member Survey, nearly six in 10 insurers believe fee-based products will ultimately result in higher total costs to consumers than commissionable products.

We believe the best way for regulators to encourage innovation is to create a flexible regulatory environment that can easily adapt to new ideas. A system built on a series of narrowly tailored rules will require additional regulatory action in order for new innovations to test the market. By contrast, a broad, principles-based approach consistent with the guiding principles outlined in this letter will give industry the opportunity to experiment with new ideas to meet evolving consumer needs and desires. Regulators can retain the ability to rein in new innovations if necessary to protect consumers, but regulations should not be designed to prevent such products from coming to market in the first place.

**9. *The Best Interest Standard Should Not be Interpreted or Enforced Through Private Litigation; Regulators Should Control Interpretation of the Standard, and Enforcement Should be Handled Through Regulatory Actions or Arbitration.***

Given that the DOL lacks authority to enforce the DOL Rule in the IRA space, the BIC Exemption requires financial institutions to enter into contracts that expose them to liability in class action lawsuits. The preamble to the BIC Exemption acknowledges that financial institutions will have no choice but to submit to the terms of its exemptions. That was the DOL's objective, since, as it stated in the preamble to the BIC Exemption, "banning all commissions, transaction-based payments, and other forms of conflicted payments" (which would otherwise occur under the Rule) "could have serious adverse unintended consequences."

The DOL also made clear that it intended to subcontract to the class action bar enforcement of the new regulatory scheme that it lacks the power to enforce itself. Former Assistant Secretary of Labor Phyllis Borzi acknowledged this, saying "Back in the day, when people wanted to make changes, they passed legislation," but the DOL Rule changes "the way that social change and legal change and financial change is accomplished through congressional action to two different avenues for making changes: The main one being regulation and the second one being litigation." Borzi further explained that the BIC Exemption "deputiz[es]" consumers to bring "state contract actions" because the DOL lacked direct statutory authority over IRAs.

This inappropriate utilization of private litigation as the primary enforcement mechanism for the DOL Rule would expose the financial services industry to a significant risk of

increased litigation. This risk is attributable not to actual violations of the best interest standard but to the uncertainty around the requirements of the DOL Rule and the BIC Exemption.

Outsourcing enforcement to the plaintiffs bar in the manner contemplated by the DOL Rule would also result in outsourcing interpretation to state courts. In the context of the DOL Rule, this would be contrary to congressional intent as reflected in ERISA § 514(a). Perhaps more troubling and problematic, relying on state courts to interpret a federal regulation is likely to result in inconsistent interpretations, which would be particularly problematic for businesses and individuals who operate in multiple states. Moreover, it would be reasonable to expect that some state court interpretations of a particular rule would be inconsistent with or contrary to the intent of the regulator that adopted the rule.

As noted above, the Commission and the state insurance departments have robust examination and enforcement tools at their disposal to effectively ensure compliance or penalize violators for non-compliance. These tools are described in detail in the comment letters we submitted to the DOL on July 21, 2015 and September 24, 2015,<sup>43</sup> which we hereby incorporate by reference into this letter. These regulatory regimes have proven highly effective at addressing consumer protection concerns. This is clear from an examination of complaint data from both FINRA and the NAIC. According to FINRA, just 115 cases involving variable annuities were brought in 2016, representing only 3 percent of all cases (3,635 in total). Similarly, the NAIC reports that just 185 annuity suitability complaints were filed with the states in 2016, representing only 1.8 percent of all complaints in the “Life & Annuity” category (9,970 total).<sup>44</sup>

By contrast, recent experience demonstrates that outsourcing enforcement to the plaintiffs’ bar is not an effective way to protect consumers. From 2009 to 2016, plaintiffs in lawsuits alleging breaches of ERISA fiduciary duties received just \$116 on average.<sup>45</sup> In fact, the real beneficiaries of these cases were the plaintiffs’ attorneys, who collected roughly \$204 million for themselves.<sup>46</sup>

In February 2017, Morningstar, Inc. conducted a study of the litigation risk created by the contract and warranty requirements and found that class action lawsuits under the DOL

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<sup>43</sup> See the July 2015 Letter and the September 2015 Letter.

<sup>44</sup> National Association of Insurance Commissioners, *Closed Confirmed Consumer Complaints by Coverage Type*, (July 24, 2017), available at [https://eapps.naic.org/documents/cis\\_aggregate\\_complaints\\_by\\_coverage\\_types.pdf](https://eapps.naic.org/documents/cis_aggregate_complaints_by_coverage_types.pdf).

<sup>45</sup> DC Dimensions, Summer 2016, “Fiduciary Benchmarks: Protect Yourself at All Time,” by Tom Kmak, <https://us.dimensions.com/-/media/Dimensional/Documents/US/Auxiliary/Defined-Contribution/Summer-2016/02-Fiduciary-Benchmarks-Protect-Yourself-at-All-Times.pdf>

<sup>46</sup> *Id.*

Rule<sup>47</sup> will cost the industry between \$70 million and \$150 million each year. In the near term, these costs could be several times higher “as firms try to figure out how to determine, demonstrate, and document best interest.” Ultimately, significant portions of this litigation expense will likely be passed along to retirement savers in the form of increased costs for products and services.

Retirement savers are also being harmed as a result of this litigation risk in other important ways. For example, a recent Cerulli study found that 55 percent of plan sponsors view litigation risk as a very important consideration when making decisions for their plans.<sup>48</sup> The same study found that “improving participant outcomes” ranked only slightly higher at 63 percent.<sup>49</sup> This fear of litigation is driving many plan fiduciaries to focus on easily quantifiable factors such as the fees associated with particular products or services to the exclusion of other important considerations such as the value of those products or services and their appropriateness for the plan’s particular participant population. In our view, this approach is incompatible with the best interest standard, which we believe requires fiduciaries to take a more holistic view of different products and services before making a recommendation to a client.

During the rulemaking process, IRI and numerous other commenters expressed serious concerns about these costs,<sup>50</sup> as well as the risks inherent in deferring interpretation and enforcement of the Fiduciary Rule to fifty different state courts across the country.<sup>51</sup> The DOL simply disregarded these extensive comments, assigning no cost estimate to class action litigation in the Regulatory Impact Analysis. We respectfully urge the Commission to consider all relevant factors when assessing possible enforcement mechanisms for a best interest proposal, including the direct and indirect costs associated with enforcement through private litigation. We believe a full and fair cost-benefit analysis would clearly show that regulatory actions and arbitration are the most appropriate enforcement mechanisms.

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<sup>47</sup> We note that the DOL has recently conceded that the BIC Exemption’s prohibition on class action waivers in pre-dispute arbitration agreements violates federal law and should be vacated. While we applaud and appreciate this decision, it is important to note that broker-dealers and their registered representatives are subject to FINRA rules that prohibit class action waivers, and therefore will continue to face significant class action litigation risk as long as the BIC Exemption contract requirement remains in place.

<sup>48</sup> Cerulli Associates, *The Cerulli Report – U.S. Retirement Markets 2016: Preparing for a New World Post---Conflict of Interest Rule*.

<sup>49</sup> *Id.*

<sup>50</sup> Commenters have also provided extensive new data and information to the DOL in connection with its review of the Fiduciary Rule pursuant to the Presidential Memorandum issued on February 3, 2017. A compilation of this new data and information is attached to this letter as [Appendix A](#).

<sup>51</sup> Allowing state courts to interpret ERISA fiduciary standards is also contrary to congressional intent as reflected in ERISA §514(a).

## Conclusion

In an age when saving and preparing for retirement is squarely on the shoulders of individuals, financial professionals will have an important part in helping their clients develop retirement plans and grow their savings. The DOL Rule is already limiting consumer choice and depriving lower- and middle-income consumers from accessing affordable assistance with retirement planning. We believe the guiding principles and proposals outlined in this letter will enable the Commission to establish a best interest standard while preserving Americans' access to retirement planning products and services.

If you have questions about anything in this letter, or if we can be of any further assistance in connection with this important regulatory effort, please feel free to contact me or Lee Covington, IRI's Senior Vice President and General Counsel.

Sincerely,

A handwritten signature in black ink, appearing to read "Catherine J. Weatherford". The signature is fluid and cursive, with a large loop at the end.

Catherine J. Weatherford  
President & CEO  
Insured Retirement Institute

Cc: The Honorable Michael S. Piwowar, Commissioner  
The Honorable Kara M. Stein, Commissioner  
Dalia Blass, Director, Division of Investment Management  
William Hinman, Director, Division of Corporation Finance  
Brett Redfearn, Director, Division of Trading and Markets

## Appendix A

### **NEW DATA SHOWS DOL FIDUCIARY RULE HARMING SMALL RETIREMENT SAVERS**

*Comments Also Highlight Procedural and Analytical Flaws in Rulemaking Process*

#### **Executive Summary**

As ordered by President Trump, the Department of Labor requested new information about the economic effects of the fiduciary rule. This new data, based on actual experience rather than academic guesswork, shows that the Department's original predictions were wrong. The facts show that the Department significantly underestimated the negative effects of the rule, particularly in reducing access to advice and retirement products for small retirement savers and small businesses.

Specifically:

- A survey of advisors finds 71 percent will stop providing advice to at least some of their current small accounts due to the risk and increased costs of the rule.
- Other surveys found that 35 percent of advisors will stop serving accounts under \$25,000, and 25 percent will raise their client minimum account thresholds.
- A major mutual fund provider reported that the number of orphaned accounts on its books (accounts no longer serviced by an advisor, leaving investors on their own) tripled in the first quarter of 2017 due to the fiduciary rule. These small accounts averaged \$21,000. It further estimated that roughly 15 percent of its accounts would be orphaned following full implementation of the rule.
- A survey of insurance service providers shows 70 percent already have or are considering exiting the market for small balance IRAs and small plans, and half are preparing to raise minimum account requirements for IRAs.
- Lack of access to advice hurts retirement savers—a study shows that investors starting with \$25,000 who receive advice save nearly three times more than their non-advised peers. This is due not only to investment recommendations, but to personal assistance in developing better retirement saving habits and other positive financial behaviors.
- Many comments explained that a wide array of financial service providers are responding to the Rule's new litigation risks by limiting the investment types and products they will recommend.

The information also highlighted critical procedural and analytical flaws in the Department's original analysis, including its reliance on old data, inadequate consideration of alternatives, not taking into account the benefits advisors provide while focusing on aspect of costs, and underestimating the impact on small businesses.

As this data shows, the Trump Administration should further delay the applicability date of the rule while it completes its full review to avoid harming the very people the rule is intended to help.

### **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.<sup>1</sup> (IRI, Davis & Harman, FSR and Chamber)
- A 2016 study by CoreData found that 71 percent of financial professionals will disengage from at least some retirement savers because of the fiduciary rule, 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), and 39 percent think that financial advice will become too expensive for most retirement savers. 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.<sup>2</sup> (IRI, Davis & Harman, ABA, Market Synergy, SIFMA, ACLI)
- A 2016 study by A.T. Kearney found that by 2020, broker-dealer firms (including wirehouses, independents, and dually-registered broker-dealer/registered investment advisers) will collectively stop serving the majority of the \$400 billion currently held in low-balance retirement accounts.<sup>3</sup> (IRI, Davis & Harman, FSI)
- In a 2017 survey of IRI member firms, 70 percent of respondents either already have or are considering exiting smaller markets such as lower balance IRAs and small employer based plans, and nearly half already have or are considering raising IRA account minimums.<sup>4</sup> (IRI)
- A 2017 survey by the National Association of Insurance and Financial Advisors (“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.<sup>5</sup> (IRI, NAIFA)
- Nearly every financial institution that has disclosed its plans publicly will be changing products and services available to retirement investors, restricting choices, and changing pricing.<sup>6</sup> (SIFMA)
- According to a recent SIFMA survey of 25 financial firms that would be impacted by the Rule, more than half of the firms were considering moving IRA brokerage clients to call center services only, several firms were considering moving clients to a self-directed structure, and nearly three quarters of the responding firms said their plans would not permit small accounts to have advisory accounts. (SIFMA)
- Over 50 percent of respondents to the SIFMA survey anticipated offering only advisor services to a subset of their current IRA brokerage customers. 92 percent of responding firms stated that their Rule compliance plans could limit or restrict products for retirement investors, and over 75 percent of the respondents stated their Rule compliance plans could restrict or restrict services available to retirement investors. (SIFMA)
- One report notes that 35 percent of advisers surveyed “will move away from low-balance accounts” (i.e., less than \$25,000 in assets).<sup>7</sup> 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.”<sup>8</sup> (FSR)

- In many cases, our members have been informed by their intermediary partners that they will no longer service certain account holders in light of the rule. These so-called “orphaned” account holders already number in the hundreds of thousands (and industry participants indicate that the numbers will climb substantially as implementation efforts proceed) and will be left without access to advice. Many will be forced to pay more for advice as they lose access to commission-based arrangements (ICI)
- 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 percent of the accounts it services will be orphaned this year because of the fiduciary rule. Extrapolating this prediction suggests that at least 1.6 million small retirement savers have already lost access to investment assistance since January 2017, and an additional 1.6 million are likely to lose access after the rule becomes applicable. (Chamber, ICI)
- According to an informal survey of ICI members in 2017, 31 out of 32 mutual fund companies reported either having received orphaned accounts or receiving notices regarding some volume of accounts that will become orphaned. The average account balance of those accounts where an intermediary has resigned is \$17,138. The expectation is that the number of orphaned accounts likely will run into the hundreds of thousands. (ICI)
- The National Conference of Insurance Legislators (“NCOIL”) adopted a resolution stating that “the rule will prevent consumer access to crucial retirement education and services, ultimately harming the very people it seeks to aid.” (Market Synergy)
- According to a February 2017 survey of more than 1,000 investors conducted by J.D. Power, more than half (59 percent) who pay commissions now say they either “probably will not” (40 percent) or “definitely will not” (19 percent) be willing to stay with their current firm if it meant being forced to move to fee-based retirement accounts. (Market Synergy)
- The American Action Forum estimates that anywhere from 2.3 million to 14.7 million consumers will face significant changes to their retirement and financial advice. The Rule has caused several large companies to leave the market or scale back sales, affecting an estimated 92,000 advisors and at least 2.3 million consumers. “[A] conservative estimate of 25 to 35 for each of the 92,000 affected advisers still yields 2.3 million to 3.2 million consumers with significant changes to their retirement and financial advice.”<sup>9</sup> (ICI)
- 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.<sup>10</sup> (FSR, FSI, NAIFA)
- Based on a minimum balance requirement of \$30,000, the Rule could force 28 million Americans out of managed retirement accounts; based on a minimum balance of just \$5,000, over 13 million would lose access to managed retirement accounts.<sup>11</sup> (SIFMA, NAIFA, FSI)

- Many advisors plan to exit the business entirely. In a blind online poll of 459 advisors conducted by Fidelity Clearing & Custody Solutions from August 18-26, 2016, 10 percent of advisors reported they are planning to leave or retire from the field earlier than expected because of the rule, and another 18 percent said they are “reconsidering their careers as advisors.”<sup>12</sup>
- “For example, effective April 10, 2017, specific distribution partners of Pacific Life will scale back the retirement products they offer, limiting competition and choice. Advisors plan to be more selective of the new investors they choose to service which will limit access to retirement information and personalized advice for many. In addition, distributors continue to identify and eliminate clients with small to modest account balances in anticipation of the added compliance costs and heightened litigation risks generated by compliance with the new rule. As a result, a significant number of existing investors could lose access to an advisor to talk to, answer questions, and who can help encourage them to save more and remain invested over time.”<sup>13</sup>
- “According the 2016 Global Survey of Financial Advisors published by Natixis Global Asset Management, more than three-quarters of advisors surveyed believe increased regulations could lead to higher costs for their clients. The rule is specifically mentioned as being one of the primary drivers of increased regulatory costs. More alarming to small businesses, 38 percent of respondents said they were likely to “disengage from smaller clients.” Because retirement plans sponsored by small businesses often pale in comparison to larger corporate retirement plans in terms of assets invested, small businesses face a greater likelihood of being dropped by their financial advisors.”<sup>14</sup>
- “It is estimated the rule could disqualify up to 7 million IRA holders from investment advice and reduce the number of IRAs opened annually by between 300,000 and 400,000.”<sup>15</sup>
- “According to Cerulli, two-thirds (66 percent) of advisors believe that small investors will have less access to professional financial advice as a result of the rule. And, according to a recent report by CoreData Research, 71 percent of surveyed U.S. advisors plan to disengage from “mass market” investors because of the DOL rule and these advisors estimate they will no longer service 25 percent of their current clients – creating a potential “advice gap” for low balance investors.”<sup>16</sup>
- Due to the requirements of BICE “Ladenburg will be forced to preclude some lower cost investment options that may be appropriate for some clients and reduce available product offerings to only those that pay the same level compensation (even if that compensation is higher) to the Financial Institution. This will likely cause a broad reduction across multiple product categories and, in some categories, may reduce available products from over 100 to less than 10.”<sup>17</sup>

**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 \$130.4 billion in 2015 to \$102.1 billion in 2016.<sup>18</sup> (IRI)

- Adverse effects on annuities have already occurred. “The variable annuity industry took a beating in 2016, with several of the top sellers inking losses upwards of 25 percent on the year and some exceeding 40 percent. 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.”<sup>19</sup> (Davis & Harman, IRI)
- Advisors recognize that moving away from certain products will be part of the adjustment process to the new normal established by the fiduciary rule. About a third (32 percent) believe shifting away from certain products, such as annuities and non-traded REITs, is one of the biggest challenges posed by the fiduciary rule.<sup>20</sup> (SIFMA, Davis & Harman)
- In 2015, variable annuities represented 56 percent of IRA annuity sales and 46 percent of 2016 IRA annuity sales. LIMRA projects that variable annuity purchases will decrease another 20-25 percent in 2017 if the rule goes into effect. Several factors contributed to declining variable annuity sales, primarily the BICE and other components of the rule. LIMRA also projects that sales of indexed annuities will drop by similar levels because of the rule.<sup>21</sup> (SIFMA)
- For IRA purchases, sales declined 22 percent in 2016 compared to the prior year.<sup>22</sup> The ambiguous regulatory structure of the rule is expected to result in additional decreases in purchases of variable annuities, which represents a significant amount of IRA annuity purchases. (SIFMA)
- More than 80 percent of respondents to the 2017 IRI survey have already introduced, plan to introduce, or are considering introducing fee-based variable annuities. However, those products are unlikely to be widely available in the near-term and may not be appropriate for all retirement savers, including some for whom a traditional commission-based variable annuity would be more economical, less costly, and likely in their best interest. <sup>23</sup> (IRI)
- Several large intermediaries have already announced a variety of changes to service offerings, including firms no longer offering mutual funds in IRA brokerage accounts; others offering no IRA brokerage accounts at all; firms reducing web-based educational tools; and firms raising account minimums for advisory fees.<sup>24</sup> (ICI)
- Recent media reports have highlighted the decisions being made by some firms to change their service models and product availability, including (a) moving clients to fee-based accounts, (b) eliminating commission-based IRAs; (c) raising investment minimums for commission-based IRAs; (d) eliminating variable annuity products; and (e) excluding certain products from commission-based IRAs (*e.g.*, annuities, mutual funds, and exchange-traded funds).<sup>25</sup> (FSR)
- Many firms have already determined the BIC Exemption is unworkable for certain products, and the substantial threat of unwarranted litigation cannot be justified for certain accounts or that the BIC exemption in its entirety is simply too burdensome.<sup>26</sup> (ICI)
- Many companies will be inclined to reduce the universe of available investments to effectively mitigate potential conflicts of interest arising from different compensation amounts and cost structures, which the company does not control. Likewise, investment choice will be limited to ensure that financial institutions can comply with the numerous initial and ongoing disclosure requirements applicable to BICE. The technology and operational capabilities necessary to meet

these disclosure obligations inevitably will cause us and others to offer fewer products to control the costs of these efforts.<sup>27</sup>

- “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) to avoid the cost of complying with the BIC Exemption and mitigate the threat of costly class action lawsuits.”<sup>28</sup>
- “AAF found that three major companies have already left part of the brokerage business, and an additional six are drawing down their business or switching to a fee-based arrangement, depriving more consumers of investment advice.”<sup>29</sup>
- “Over the 12-month period ending on September 30, 2016, industrywide sales of variable annuities with guarantees declined 24 percent.”<sup>30</sup>
- “The National Economic Research Association estimates more than 57 percent of current retirement savings account holders will be forced out of their current plan by this rule. Economists from the Brookings Institution estimated the consumer loss could be \$80 billion – twice as much as was projected by the Department of Labor – and a report from economic consulting firm Oliver Wyman concluded the rule could raise the price of financial advice by nearly 200 percent.”<sup>31</sup>
- “According to the Insured Retirement Institute, 2016 sales of all annuities declined 7.6 percent from 2015, and 2016 sales of variable annuities, which under the rule will fall under the complicated BICE regulations, fell 21.65 percent from 2015. Fourth quarter 2016 fixed indexed annuity sales declined 7 percent from third quarter 2016 sales. For 2017, the LIMRA Secure Retirement Institute projects that total sales of US individual annuity sales will drop 10 percent to 15 percent, while sales of variable and indexed annuities will drop as much as 20 percent to 25 percent.”<sup>32</sup>
- “Most notably, 91 percent of respondents [to a recent survey of NAIFA members] have already experienced or expect to experience restrictions on product offerings to their clients, nearly 90 percent believe consumers will pay more for professional advice services, and 75 percent have seen or expect to see increases in minimum account balances for the clients they serve.”<sup>33</sup>
- “In fact, nearly half of NAIFA’s members (46 percent) already have experienced a restriction of product offerings to their clients, and another 45 percent anticipate that such restrictions are forthcoming. More specifically, 68 percent of our members have been told that they cannot recommend certain mutual fund classes to clients, and over 70 percent say they cannot recommend certain annuities.”<sup>34</sup>
- Due to BICE’s requirements “KMS will be forced to preclude some lower cost investment options that may be appropriate for some clients and reduce available product offerings to only those that pay the same level compensation (even if that compensation is higher) to the Financial Institution. This will likely cause a broad reduction across multiple product categories and, in some categories, may reduce available products from over 100 to less than 10.”<sup>35</sup>

- The Oxford Economics report warned that the DOL has “dramatically underestimated” the cost to comply with the new rule and that smaller firms would find it difficult to stay in business. The Oxford Economics study estimates the fiduciary rule will result in startup costs ranging from \$1.1 million to \$16.3 million per firm, depending on firm size. The study also found that because of the cost burdens, firms will shift their business model towards fee-based advising and create a minimum balance for client accounts. These account minimums will effectively force smaller investors into self-advised or robo-advice accounts. As compliance costs rise, fees for investors and account minimums rise, causing middle and lower class investors to be priced out of professional investment advice. The impact of being priced out of professional investment advice will have a permanent, long-term impact on investor’s retirement savings.”<sup>36</sup>

### **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.<sup>37</sup> (Chamber, ABA, SIFMA, FSI)
- 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 percent with the use of an advisor and the proportion dedicated to stock positions increases by 39 percent. Academic work clearly shows that asset allocation, not mutual fund selection, explains, on average, 100 percent of performance. If the rule results in a reduction of equity allocations by only 15 percent, the ICI estimated that would result in a performance decline of 50-100 bps per year, on average, or \$95 billion and \$189 billion over the next 10 years and between \$202 billion and \$404 billion over the next 20 years. (ICI, SIFMA)
- New economic studies estimate that investors could lose \$109 billion over 10 years because of the rule’s implementation. This would amount to \$780 million per month in losses to investors. A 60-day delay would thus save investors \$402 million in lost returns over 60 days. A 180-day delay would save more than \$1.2 billion. Even a 60-day delay would amount to \$414 million in lost returns saved for investors over the first year if the rule ultimately goes forward as now structured and \$542 million over a 10-year period (at a three percent discount rate). These lost returns far exceed the Department’s estimated \$104 million losses in the form of foregone gains— gains that, as shown above, are widely overstated. (SIFMA, ICI)
- Kinniry, et al., found that having a financial professional can make up to a 300 basis point difference in annual compound returns. They found that the greatest contributing factor of assistance, amounting to 150 basis points in annual compound rate of return, was the “behavioural coaching” element of the interactions between a customer and a financial professional.<sup>38</sup> (Chamber, FSR)

- A paper casts doubt on the social benefits of the Department’s promotion of passive index fund investing. The paper shows that despite the apparent advantages to some individual investors, widespread and growing adoption of the strategy could distort capital markets in ways that could slow overall economic growth. The author shows how inclusion of a stock in an index fund may artificially raise its internal cost of capital calculations and discourage otherwise profitable investment decisions. He also illustrates how an index fund investor may be exposed to unforeseen risk of loss.<sup>39</sup> (Chamber)
- A report finds that many retirement savers are adverse to assistance from call centers or robots. The personal connection with a financial professional is important for educating and motivating savings behavior.<sup>40</sup> (Chamber)
- Research from Vanguard shows that human contact from advisors helps investors to stay invested in the market for the long-term, instead of trying to time the market.<sup>41</sup> (ICI, FSI)
- “Studies indicate that households that have worked with a financial advisor over a 15-year period “have about 290 percent more financial assets than non-advised households,” even though half of these households had less than \$25,000 in savings when they initially began to work with an advisor. “The discipline imposed by a financial advisor on households’ financial behavior and increased savings of advised households are key to improving asset values of households relative to comparable households without an advisor.” Indeed, some studies find that “behavioral coaching can add 1 percent to 2 percent in net return.”<sup>42</sup>

#### **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.<sup>43</sup> (IRI, Chamber, FSI)
- 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.<sup>44</sup> (Chamber, ICI, FSR, Market Synergy)
- Companies interviewed by the Chamber suggest insurance costs could exceed two to three times the cost estimated by the Department. Some respondents to Chamber interviews cited numbers as high as \$10,000 per professional per year for Errors and Omissions coverage. 23 percent of NAIFA members have already seen an increase in E&A premiums, while 60 percent anticipate such an increase. (Chamber, NAIFA)
- The expanded incentive for class action litigation results in defendants settling with an extremely litigious plaintiffs’ 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.<sup>45</sup> (ARA, ICI)
- Many advisors are fearful of litigation, as the CoreData survey found that “Advisors are also in a heightened state of readiness for a potential rise in lawsuits related to the fiduciary rule. Nearly two in 10 advisors (18 percent) believe preparing for potential litigation will be one of the biggest

challenges they must overcome. And 12 percent think the need to invest in appropriate technologies to aid compliance and implementation constitutes a major challenge.”<sup>46</sup> (SIFMA, Davis & Harman)

- A recent SIFMA survey of 25 financial firms that would be impacted by the Rule found that more than 60 percent of the responding firms stated that they anticipated some or all of the costs resulting from the potential increase in litigation and liability insurance to be passed on to clients. (SIFMA)
- 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.<sup>47</sup>
- A SIFMA survey indicated “...more than 60 percent 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.”
- “An equity analyst from Morningstar stated that annual litigation costs will be \$70MM-\$150MM per year.”<sup>48</sup>
- “A February 2017 study prepared by the Lockton Companies indicated that the costs to get through a motion to dismiss range from \$500,000-\$750,000. Beyond that, discovery costs alone can reach between \$2.5 million and \$5 million.”<sup>49</sup>
- “Participants are not the primary beneficiaries of these awards, as a Fiduciary Benchmarks survey conducted in 2016 concluded that out of \$698 million awarded, attorneys received \$204 million and the average participant award was \$116.”<sup>50</sup>

### **New Information: Compliance Costs**

- The Securities Industry and Financial Markets Association estimates that annual compliance costs will range from \$240 million to \$570 million over the next ten years.<sup>51</sup> (SIFMA)
- Small broker-dealers face the greatest financial risk under the rule, forcing potential consolidation of broker-dealers.<sup>52</sup> (SIFMA, FSI, FSR)
- One recent study by the American Action Forum found reported compliance costs of at least \$106 million in 2016, representing up-front costs from just four companies.<sup>53</sup> (Market Synergy)
- The rule presents many compliance and operational hurdles for advisors to overcome. As expected, advisors are preparing for an increase in paperwork. A majority (57 percent) believe increased paperwork stemming from reporting and disclosure requirements will be one of the top three challenges of the fiduciary rule. Compliance training is a concern for more than a quarter (28 percent) of advisors.<sup>54</sup> (SIFMA, Davis & Harman)
- The DOL’s RIA grossly underestimated the cost of the rule. FSI members have already incurred costs of \$189 million to implement the Rule and estimate they will spend an additional \$205 million when the Rule’s implementation resumes on June 9. This puts the start-up costs for the regulations at 20 times higher than the DOL’s updated RIA’s estimate. The total implementation costs for FSI

members are estimated to be \$394 million, while annual operating expenses are estimated at \$230 million. Management and compliance planning make up 20 percent of current costs. If FSI members' experience is extrapolated across the entire broker-dealer industry, FSI estimates that the 10-year cost of the Rule will be \$14.2 billion, three times higher than the DOL had estimated.<sup>55</sup> (FSI)

- “The costs that will be incurred to comply will most likely force smaller firms to consolidate or close their doors. In other words, lost jobs. A Morningstar quote for their technology solution which would assist with compliance procedures was \$1,014,540 annually. We don’t have \$1,000,000 of net income annually. How would we pay for this? Other solutions quoted in the several hundred thousand dollar range, again annually. We have already spent over \$300,000 in legal costs and staff hours trying to develop our compliance procedures. We won’t survive.”<sup>56</sup>
- “The proposed rule has already substantially increased our compliance costs. We estimate compliance costs have increased 450 percent as a result of this rule.”<sup>57</sup>
- “Our research has found that almost all retail investors will see their costs increased by 73 to 196 percent due to a mass shift toward fee-based accounts. Further, firms providing investment advice will see an average of \$21.5 million in initial compliance costs and \$5.1 million in annual maintenance costs. Even worse, up to 7 million Individual Retirement Accounts (IRAs) would fail to qualify for an advisory account due to the balance too low to be sustainable for the advisor. In the shorter term, we found that the fiduciary rule, as written, will result in over \$1500 of duplicative fees charged per household retirement account.”<sup>58</sup>
- “AAF also found reported compliance costs of more than \$106 million in 2016, representing up-front compliance costs of just four companies.”<sup>59</sup>
- “Industry estimates show that the rule will cost \$5 billion to implement and \$1 billion annually to maintain.”<sup>60</sup>
- “Implementing the DOL’s new fiduciary rule for retirement accounts will cost the brokerage industry \$11 billion in revenue over the next four years, according to a recent study from A.T. Kearney, a consultant.”<sup>61</sup>
- “The Oxford Report estimated that the rule would result in startup costs ranging from \$1.1 million to \$16.3 million per [Individual broker dealer] firm, depending on firm size.”<sup>62</sup>
- “To date, Advisors Excel has spent in excess of \$1 million in preparation for the rule. Across the financial industry, compliance estimates range from Ameriprise spending in excess of \$11 million in the first part of 2016, to an estimate by the Securities Industry and Financial Markets Association (“SIFMA”) indicating start-up costs for large and medium broker- dealers would total \$4.7 billion with on-going costs of \$1.1 billion.”<sup>63</sup>
- A new report showed that to comply with the Fiduciary Rule, Primerica believes it will spend between \$4 million and \$5 million every year, and Ameriprise Financial has already spent \$11 million on DOL-related compliance activities as of September 2016.<sup>64</sup> (FSI)

### **Procedural Flaws**

- An inquiry initiated by Senator Ron Johnson (R-Wisconsin) in 2015 found the Department “was predetermined to regulate the industry and sought evidence to justify its preferred action.” In other words, the Department first concluded that it wanted to change the rules governing investment advice fiduciaries, and then sought to justify that conclusion. (IRI, Davis & Harman)
- The Department failed to consider how the rule would likely create an “advice gap” for low- to middle-income families. The Department dismissed concerns of loss of access, and instead found “little evidence” that “financial advisers improve retirement savings.” However, this conclusion is contradicted by the Department’s own assessment in a prior rulemaking that investment mistakes cost investors approximately \$114 billion per year, that access to financial assistance reduced the cost of those mistakes by \$15 billion per year, and that increased access to financial assistance would enable them to save billions more. (IRI)
- The Department chose to ignore evidence regarding the impact of similar rules established in other jurisdictions. Most notably, following the United Kingdom’s move to a fee-based compensation model, the U.K. regulator issued a report in March 2016 confirming 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.”<sup>65</sup> Rather than taking advantage of the opportunity to learn from mistakes made by other countries, the Department simply denied the existence of an “advice gap” in the U.K. and dismissed the possibility that a similar “advice gap” would develop in the U.S. under the fiduciary rule. (IRI, Chamber, ICI and Davis & Harman)
- Under Executive Order 12866<sup>66</sup> and related guidance issued by OMB,<sup>67</sup> consideration of viable alternatives is a fundamental element of federal agency rulemaking. However, the lack of consideration given to all relevant costs of the fiduciary rule prevented the Department from properly evaluating less burdensome alternatives that would have greatly reduced the costs of the fiduciary rule, harmonized the Department’s regulatory regime with that of the SEC and, because they would have applied only to relationships in which the client has no reasonable expectation of fiduciary status, would not have caused any meaningful consumer harm. However, as a result of the Department’s flawed process, it arbitrarily rejected these and other alternatives. (IRI)
- According to the Johnson Report discussed above, the Department failed to adequately consider comments from expert regulators and professional staffers from the SEC, OIRA and the Treasury Department expressing concerns and offering recommendations regarding the rule. (IRI, Davis & Harman)
- “Further, the Department of Labor underestimated the impact of the rule on small and independent businesses by insufficiently fulfilling its obligations under the Regulatory Flexibility Act (RFA). The RFA requires agencies to consider the impact of their regulatory proposals on small entities, to analyze effective alternatives that minimize small entity impacts, and to make their analyses available for public comment. It is the role of the U.S. Small Business Administration’s Office of Advocacy to advance the views, concerns, and interests of small business before Congress, the White House, federal agencies, federal courts, and state policy makers. The Office of Advocacy is the government’s expert on the RFA. In this role, the Office of Advocacy comments to federal agencies

regarding the impact of proposed regulations on small business and provides feedback on agency analyses of the regulatory impact. Under the RFA, an agency is required to examine whether its proposed rule will have a significant economic impact on a substantial number of small entities. If the agency determines that its proposed rule will have such an impact, it is required to prepare an initial regulatory flexibility analysis (IRFA). The IRFA must meet several requirements spelled out by section 603 of the RFA, including what small businesses are expected to be directly impacted, the major cost factors, and consideration of all significant regulatory alternatives. The RFA requires agencies to publish the IRFA, or a summary, in the Federal Register at the same time it publishes the proposed rulemaking. In its public comment letter to the Department of labor of July 17, 2015, the Office of Advocacy wrote that it had found the IRFA for the rule deficient.”<sup>68</sup>

### **Analytical Flaws**

- According to a February 2017 analysis by the American Action Forum, it is unclear how CEA found that \$1.7 trillion of IRA assets involved conflicts of interest. Total affected IRA assets are significantly less. Retirement account assets were \$7.3 trillion in 2013, 86.2 percent of which, by the CEA’s own definition, were not “conflicted.” That leaves less than \$1 trillion in so-called “conflicted” assets. And even that amount is too large because it represents total “conflicted” assets across all retirement accounts, while the CEA’s analysis was limited to IRA assets only. Total “conflicted” IRA assets are some amount less than \$1 trillion. Also, as the CEA stated, the \$1.7 trillion figure is some combination of front-load funds and variable annuity in IRAs. By including the annuity market, the CEA increased total affected assets by approximately \$600 billion, or about 50 percent. (Market Synergy, ACLI, SIFMA)
- The Final RIA is deficient because the regulation is built on two false premises: all commission-based sales are conflicted, and all fee-only advice is always unconflicted and serves retirement savers’ best interest. Neither premise is correct, and neither is supported by the final RIA. (ACLI)
- The Department’s Regulatory Impact Analysis only briefly addressed the impact the rule would have on jobs, noting the rule could have “some social costs.”<sup>69</sup> (IRI, Davis & Harman)
- In projecting the costs of the rule, the Department did not give due consideration to the costs of the rule specifically applied to annuity manufacturers and distributors, despite several studies made available to the Department demonstrating the costs.<sup>70</sup> (IRI)
- The Regulatory Impact Analysis overstated the benefits of the fiduciary rule, underestimated the fiduciary rule’s direct and indirect costs to the financial services industry and retirement savers, and, as described above, failed to give meaningful consideration to the costs to retirement savers from lost access to retirement assistance (including assistance with guaranteed lifetime income products such as annuities) and the transaction-based fee model as well as the costs of class action lawsuits arising from the BIC Exemption. The record shows those costs total tens of billions of dollars. (IRI, ICI)
- The Department relied on flawed and problematic factors and data in their Regulatory Impact Analysis projections. Specifically, the Department admitted to basing savers’ projected financial gains on research regarding “only one” issue: the purported “conflict that arises from variation in

the share of front-end-loads that advisers receive when selling different mutual funds that charge such loads to IRA investors.” This research provides no basis for regulating products—such as annuities—that may not invest in mutual funds at all, and was not even a proper assessment of mutual fund performance. (IRI, ICI, FSR, FSI)

- 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.<sup>71</sup> (IRI, ICI, ACLI, SIFMA, NAIFA)
- Vanderbilt Professor and former SEC Chief Economist Dr. Craig Lewis noted the research relied on by the Department did not analyze the performance of mutual funds held in annuities, relied on old data not reflecting the current marketplace, and the author of one of the key studies later revised his work to show the “cost” of conflicts was about 1/6th of the amount originally estimated.<sup>72</sup> (Chamber, ABA, SIFMA)
- The Department was far too optimistic in relying on “robo advisers” to alleviate the potential loss of access to retirement advice for small savers. The Chamber of Commerce is currently unaware of any “robo advisor” that recommends annuity products to generate retirement income, despite the clear need for those products. (Chamber, ICI)
- The Department seemingly concludes that “robo advisors” and low-expense passive investment options are the best course of action for retirement investors, while ignoring the reality that there is no “one size fits all” investment strategy and even if some investors would benefit from this development, others would be harmed. The Department failed to address this potential impact in their Regulatory Impact Analysis. (Chamber, FSI)
- DOL failed to acknowledge that annuities are governed by a distinct, customized, and comprehensive regulatory framework that was enhanced in 2010 to account for annuities’ unique features. The dated mutual fund studies relied upon by the Department, which focus primarily on investment performance in the historical period 1991 to 2005, do not measure the efficacy of targeted and more rigorous annuity-specific rules. (ACLI)
- “DOL’s cost analysis is flawed on two accounts. First, DOL states that the fiduciary rule will save retirement savers \$17 billion a year. It came to this conclusion by taking a uniform 1 percent off of the total amount of assets in IRAs in the United States. From a statistical standpoint, DOL failed to take into account the asset-weighted performance of funds. Craig Lewis of Vanderbilt’s Owen School of Business provides an example of how this skews an analysis: “[A] non-asset weighted study examining nine funds each with \$1 million invested yielding a 1 percent return and one fund with \$10 million invested yielding a 10 percent return would show an average return of 1.8 percent. But

an asset-weighted study looking at the same 10 funds would show an average return of 5.7 percent. By ignoring which funds investors actually invest in, the report fails to achieve its stated objective of measuring the market-wide impact of conflicted advice in retirement accounts.” Second, DOL vastly underestimated the costs of compliance with the fiduciary rule. DOL estimated total startup compliance costs at \$5 billion and ongoing costs of \$1.5 billion. Even if true, these would make the fiduciary rule one of the most expensive regulations in history, but the costs are much higher than DOL’s original estimates. AAF found that the fiduciary rule would cost \$31.5 billion in total costs and \$2 billion in annual burdens, making it the most expensive rule of 2016 and the second most expensive non-EPA rule since 2005.”<sup>73</sup>

- “Among other things, the updated analysis should account for the following: (1) the Department should acknowledge that the data comprising most of the studies relied on by CEA are from the late 1990s and early 2000s, when there was scant overlap in the marketing and sale of broker-sold funds versus no-load funds. The competitive landscape now is markedly different, with 90 percent of front-load mutual funds also having no-load shares. (2) The author of one of the academic studies cited by CEA, Jonathan Reuter, issued an updated analysis that looked at more recent mutual fund performance (from 2003 to 2012) and concluded that broker-sold funds underperform no-load funds by an average of 18 basis points, significantly narrower than the 100-basis point difference cited by CEA. This means that CEA greatly overestimates with its projected \$17 billion figure. (3) A survey of financial advisors by CoreData Research that was conducted after the fiduciary rule was finalized (October 2016) found that 71 percent plan to disengage from some mass-market investors due to the fiduciary rule. On average, these advisors further estimate that they will no longer service 25 percent of their mass-market clients, creating a significant likely advice gap for low-balance investors.”<sup>74</sup>
- “The Department commented in its original release of the proposed rule that the “research has shown that disclaimers are ineffective in alerting retail investors to the potential costs imposed by conflicts of interest,” yet the Department has constructed a rule that does just that. The rule as written adds dozens of pages of disclaimers and disclosures for consumers to review in addition to the ones imposed by state insurance regulation.”<sup>75</sup>
- “First, the Department’s premise that investors will gain from the rule is incorrect. Instead, investors will incur substantial quantitative and qualitative losses. The rule has the potential to increase consumer costs by \$46.6 billion, or \$813 annually per account, in addition to the \$1,500 in duplicative fees for retirement savers that have already paid a fee on their commission-based accounts. The RIA’s assessment of the “Small Saver Market” is woefully inadequate. For example, the RIA spends a mere 14 pages of 376 assessing the very market segment the rule purports to protect.”<sup>76</sup>
- “Separately, the Investment Company Institute has pointed out that new economic studies estimate that investors could in fact lose \$109 billion over 10 years because of the rule’s implementation.”<sup>77</sup>
- “For example, a Vanguard study from last September shows that having a financial professional’s assistance can increase compound annual returns by 300 basis points, fully half of which is due not to investment selection, but to teaching better saving habits and other behavioral changes. Another

paper discusses factors the Department did not consider in its analysis, showing the effects a financial professional has in encouraging increased savings and financial discipline. These studies show that the Department underestimated the costs and overestimated the gains of the rule for individual retirement investors—when these investors lose access to financial professionals, regardless of how they are paid, they lose valuable financial assistance causing real harm.”<sup>78</sup>

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<sup>1</sup> Claude Montmarquette, Nathalie Viennot-Briot. Centre for Interuniversity Research and Analysis on Organizations (CIRANO). *The Gamma Factor and the Value of Advice of a Financial Advisor*.

<sup>2</sup> CoreData Research UK, Fiduciary rule to leave US mass-market investors stranded, study shows, (November 2016), available at [http://www.valuwalk.com/wp-content/uploads/2016/11/Fiduciary-rule-Press-Release-percentE2\\_percent80\\_percent93-CoreData-Research.pdf](http://www.valuwalk.com/wp-content/uploads/2016/11/Fiduciary-rule-Press-Release-percentE2_percent80_percent93-CoreData-Research.pdf)

<sup>3</sup> A.T. Kearney, *The \$20 billion impact of the new fiduciary rule on the U.S. wealth management industry*, October 2016, available at <https://www.atkearney.com/financial-institutions/dol-fiduciary-rule>.

<sup>4</sup> *Id.*

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

<sup>6</sup> Michael Wursthorn. "A Complete List of Brokers and Their Approach to 'The Fiduciary Rule'." WSJ. (Feb. 6, 2017), available at <https://www.wsj.com/articles/a-complete-list-of-brokers-and-their-approach-to-the-fiduciary-rule-1486413491>; Greg Iacurci. "How insurers are losing when it comes to variable annuities." Investmentnews.com. (Aug. 30, 2016), available at <http://www.investmentnews.com/article/20160830/FREE/160839998/how-insurers-are-losing-when-itcomes-to-variable-annuities>; Financial Advisor IQ. "JPMorgan Halts Action as DOL Weighs Fiduciary Rule." Financial Advisor IQ. (Apr.13, 2017), available at [http://financialadvisoriq.com/c/1611373/186813/jpmorgan\\_halts\\_action\\_weighs\\_fiduciary\\_rule?referrer\\_module=emailMorningNews&module\\_order=0&login=1&code=YW1WdWlyTm9RSE5wWm0xaExtOXlaeXdnT1RZeE5EY3INeXdnTIRFek16azVOek00](http://financialadvisoriq.com/c/1611373/186813/jpmorgan_halts_action_weighs_fiduciary_rule?referrer_module=emailMorningNews&module_order=0&login=1&code=YW1WdWlyTm9RSE5wWm0xaExtOXlaeXdnT1RZeE5EY3INeXdnTIRFek16azVOek00); Michael Wursthorn. "J.P. Morgan Moves Ahead With Plan to Drop Commissions in IRAs." WSJ. (Mar. 13, 2017), available at <https://www.wsj.com/articles/j-p-morgan-moves-ahead-with-plan-to-drop-commissions-in-iras-1489420979>; Janet Levaux. "Merrill Kills Mutual Fund Sales in IRAs; DOL Rule Sparks Move." Thinkadvisor.com. (Nov. 2, 2016), available at <http://www.thinkadvisor.com/2016/11/02/merrill-kills-mutual-fund-sales-in-iras-dol-rule-s>; FinancialAdvisor IQ. "JPMorgan Kills Commission IRAs as Industry Ponders Trump's DOL Stance." Financial Advisor IQ. (Nov. 10, 2016), available at [http://financialadvisoriq.com/c/1497033/172103/jpmorgan\\_kills\\_commission\\_iras\\_industry\\_ponders\\_trump\\_stance?referrer\\_module=emailMorningNews&module\\_order=1&login=1&code=WldaMWJtdEFjMmxtYldFdWlzSm5MQ0E0tKRnME56Z3pMQ0F4T1RjNE5UVXdOVGD6](http://financialadvisoriq.com/c/1497033/172103/jpmorgan_kills_commission_iras_industry_ponders_trump_stance?referrer_module=emailMorningNews&module_order=1&login=1&code=WldaMWJtdEFjMmxtYldFdWlzSm5MQ0E0tKRnME56Z3pMQ0F4T1RjNE5UVXdOVGD6).

<sup>7</sup> 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.

<sup>8</sup> *Id.* at 13.

<sup>9</sup> Sam Batkins, *Fiduciary Rule Has Already Taken Its Toll: \$100 Million in Costs, Fewer Options* (February 22, 2017), available at <https://www.americanactionforum.org/insight/fiduciary-rule-already-taken-toll-100-million-costs-fewer-options/#ixzz4fHCUEPmW>.

<sup>10</sup> Milloy, *The Consequences of the Fiduciary Rule for Consumers*, American Action Forum at 11 (Apr. 10, 2017), available at <https://www.americanactionforum.org/research/consequences-fiduciary-rule-consumers/>.

<sup>11</sup> *Id.*

<sup>12</sup> Comment Letter submitted by the National Association of Insurance and Financial Advisors (March 10, 2017),

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quoting ThinkAdvisor *DOL Fiduciary Has Many Advisors Mulling Career Change: Fidelity Survey*, (November 3, 2016)

<sup>13</sup> Comment Letter submitted by Pacific Life (March 16, 2017).

<sup>14</sup> Comment Letter submitted by The National Federation of Independent Business (March 16, 2017).

<sup>15</sup> Comment Letter submitted by Americans for Tax Reform (March 17, 2017).

<sup>16</sup> Comment Letter submitted by Lincoln Financial Group, citing various sources (March 17, 2017).

<sup>17</sup> Comment Letter submitted by Landenburg Thalmann Financial Services Inc. (March 17, 2017).

<sup>18</sup> Insured Retirement Institute, *IRI Issues Fourth-Quarter 2016 Sales Report*, March 30, 2017, available at <https://www.myirionline.org/newsroom/newsroom-detail-view/iri-issues-fourth-quarter-2016-annuity-sales-report> (variable annuity sales data provided by Morningstar, Inc.). See also, InvestmentNews, *Department of Labor's fiduciary rule blamed for insurers' massive hit on variable annuity sales*, March 28, 2017.

<sup>19</sup> Greg Iacurci, "Department of Labor's fiduciary rule blamed for insurers' massive hit on variable annuity sales," InvestmentNews, March 28, 2017.

<sup>20</sup> CoreData U.K., *The Fiduciary Rule – Sailing Through the Fiduciary Fog* (November 2016).

<sup>21</sup> 1 Montminy, Joseph E. "Bumpy Ride Predicted for Individual Annuity Sales in 2017." InsuranceNewsNet Magazine. April 2017. <http://insurancenewsnetmagazine.com/article/bumpy-ride-predicted-for-individualannuity-sales-in-2017-3268>.

<sup>22</sup> Id. See also LIMRA Secure Retirement Institute, Fourth Quarter 2016.

<sup>23</sup> Insured Retirement Institute, *March 2017 Survey of IRI Member Companies*.

<sup>24</sup> See "A Complete List of Brokers and Their Approach to 'The Fiduciary Rule'," Wall Street Journal, Feb/ 6, 2017, available at <https://www.wsj.com/articles/a-complete-list-of-brokers-and-their-approach-to-the-fiduciary-rule-1486413491>.

<sup>25</sup> See, Wursthorn, *New Retirement Rule Is Delayed, but Not Its Impact*, Wall St. J. (Apr. 8, 2017); Wursthorn, *A Complete List of Brokers and Their Approach to "The Fiduciary Rule,"* Wall St. J. (Feb. 6, 2017).

<sup>26</sup> See "Edward Jones Shakes Up Retirement Offerings Ahead of Fiduciary Rule," Wall Street Journal, Aug. 17, 2016, available at <https://www.wsj.com/articles/edward-jones-shakes-up-retirement-offerings-ahead-of-fiduciary-rule-1471469692>; "Fiduciary Ready: Edward Jones Unveils Compliance Plans," On Wall Street, Aug. 19, 2016, available at <https://www.onwallstreet.com/news/fiduciary-ready-edward-jones-unveils-compliance-plans>; "JPMorgan Chase to Drop Commissions-Paying Retirement Accounts," Reuters, Nov. 10, 2016, available at <http://www.reuters.com/article/us-jpmorgan-wealth-compliance-idUSKBN1343LK>.

<sup>27</sup> Kestra Financial Comment Letter, submitted March 10, 2017

<sup>28</sup> Comment Letter submitted by the National Association of Insurance and Financial Advisors (March 10, 2017) quoting: 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 88415891.2 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, *Merrill to End Commission-Based Retirement Business on Retail Accounts* (Oct. 6, 2016) available at <https://advisorhub.com/exclusive-merrill-end-commission-based-retirementbusinessretail-accounts/> (Merrill Lynch announces, in response to the fiduciary rule, that its 14,000

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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).

<sup>29</sup> Comment Letter submitted by American Action Forum (March 16, 2017).

<sup>30</sup> Comment Letter submitted by Lincoln Financial Group, citing LIMRA Secure Retirement Institute Variable Annuity Guaranteed Living Benefit Election Tracking Survey, 3rd Quarter 2016 (March 17, 2017).

<sup>31</sup> Comment Letter submitted by Americans for Prosperity (April 6, 2017).

<sup>32</sup> Comment Letter submitted by The Standard (April 14, 2017).

<sup>33</sup> Comment Letter submitted by National Association of Insurance and Financial Advisors (April 17, 2017).

<sup>34</sup> Comment Letter submitted by National Association of Insurance and Financial Advisors (April 17, 2017).

<sup>35</sup> Comment Letter submitted by KMS Thalmann & Co. Inc. (April 17, 2017).

<sup>36</sup> Comment Letter submitted by Investment Program Association (April 17, 2017).

<sup>37</sup> Jonathan Reuter, "Revisiting the Performance of Broker-Sold Mutual Funds," [https://www2.bc.edu/jonathan-reuter/research/brokers\\_revisited\\_201511.pdf](https://www2.bc.edu/jonathan-reuter/research/brokers_revisited_201511.pdf).

<sup>38</sup> Francis M. Kinniry, Jr., Colleen M. Jaconetti, Michael A. DiJoseph, Yan Zilberging and Donald G. Bennyhof, "Putting a value on your advice: Quantifying Vanguard Advisor's Alpha." Vanguard Research, September 2016. [https://advisors.vanguard.com/VGApp/iip/site/advisor/researchcommentary/article/IWE\\_ResPuttingAValueOnValue](https://advisors.vanguard.com/VGApp/iip/site/advisor/researchcommentary/article/IWE_ResPuttingAValueOnValue)

<sup>39</sup> Jeffrey Wurgler, "On the Consequences of Index-linked Investing," <http://pages.stern.nyu.edu/~jwurgler/papers/indexing13.pdf>

<sup>40</sup> Charles Schwab & Co., "Communicating retirement plan benefits in a world of skeptics." <http://www.schwab.com/public/file/P-8557214>

<sup>41</sup> Vanguard Research, *Putting a Value on Your Value: Quantifying Vanguard Advisor's Alpha* (September 2016), available at <https://www.vanguard.com/pdf/ISGQVAA.pdf>.

<sup>42</sup> Comment Letter submitted by The Financial Services Roundtable (April 17, 2017).

<sup>43</sup> Morningstar, Inc., *Weighing the Strategic Tradeoffs of the U.S. Department of Labor's Fiduciary Rule*, Feb. 2017.

<sup>44</sup> Mayer Brown LLP. "Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions." December 11, 2013. Available online: <http://www.instituteforlegalreform.com/uploads/sites/1/Class-Action-Study.pdf> (last visited April 17, 2017).

<sup>45</sup> "Class Action Litigation Against Fiduciaries," Multnomah Group, pgs. 11-14. Sept. 2016. [http://www.multnomahgroup.com/hubfs/PDF\\_Files/Webinar\\_Presentation\\_Slides/Class\\_Action\\_Litigation\\_Against\\_Fiduciaries.pdf](http://www.multnomahgroup.com/hubfs/PDF_Files/Webinar_Presentation_Slides/Class_Action_Litigation_Against_Fiduciaries.pdf)

<sup>46</sup> CoreData U.K., *The Fiduciary Rule – Sailing Through the Fiduciary Fog* (November 2016).

<sup>47</sup> Meghan Milloy, The Consequences of the Fiduciary Rule for Consumers, AMERICAN ACTION FORUM, April 10, 2017, <https://www.americanactionforum.org/research/consequences-fiduciary-rule-consumers/>.

<sup>48</sup> Comment Letter submitted by Securities Management & Research, Inc. (March 10, 2017).

<sup>49</sup> Comment Letter submitted by The Financial Services Institute (March 17, 2017).

<sup>50</sup> Comment Letter submitted by Empower Retirement (April 12, 2017).

<sup>51</sup> Kelly, Bruce, InvestmentNews, *DOL fiduciary rule to cost the securities industry \$11 B by 2020: study* (Sep. 21, 2016) available at <http://www.investmentnews.com/article/20160921/FREE/160929978/dol-fiduciary-rule-to-cost-the-securities-industry-11b-by-2020-study> (last visited Apr. 13, 2017).

<sup>52</sup> Cerulli Associates, "DOL Rule will force the consolidation of Broker-Dealers" (December 12, 2016), available at <http://www.lifehealthpro.com/2016/12/20/dol-rule-will-force-consolidation-of-broker-dealer>.

<sup>53</sup> Meghan Milloy, The Consequences of the Fiduciary Rule for Consumers, AMERICAN ACTION FORUM, April 10, 2017, <https://www.americanactionforum.org/research/consequences-fiduciary-rule-consumers/>.

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- <sup>54</sup> CoreData U.K., *The Fiduciary Rule – Sailing Through the Fiduciary Fog* (November 2016).
- <sup>55</sup> Oxford Economics 2017 Report, “How the Fiduciary Rule Increases Costs and Decreases Choice” (April 2017), also available at [http://www.financialservices.org/uploadedFiles/FSI/Advocacy\\_Action\\_Center/The\\_Fiduciary\\_Rule\\_Increases\\_Costs\\_And\\_Decreases\\_Choice.pdf](http://www.financialservices.org/uploadedFiles/FSI/Advocacy_Action_Center/The_Fiduciary_Rule_Increases_Costs_And_Decreases_Choice.pdf).
- <sup>56</sup> Comment Letter submitted by Securities Management & Research, Inc. (March 10, 2017).
- <sup>57</sup> Comment Letter submitted by Lyon Capital Management LLC (March 14, 2017).
- <sup>58</sup> Comment Letter submitted by American Action Forum (March 16, 2017).
- <sup>59</sup> Comment Letter submitted by American Action Forum (March 16, 2017).
- <sup>60</sup> Comment Letter submitted by Americans for Tax Reform (March 17, 2017).
- <sup>61</sup> Comment Letter submitted by The Financial Services Institute (March 17, 2017).
- <sup>62</sup> Comment Letter submitted by The Financial Services Institute (March 17, 2017).
- <sup>63</sup> Comment Letter submitted by Advisors Excel (April 17, 2017).
- <sup>64</sup> Comment Letter submitted by The Financial Services Institute (March 17, 2017). *See* <https://www.finextra.com/blogposting/13139/what-it-costs-to-comply-with-the-dol-fiduciary-rule>.
- <sup>65</sup> HM Treasury. "Financial Advice Market Review, Final Report". *Fca.org.uk*. (March 2016.), available at <https://www.fca.org.uk/publication/corporate/famr-final-report.pdf>.
- <sup>66</sup> Exec. Order No. 12,866, 3 C.F.R. 638 (1993).
- <sup>67</sup> Office of Mgmt. & Budget, Circular No. A-4, Regulatory Analysis (Sept. 17, 2003).
- <sup>68</sup> Comment Letter submitted by The National Federation of Independent Business (March 16, 2017).
- <sup>69</sup> 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* (April 2016), p. 244.
- <sup>70</sup> *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*.
- <sup>71</sup> *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.
- <sup>72</sup> *See* Craig M. Lewis, “An Inflated \$17 Billion Talking Point from DOL,” *Forbes* (Dec. 16, 2015).
- <sup>73</sup> Comment Letter submitted by American Action Forum (March 16, 2017).
- <sup>74</sup> Comment Letter submitted by American Bankers Association (March 15, 2017).
- <sup>75</sup> Comment Letter submitted by Americans for Annuity Protection (March 17, 2017).
- <sup>76</sup> Comment Letter submitted by Primerica (April 17, 2017).
- <sup>77</sup> Comment Letter submitted by Neuberger Berman Group LLC (April 17, 2017).
- <sup>78</sup> Comment Letter submitted by Association for Advanced Life Underwriting (AALU) (April 17, 2017).