SPRING 2017

THE DATA IS IN:

THE FIDUCIARY RULE WILL HARM SMALL RETIREMENT SAVERS

U.S. CHAMBER OF COMMERCE

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THE FIDUCIARY RULE WILL HARM SMALL RETIREMENT SAVERS

The facts are clear: Retirement services will become more expensive and less available.

New data confirms the Department of Labor's (DOL) fiduciary rule will cost savers.

Access to retirement products and services will decrease

Jane's

$20K retirement account

isn't enough to keep her financial advisor, Steve. Sadly, Steve's company no longer allows him to serve accounts less than $25K.

7 million

IRA holders could lose investment advice.

300K–400K

fewer IRA accounts will be opened each year.

Retirement services will become more expensive

When Jane looks for a new advisor, she'll potentially have to pay a fee of

$800

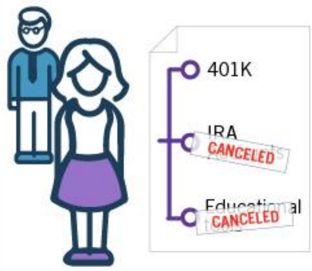
to get an advisor who provides the same service as Steve.

Service fees could increase by **200%**

Over 10 years, investors could lose

$109 billion

Investment choices and options will be limited



Even with a new advisor, Jane will have

fewer investment options

because financial firms will significantly scale back their range of products.

92% of firms surveyed

stated that their plans could limit or restrict products for retirement investors.

11 million households

could face fewer choices as a result of the rule.

DOL, the SEC, and Congress need to ACT NOW to protect small retirement savers.

Visit www.LearnSaveRetire.com to download the summary of new data submitted to the comment file.

The Data Is In: The Fiduciary Rule will Harm Small Retirement Savers

Executive Summary

In April 2016, the Department of Labor (DOL or Department) finalized its controversial and long-awaited "Fiduciary Rule," a sweeping expansion of government authority that fundamentally disrupts the way in which Americans save for retirement. Throughout the rulemaking process, the U.S. Chamber warned that the Fiduciary Rule was built upon a mountain of flawed data and analysis, and would harm the very people it was purported to protect by raising costs and limiting investment options.

Unfortunately for the millions of Americans who rely on the private savings market for their retirement, our concerns are coming true. The theoretical academic exercises underlying the Rule are giving way to hard evidence, and the evidence is coming in showing that the rule is harming American investors. This new data, based on actual experience, demonstrates that the DOL's original predictions were wrong. This data indicates that the DOL underestimated the negative effects of the rule, particularly in reducing access to advice for small retirement savers and small businesses.

This report is a compilation of survey statistics and other data that was submitted by various organizations in response to a DOL recent comment period, in response to the February 3, 2017 Presidential Executive Order, on the Fiduciary Rule. The Executive Order directed the Department to review the impact of the Fiduciary Rule on retirement savers' access to investment products and services. We believe this information should be helpful to the Administration, Congress, and policymakers as they explore ways to mitigate the negative ramifications of the Fiduciary Rule and promote a robust retirement savings market.

Some examples from the report include:

- 92% of firms surveyed say that the Rule could limit or restrict investment products for their customers, which could ultimately effect some 11 million households
- Up to 7 million individual retirement account (IRA) owners could lose access to investment advice altogether
- A survey of insurance service providers shows 70% 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
- A survey of advisors finds 71% 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% of advisors will stop serving accounts under $25,000, and 25% will raise their client minimum account thresholds
- One large mutual fund provider reports that its number of orphaned accounts nearly doubled in the first three months of 2017, and that the average account balance in these orphan accounts is just $21,000. Further, it projects that ultimately 16% of the accounts it services will be orphaned this year because of the Fiduciary Rule

We believe this report will help show that the Rule was a policy mistake and that the DOL has overstepped both its jurisdiction and its expertise. The Chamber looks forward to working with the DOL, Congress, and the Securities and Exchange Commission (SEC) to develop an alternative and permanent solution that will restore the ability of Americans to save for a dignified retirement.

The Data Is In: The Fiduciary Rule will Harm Small Retirement Savers

New Information: Loss of Consumer Access to Retirement Advice

- A 2016 study by Centre for Interuniversity Research and Analysis on Organizations (CIRANO), showed that Americans who work with a financial professional save more than Americans who do not, including saving twice as much over a seven- to 14-year period.[1]
- A 2016 study by CoreData found that 71% of financial professionals will disengage from at least some retirement savers because of the Fiduciary Rule, and 64% think the Fiduciary Rule will have a large negative impact on their mass-market clients (i.e., investors with less than $300,000 in net investable assets). On average, these financial professionals estimate they will no longer work with 25% of their mass-market clients, creating an advice gap for low-balance investors.[2]
- 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. [3]
- In a 2017 survey of Insured Retirement Institute (IRI) member firms, 70% of respondents either already have or are considering exiting smaller markets such as lower balance IRAs and small employer based plans, and nearly half already have or are considering raising IRA account minimums.[4]
- A 2017 survey by the National Association of Insurance and Financial Advisors (NAIFA) found that nearly 90% of financial professionals believe consumers will pay more for professional advice services, 75% have seen or expect to see increases in minimum account balances for the clients they serve, and 91% have already experienced or expect to experience restrictions of product offerings to their clients. [5]
- A 2016 report by *InvestmentNews* notes that 35% of advisers surveyed "will move away from low-balance accounts" (*i.e.*, less than $25,000 in assets).[6] And "nearly one in four advisers said that they will likely increase their current client minimums as a result of the fiduciary rule, focusing their attention on higher-net worth clients and more profitable relationships."[7]
- One large mutual fund provider reported 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 $21,000. Further, it projects that ultimately 16% of the accounts it services will be orphaned this

[1] 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*. Available at https://www.cirano.qc.ca/files/publications/2016s-35.pdf (August 2016).

[2] CoreData Research UK, *Fiduciary rule to leave US mass-market investors stranded, study shows*. Available at http://www.valuewalk.com/wp-content/uploads/2016/11/Fiduciary-rule-Press-Release-%E2%80%93-CoreData-Research.pdf (November 2016).

[3] A.T. Kearney, *The $20 billion impact of the new fiduciary rule on the U.S. wealth management industry*. Available at https://www.atkearney.com/financial-institutions/dol-fiduciary-rule (October 2016).

[4] *Id.*

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

[6] InvestmentNews. "The Economics of Change: How the DOL Fiduciary Rule Will Set Money in Motion and Alter Business Models Across the Advice Industry" p11. Available at http://www.investmentnews.com/assets/docs/CI105297516.PDF (May 2016).

[7] *Id*. p13.

year because of the 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. [8]

- According to a February 2017 survey of more than 1,000 investors conducted by J.D. Power, more than half (59%) who pay commissions now say they either "probably will not" (40%) or "definitely will not" (19%) be willing to stay with their current firm if it meant being forced to move to fee-based retirement accounts. [9]
- The American Action Forum's 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.[10]
- In a blind online poll of 459 advisors conducted by Fidelity Clearing & Custody Solutions from August 18-26, 2016, 10% of advisors reported they are planning to leave or retire from the field earlier than expected because of the rule, and another 18% said they are "reconsidering their careers as advisors.[11]
- 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." [12]
- The following are excerpts from comment letters submitted to the Department of Labor:
    - *Pacific Life*: "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."[13]
    - *The National Federation of Independent Business (NFIB)*: "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% of respondents said they were likely to 'disengage from smaller clients.' Because retirement plans sponsored by

[8] Comment Letter submitted by U.S. Chamber of Commerce (April 17, 2017).
[9] J.D. Power, *Wealth Management Fiduciary Roulette*. Available at http://www.jdpower.com/resource/wealth-management-fiduciary-roulette (February 2017).
[10] Megan Milloy, American Action Forum. *The Consequences of the Fiduciary Rule for Consumers*, American Action Forum at 11. Available at https://www.americanactionforum.org/research/consequences-fiduciary-rule-consumers/ (April 10, 2017).
[11] Comment Letter submitted by the National Association of Insurance and Financial Advisors (March 10, 2017), quoting ThinkAdvisor "DOL Fiduciary Has Many Advisors Mulling Career Change: Fidelity Survey", (November 3, 2016).
[12] National Conference of Insurance Legislators Resolution in Opposition to the United States Department of Labor (DOL) Fiduciary Rule. Available at http://ncoil.org/wp-content/uploads/2016/12/DOL-resolution-portland-11-20-16.pdf (November 2016).
[13] Comment Letter submitted by Pacific Life (March 16, 2017).

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."[14]

- *Americans for Tax Reform:* "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."[15]
- *Lincoln Financial Group:* "According to Cerulli, two-thirds (66%) 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% 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% of their current clients—creating a potential 'advice gap' for low balance investors."[16]
- *Landenburg Thalmann Financial Services Inc.*: "[Due to the requirements of Best Interest Contract Exemption (BICE),] Landenburg 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."[17]

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. Despite the existence of a rising stock market, which has always led to increased sales of variable annuities, sales have declined by 21.6% from 2015 to 2016. [18]
- Greg Iacurci in *InvestmentNews* noted that adverse effects on annuities have already occurred. "The variable annuity industry took a beating in 2016, with several of the top sellers inking losses upwards of 25% on the year and some exceeding 40%. The DOL's Fiduciary Rule, issued in its final form last spring, played a big role in the industry's bruising, observers said."[19]

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[14] Comment Letter submitted by The National Federation of Independent Business (March 16, 2017).

[15] Comment Letter submitted by Americans for Tax Reform (March 17, 2017).

[16] Comment Letter submitted by Lincoln Financial Group (March 17, 2017).

[17] Comment Letter submitted by Landenburg Thalmann Financial Services Inc. (March 17, 2017).

[18] Insured Retirement Institute, *IRI Issues Fourth-Quarter 2016 Sales Report*. 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.) (March 30, 2017); See, also, *InvestmentNews*, "Department of Labor's fiduciary rule blamed for insurers' massive hit on variable annuity sales" (March 28, 2017).

[19] Greg Iacurci, *InvestmentNews,* "Department of Labor's fiduciary rule blamed for insurers' massive hit on variable annuity sales," (March 28, 2017).

- In 2015, variable annuities represented 56% of IRA annuity sales and 46% of 2016 IRA annuity sales. LIMRA projects that variable annuity purchases will decrease another 20-25% in 2017 if the Rule goes into effect.[20]
- For IRA purchases, sales declined 22% in 2016 compared to the prior year. The 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. [21]
- More than 80% 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. [22]
- 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.[23]
- Media reports have highlighted the decisions being made by some firms to change their service models and product availability, including:
  - moving clients to fee-based accounts,
  - eliminating commission-based IRAs;
  - raising investment minimums for commission-based IRAs;
  - eliminating variable annuity products; and
  - excluding certain products from commission-based IRAs (*e.g.*, annuities, mutual funds, and exchange-traded funds).[24]
- 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.[25]
- Many companies will be inclined to reduce the universe of available investments in order 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 in order 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 in order to control the costs of these efforts.[26]

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[20] 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

[21] Id. See also LIMRA Secure Retirement Institute, Fourth Quarter 2016.

[22] Insured Retirement Institute, *March 2017 Survey of IRI Member Companies* (March 2017).

[23] "A Complete List of Brokers and Their Approach to 'The Fiduciary Rule'," *Wall Street Journal* (February 6, 2017) available at https://www.wsj.com/articles/a-complete-list-of-brokers-and-their-approach-to-the-fiduciary-rule-1486413491.

[24] Wursthorn, *Wall Street Journal* "New Retirement Rule Is Delayed, but Not Its Impact," (April. 8, 2017) and Wursthorn, *Wall Street Journal* "A Complete List of Brokers and Their Approach to "The Fiduciary Rule,"" (February 6, 2017).

[25] *Wall Street Journal,* "Edward Jones Shakes Up Retirement Offerings Ahead of Fiduciary Rule" (August 17, 2016); *On Wall Street*, "Fiduciary Ready: Edward Jones Unveils Compliance Plans", (August 19, 2016); and *Reuters,* "JPMorgan Chase to Drop Commissions-Paying Retirement Accounts", (November 10, 2016)

[26] Comment Letter submitted by Kestra Financial (March 10, 2017).

- The following are excerpts from comment letters submitted to the Department of Labor:
    - *National Association of Insurance and Financial Advisors*: "Firms have restricted product offerings to certain clients, thereby limiting consumer choice, and have abandoned traditional, lower-cost compensation arrangements for advisors (e.g., commissions, rather than high upfront management fees that small and first-time savers cannot afford) in order to avoid the cost of complying with the BIC Exemption and mitigate the threat of costly class action lawsuits." [27]
    - *American Action Forum*: "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."[28]
    - *Lincoln Financial Group*: "Over the 12-month period ending on September 30, 2016, industrywide sales of variable annuities with guarantees declined 24%."[29]
    - *Americans for Prosperity*: "The National Economic Research Association estimates more than 57% 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%."[30]
    - *The Standard*: "According to the Insured Retirement Institute, 2016 sales of all annuities declined 7.6% from 2015, and 2016 sales of variable annuities, which under the Rule will fall under the complicated BICE regulations, fell 21.65% from 2015. Fourth quarter 2016 fixed indexed annuity sales declined 7% from third quarter 2016 sales. For 2017, the LIMRA Secure Retirement Institute projects that total sales of US individual annuity sales

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[27] Comment Letter submitted by the National Association of Insurance and Financial Advisors (March 10, 2017) quoting:
- *Wall Street Journal*, "Edward Jones Shakes up Retirement Offerings Ahead of Fiduciary Rule" (August 17, 2016) (Edward Jones announces it will limit mutual fund access for retirement savers in accounts that charge commissions);
- *Crain's*, "Why State Farm agents are getting out of the investment game" (September 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);
- Daisy Maxey, *Wall Street Journal*, "New Rule Helps No-Loan Funds—But Investors Still Need to Watch for Other Fees" (November 7, 2016) (Charles Schwab stops selling fund share classes with frond-end sales loads in May 2016)
- Jeff Benjamin, "Fiduciary Focus, DOL Fiduciary Rule Class-Actions Costs could Top $150M a Year" (February 9, 2017) (Some firms, including Merrill Lynch, Capital One, and Commonwealth Financial Network, have already announced plans to use a streamlined [BIC Exemption] that does not include a contract or variable commission rate, making them exempt from class-action lawsuits. Other firms will be rolling the dice.);
- *AdvisorHUB*, "Merill to End Commission-Based Retirement Business on Retail Accounts" (October 6, 2016) (Merrill Lynch announces, in response to the fiduciary rule, that its 14,000 brokers cannot receive commissions for advice on retirement accounts and will have to shift clients who remain with the firm to fee-based advisory accounts).

[28] Comment Letter submitted by American Action Forum (March 16, 2017).

[29] 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).

[30] Comment Letter submitted by Americans for Prosperity (April 6, 2017).

will drop 10% to 15%, while sales of variable and indexed annuities will drop as much as 20% to 25%."[31]

- *National Association of Insurance and Financial Advisors*: "Most notably, 91% 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% believe consumers will pay more for professional advice services, and 75% have seen or expect to see increases in minimum account balances for the clients they serve."[32]
- *National Association of Insurance and Financial Advisors*: "In fact, nearly half of NAIFA's members (46%) already have experienced a restriction of product offerings to their clients, and another 45% anticipate that such restrictions are forthcoming. More specifically, 68% of our members have been told that they cannot recommend certain mutual fund classes to clients, and over 70% say they cannot recommend certain annuities."[33]
- *KMS Thalmann & Co. Inc.*: 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."[34]
- *Securities Industry and Financial Markets* Association *(SIFMA):* "Over three quarters of the respondents stated that their Rule compliance plans could limit or restrict services or products available to certain customer segments, and 92% of the responding firms stated that their plans could limit or restrict products for retirement investors. According to data from the Survey of Consumer Finances, there are 12.2 million households with a brokerage IRA or an IRA and other assets. This means that as many as 11 million households could face fewer choices as a result of the rule."[35]
- *Investment Program Association*: "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."[36]

[31] Comment Letter submitted by The Standard (April 14, 2017).
[32] Comment Letter submitted by National Association of Insurance and Financial Advisors (April 17, 2017).
[33] *Id.*
[34] Comment Letter submitted by KMS Thalmann & Co. Inc. (April 17, 2017).
[35] Comment Letter submitted by SIFMA (April 17, 2017).
[36] Comment Letter submitted by Investment Program Association (April 17, 2017).

New Information: Value of Advice

- Jonathan Reuter, Associate Professor of Finance at Boston College's Carroll School of Management, updated previous analyses based on data from 1994-2004 with newer data from 2004 – 2012 in "Revisiting the Performance of Broker-Sold Mutual Funds." He found 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 Guericio and Reuter in their 2014 paper on which the Department relied for its regulatory impact analysis, Reuter reported 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.[37]

- Studies show that unadvised households tend to hold fewer equities than advised households. The likelihood of owning any stocks or stock-based mutual funds increases by 67% with the use of an advisor and the proportion dedicated to stock positions increases by 39%. Academic work clearly shows that asset allocation, not mutual fund selection, explains, on average, 100% of performance. If the Rule results in a reduction of equity allocations by only 15%, the Investment Company Institute (ICI) estimated that would result in a performance decline of 50-100 bps per year, on average, or $95 billion and $189 billion over the next 10 years and between $202 billion and $404 billion over the next 20 years.

- New economic studies estimate that investors could lose $109 billion over 10 years because of the Rule's implementation. This would amount to $780 million per month in losses to investors. 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. [38]

- 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.[39]

- Jeffrey Wurgler's paper "On the Economic Consequences of Index-Linked Investing," 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.[40]

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[37] Jonathan Reuter, Boston College and NBER. "Revisiting the Performance of Broker-Sold Mutual Funds." Available at https://www2.bc.edu/jonathan-reuter/research/brokers_revisited_201511.pdf (November 2015).

[38] Department of Labor Hearing: Proposed Fiduciary Rules—Regulatory Impact Analysis, Statement of Sean Collins, Senior Director, Industry and Financial Analysis, Investment Company Institute. Available at https://www.ici.org/fiduciary_rule/resources/15_dol_fiduciary_ria_collins_oral (August 2015).

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

[40] Jeffrey Wurgler, New York University and National Bureau of Economic Research. "On the Consequences of Index-linked Investing," Available at http://pages.stern.nyu.edu/~jwurgler/papers/indexing13.pdf (October 2010).

- A report by Charles Schwab & Co. found 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.[41]
- The following is an excerpt from comment letters submitted to the Department of Labor:
    - *The Financial Services Roundtable:* "Studies indicate that households that have worked with a financial advisor over a 15-year period "have about 290% 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% to 2% in net return."[42]

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.[43]
- Data prepared for the U.S. Chamber Institute for Legal Reform by Mayer Brown LLP found 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.[44]
- Companies interviewed by the U.S. Chamber suggest insurance costs could exceed two to three times the cost estimated by the Department. Some respondents to U.S. Chamber interviews cited numbers as high as $10,000 per professional per year for Errors and Omissions coverage. [45]
- Expanded incentive for class action litigation results in defendant's settling with an extremely litigious plaintiff's bar instead of spending years tied up in discovery. A survey of lawsuits filed against fiduciaries in recent years demonstrates how plaintiffs use these settlements to fund future lawsuits.[46]
- 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).[47]

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[41] Charles Schwab & Co., "Communicating retirement plan benefits in a world of skeptics." Available at http://www.schwab.com/public/file/P-8557214.
[42] Comment Letter submitted by The Financial Services Roundtable (April 17, 2017).
[43] Morningstar, Inc., *Weighing the Strategic Tradeoffs of the U.S. Department of Labor's Fiduciary Rule* (February. 2017).
[44] Mayer Brown LLP. "Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions." Available at http://www.instituteforlegalreform.com/uploads/sites/1/Class-Action-Study.pdf (December 2013).
[45] Comment Letter submitted by the U.S. Chamber (April 17, 2017).
[46] Multnomah Group, "Class Action Litigation Against Fiduciaries," pgs11-14. Available at http://www.multnomahgroup.com/hubfs/PDF_Files/Webinar_Presentation_Slides/Class_Action_Litigation_Against_Fiduciaries.pdf (September 2016).
[47] Meghan Milloy, The Consequences of the Fiduciary Rule for Consumers, American Action Forum. Available at https://www.americanactionforum.org/research/consequences-fiduciary-rule-consumers/ (April 2017).

- The following are excerpts from comment letters submitted to the Department of Labor:
    - *SIFMA*: "… more than 60% of the responding firms stated that they anticipate that some or all of the costs resulting from the potential increase in litigation and liability insurance may be passed on to clients."[48]
    - *Securities Management & Research, Inc.*: "An equity analyst from Morningstar stated that annual litigation costs will be $70MM-$150MM per year."[49]
    - *The Financial Services Institute*: "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."[50]
    - *Empower Retirement*: "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."[51]

New Information: Compliance Costs

- SIFMA estimates that annual compliance costs for their members will range from $240 million to $570 million per year over the next ten years.[52]
- Small broker-dealers face the greatest financial risk under the Rule, forcing potential consolidation of broker-dealers.[53]
- One 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.
- Oxford Economics found that the Department's RIA grossly underestimated the cost of the rule.[54]
- The following are excerpts from comment letters submitted to the Department of Labor:
    - *Securities Management & Research, Inc.*: "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

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[48] Comment Letter submitted by SIFMA (April 17, 2017).
[49] Comment Letter submitted by Securities Management & Research, Inc. (March 10, 2017).
[50] Comment Letter submitted by The Financial Services Institute (March 17, 2017).
[51] Comment Letter submitted by Empower Retirement (April 12, 2017).
[52] Bruce Kelly, InvestmentNews, *DOL fiduciary rule to cost the securities industry $11 B by 2020: study.* Available at http://www.investmentnews.com/article/20160921/FREE/160929978/dol-fiduciary-rule-to-cost-the-securities-industry-11b-by-2020-study (September 2016).
[53] Cerulli Associates, "DOL Rule will force the consolidation of Broker-Dealers". Available at http://www.lifehealthpro.com/2016/12/20/dol-rule-will-force-consolidation-of-broker-dealer (December 2016).
[54] Oxford Economics 2017 Report, "How the Fiduciary Rule Increases Costs and Decreases Choice" available at http://www.financialservices.org/uploadedFiles/FSI/Advocacy_Action_Center/The_Fiduciary_Rule_Increases_Costs_And_Decreases_Choice.pdf (April 2017).

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."[55]

- *Lyon Capital Management LLC*: "The proposed rule has already substantially increased our compliance costs. We estimate compliance costs have increased 450% as a result of this rule."[56]
- *American Action Forum*: "Our research has found that almost all retail investors will see their costs increased by 73 to 196% 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 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."[57]
- *American Action Forum*: "AAF also found reported compliance costs of more than $106 million in 2016, representing up-front compliance costs of just four companies."[58]
- *Indexed Annuity Leadership Council*: "Goldman Sachs estimated that initial compliance with the Fiduciary Rule would cost the financial services industry $14 billion and on-going annual compliance would cost it $7 billion."[59]
- *Americans for Tax Reform*: "Industry estimates show that the rule will cost $5 billion to implement and $1 billion annually to maintain."[60]
- *The Financial Services Institute*: "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."[61]
- *The Financial Services Institute*: "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."[62]
- *Advisors Excel*: "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."[63]

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[55] Comment Letter submitted by Securities Management & Research, Inc. (March 10, 2017).
[56] Comment Letter submitted by Lyon Capital Management LLC (March 14, 2017).
[57] Comment Letter submitted by American Action Forum (March 16, 2017).
[58] Comment Letter submitted by American Action Forum (March 16, 2017).
[59] Comment Letter submitted by Indexed Annuity Leadership Council, footnote 2 (March 16, 2017).
[60] Comment Letter submitted by Americans for Tax Reform (March 17, 2017).
[61] Comment Letter submitted by The Financial Services Institute (March 17, 2017).
[62] Comment Letter submitted by The Financial Services Institute (March 17, 2017).
[63] Comment Letter submitted by Advisors Excel (April 17, 2017).

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. [64]
- 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. [65]
- The Department didn't consider evidence regarding the impact of similar rules established in other jurisdictions. Most notably, following the United Kingdom's 2013 move to a fee-based compensation model, the U.K. regulator determined that retirement savers—particularly those with lower incomes—were adversely affected and acknowledged that its "high standard of advice is primarily accessible and affordable only for the more affluent in society." The Department simply denied the existence of an "advice gap" in the U.K. and dismissed the possibility that a similar "advice gap" would develop in the U.S. under the Fiduciary Rule.
- Under Executive Order 12866[66] and related guidance issued by OMB,[67] consideration of viable alternatives is a fundamental element of federal agency rulemaking. However, the lack of consideration given to all relevant costs of the 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, the Department arbitrarily rejected these and other alternatives.
- According to the Johnson Report discussed above, the Department failed to adequately consider comments from expert regulators and professional staffers from the SEC, OIRA, and the Treasury Department expressing concerns and offering recommendations regarding the Rule.[68]
- The following is an excerpt from comment letters submitted to the Department of Labor:
  - *National Federation of Independent Business*: "Further, the Department of Labor underestimated the impact of the Rule on small and independent businesses by

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[64] A Majority Staff Report of the Committee on Homeland Security and Governmental Affairs United States Senate Senator Ron Johnson, Chairman, The Labor Department's Fiduciary Rule: How a Flawed Process Could Hurt Retirement Savers. Available at https://www.hsgac.senate.gov/download/the-labor-departments-fiduciary-rule-how-a-flawed-process-could-hurt-retirement-savers (February 2016).

[65] Comment Letter submitted by U.S. Chamber (July 17, 2015).

[66] Exec. Order No. 12,866, 3 C.F.R. 638 (1993).

[67] Office of Mgmt. & Budget, Circular No. A-4, Regulatory Analysis (September 2003).

[68] A Majority Staff Report of the Committee on Homeland Security and Governmental Affairs United States Senate Senator Ron Johnson, Chairman, The Labor Department's Fiduciary Rule: How a Flawed Process Could Hurt Retirement Savers. Available at https://www.hsgac.senate.gov/download/the-labor-departments-fiduciary-rule-how-a-flawed-process-could-hurt-retirement-savers (February 2016).

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."[69]

Analytical Flaws

- The final Regulatory Impact Analysis (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 without conflict and serves retirement savers' best interest. Neither premise is correct, yet they form the basis of the final RIA.
- The RIA overstated the benefits of the Rule, underestimated the Rule's direct and indirect costs to the financial services industry and retirement savers, and, as described above, failed to give meaningful consideration to the costs to retirement savers from lost access to retirement assistance (including assistance with guaranteed lifetime income products such as annuities) and the transaction-based fee model as well as the costs of class action lawsuits arising from the BIC Exemption. The record shows those costs total tens of billions of dollars.
- The Department relied on flawed and problematic factors and data in their RIA projections. Specifically, the DOL 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.
- According to a February 2017 analysis by the American Action Forum, it is unclear how he Council of Economic Advisers (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% 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

[69] Comment Letter submitted by The National Federation of Independent Business (March 16, 2017).

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%.[70]

- The Department's RIA only briefly addressed the impact the Rule would have on jobs, noting the Rule could have "some social costs." [71]
- 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.[72]
- 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 Institute refuted this data, finding the Rule could cost investors $109 billion in additional fees.[73]
- 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.[74]
- The Department was too optimistic in relying on "robo advisers" to alleviate the potential loss of access to retirement advice for small savers. The U.S. Commerce is currently unaware of any "robo advisor" that recommends annuity products to generate retirement income, despite the clear need for those products. [75]
- 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

[70] Megan Millory, American Action Forum. Warren is Wrong about the Fiduciary Rule. Available at https://www.americanactionforum.org/insight/warren-wrong-fiduciary-rule/ (February 2017).

[71] 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*, p.244 (April 2016).

[72] 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.* Available at *http://www.irionline.org/research-and-education/reports-and-factsheets*.

[73] Comment Letters submitted by Investment Company Institute (July 21, 2015, September 24, 2015, and December 1, 2015).

[74] Craig M. Lewis, "An Inflated $17 Billion Talking Point from DOL," *Forbes* (December 16, 2015).

[75] Comment Letter submitted by U.S. Chamber (April 17, 2017).

development, others would be harmed. The DOL failed to address this potential impact in their RIA.

- The Department 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.
- The following are excerpts from comment letters submitted to the Department of Labor:
  - *American Action Forum*: "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."[76]
  - *American Bankers Association*: "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% 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% 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% of their mass-market clients, creating a significant likely advice gap for low-balance investors."[77]

[76] Comment Letter submitted by American Action Forum (March 16, 2017).
[77] Comment Letter submitted by American Bankers Association (March 15, 2017).

- *Americans for Annuity Protection*: "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."[78]
- *Primerica*: "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."[79]
- *Neuberger Berman Group LLC*: "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."[80]
- *Association for Advanced Life Underwriting*: "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."[81]

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[78] Comment Letter submitted by Americans for Annuity Protection (March 17, 2017).
[79] Comment Letter submitted by Primerica (April 17, 2017).
[80] Comment Letter submitted by Neuberger Berman Group LLC (April 17, 2017).
[81] Comment Letter submitted by Association for Advanced Life Underwriting (April 17, 2017).

U.S. CHAMBER OF COMMERCE

1615 H Street, NW | Washington, DC 20062 | 202-659-6000