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Submitted Electronically – EBSA.FiduciaryRuleExamination@dol.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attention: Fiduciary Rule Examination
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Re: Definition of the Term “Fiduciary”—Additional Comments Regarding the Economic Impact of the Rule and Associated Exemptions (RIN 1210-AB79)

Ladies and Gentlemen:

The U.S. Chamber of Commerce (“the Chamber”) is the world’s largest business organization representing the interests of more than 3 million businesses of all sizes, sectors, and regions. Nearly all of our members are sponsors of employee benefit plans, and are therefore directly affected by the Department of Labor’s (“Department”) rule redefining fiduciary investment advice and its associated new and amended prohibited transaction class exemptions (collectively the “Fiduciary Rule”)¹. We are writing to provide additional information needed to properly evaluate the true economic impact of the Fiduciary Rule, and to demonstrate that through new empirical evidence and research that the previous economic analyses are flawed, inaccurate, and misrepresent the very negative effect the Fiduciary Rule will have on our members, and on America’s workers and retirees.

¹ 81 Fed. Reg. 20,945 – 21,221 (Apr. 8, 2016).

Overview

Facts are stubborn things, and the facts are that the Fiduciary Rule is making it harder for retirement investors to get the advice they need. In fact, the people who most need help—beginning savers, small businesses and small-balance retirement investors—are the most likely to be denied access to investment advice by the Fiduciary Rule. This wasn't the Department's intent, but it was the logical and predictable outcome of a rule that tries to do too much, too quickly. It took more than 40 years for our current system to develop—sweeping aside these rules protecting \$15 trillion in just 12 months from first look to final compliance was neither realistic nor safe. The Department's economic analysis was rooted in academic predictions based on 15 year-old data regarding a narrow slice of investments that are not representative of the retirement marketplace. Rushing to implement a new regulatory regime that imposes massive new class action liability risks based on such academic predictions is a recipe for failure, and failure is exactly what the facts show has already begun to occur.

The economic analysis justifying the Fiduciary Rule must finally confront these facts. Whatever the rosy predictions of the past, the ugly truth has now emerged—implementing the Fiduciary Rule yields cold, hard facts and the actual facts contradict the predications. Unfortunately, this is not an academic exercise in which we debate the Fiduciary Rule in the abstract safety of the faculty break room. Instead, practical decisions directly affecting retirement savers are being made in the real world in response to policies based on flawed data. President Trump was right to call on the Department to review the Rule in light of new information, and we demand the Department conduct a fair and impartial review.

As we describe in detail below, new facts and new research are now available that must be taken into account in a new economic analysis. For example, one of our members providing mutual funds has seen the number of orphaned accounts—accounts where there is no longer a financial professional providing assistance to the owner of the shares—double in just the first three months of this year. These small accounts, averaging about \$21,000, are no longer being served by financial professionals because the Fiduciary Rule makes it uneconomical to do so, and the provider expects this number to rise until more than 16% of their accounts are orphaned. A new study estimating the impact of the new class action liability on service providers shows this new expense could reduce operating margins by as much as 36%, which would translate into significant cost increases passed on to retirement investors. Another new study shows the value of financial professionals regardless of their compensation method—working with a professional results in nearly three times the financial assets after 15 years, and losing one's financial professional results in a

relative loss of roughly one-third. The Department is obligated to take a fresh look without preconceived notions based on the effects in the real world. It's time for theory to yield to reality, because to do otherwise is a disservice to hardworking Americans saving for the future.

From the very beginning, the Chamber consistently expressed our concerns in comment letters and testimony that the various economic analyses developed by the U.S. Department of Labor (“Department”) associated with the Fiduciary Rule are fundamentally flawed. Put simply, they radically overestimated the benefits of the Fiduciary Rule and significantly underestimated the costs. Rather than informing policy decisions by presenting a complete and impartial economic picture of the effect of the Fiduciary Rule, these analyses ignored, discounted, or otherwise failed to consider relevant information to justify predetermined policy outcomes. That is why the Chamber welcomed the President’s Memorandum ordering a new review of the effects of the Fiduciary Rule—rather than relying on select and inappropriately extrapolated academic studies to make predictions about the future, the new review can take into account the actual results of nearly one year of experience in the real world.

Final Delay Rule Compounds Errors, Defies President’s Directive to Review Before Acting

The Chamber is deeply concerned that these errors are being compounded in the analyses accompanying the proposal and final rule delaying the applicability date of the Fiduciary Rule until June 9th (“Delay Rule”).² Both regulatory actions used essentially the same flawed economic analysis methodologies to justify their policy decisions. As a result, the policy adopted in the Delay Rule is directly contrary to the President’s Memorandum directing the Department to conduct a new review of the Fiduciary Rule before deciding how to proceed.

The President ordered a review precisely so the Department could decide whether to repeal, amend or retain the Fiduciary Rule in light of new information from “real-world” experience gained in attempting to implement its requirements. Indeed, in proposing the Delay Rule the Department specifically requested the additional comments we are providing in this letter to inform that review prior to making a policy determination. We are, therefore, very troubled by the Department’s contrary decision, driven in many respects by the flawed claims of the prior economic analysis—the very economic analysis the President directed to be redone prior to

² 82 Fed. Reg. 12,319 (Mar. 2, 2017) and 82 Fed. Reg. 16,902 (Apr. 7, 2017)

making policy decisions—to partially implement the Fiduciary Rule before it has even begun to undertake its review.

New Economic Analysis is Essential to Deciding the Future Course of the Fiduciary Rule

The Chamber applauded President Trump for ordering this review, as his Memorandum required the Department to focus on the very issues that it has heretofore inappropriately discounted or ignored—the loss of access to financial services for workers and retirees, the increased costs of such services to workers and retirees, and the diversion of retirement savings assets to wasteful and frivolous litigation created by the Fiduciary Rule. Yet the Department has already acted without this vital review to implement the rule in the interim. We strongly urge the Department to revisit this decision immediately because it cannot proceed with a valid rulemaking without conducting the review directed by the President.

To facilitate that review, we offer comments and information responding to the questions posed by the Department in the Delay Rule, as well as criticisms and alternatives, based on new evidence and research, to the assumptions made by the Department in its prior analyses. We describe these issues in more detail below, but summarize them briefly here:

- **Reduced Consumer Access to Investment Services**—the Fiduciary Rule is reducing access to investment services for beginning and small-balance savers. Many financial service providers are increasing minimum balances for accounts providing investment services, and small accounts are increasingly being converted into self-directed (i.e., no advice) accounts. Orphaned accounts (accounts no longer supported by a broker-dealer or other financial professional) are increasing sharply. A large mutual fund provider we interviewed 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 as a result of the Fiduciary Rule.
- **Increased Consumer Costs for Services**—the Fiduciary Rule is increasing the costs of investment services for retirement savers across the board. The costs imposed by the rule are not “one-time” transition costs—though those costs are significant—but reflect ongoing increased compliance and litigation costs. These increases are passed on to the workers and retirees, making investment services more expensive. This is particularly an issue for IRA owners in transaction-based accounts, who, due to the costs of compliance, are

increasingly being offered higher-cost, fee-based accounts, or accounts in which no advice is provided.

- **Cost and Availability of Fiduciary Insurance**—the Department never appropriately considered the effects of the Fiduciary Rule on the fiduciary insurance marketplace. As many financial professionals who were not previously fiduciaries will now be fiduciaries, they need to purchase professional fiduciary insurance. There is a large increase in the number of financial professionals seeking such insurance, and the market is further distorted by the new litigation risks presented by the Best Interest Contract Exemption (“BIC Exemption”). Based on our interviews, the cost of such coverage in the first few years alone is likely to be two to three times the Department’s expectations, and could become much greater depending upon the outcome of the new litigation risks created by the Rule. Much how costs of malpractice insurance in the medical profession have grown at a rapid rate due largely to frivolous litigation risks, such pressures could restrict the ability of financial professionals to serve retirement plan and IRA clients as insurance costs increase.
- **Costs of Lack of Regulatory Coordination**—The Fiduciary Rule makes sweeping changes regarding permissible compensation methods, making illegal many legal forms of compensation regulated by other Federal agencies, State agencies, and other regulatory entities. The Fiduciary Rule’s policies were not well coordinated with these other regulators—indeed; several offered very critical public comments during the rulemaking process, objecting to the proposed Fiduciary Rule. As a result, legal and operational changes needed for compliance with the Fiduciary Rule have required financial professionals and financial institutions to seek modifications of rules and regulations from other regulators. As these other regulators must follow their own processes to review such requests, many of which will take substantially longer than the now-14 months available to make final decisions, financial professionals have been forced to make decisions to use or exclude investment products that are necessary for compliance, but not optimal for their customers. For example, there are significant questions about share classes in mutual funds, and compensation methodologies relating to annuities and other investment vehicles.
- **Ignoring or Discounting Value of Different Types of Financial Professionals**—The Department’s analyses ignores the very real benefits financial professionals provide to retirement investors regardless of their compensation methods or license. Small employers are twice as likely to offer their workers a retirement plan when working with a professional. Similarly,

individuals receiving professional assistance have as much as a 150 basis point increase in compound returns, due in large measure to recommendations to contribute more to their retirement accounts and other behavioral changes. Regardless of compensation methods, all financial professionals create significant benefits. Reducing the ability of beginning savers and small account balance savers to obtain services at all by reducing access to certain professionals based on how they are compensated ignores the benefit these professionals provide, and discounts the cost of the Fiduciary Rule. The focus on fractional differences in investment earnings between favored and disfavored compensation methods ignores the essential truth that a dollar never saved earns nothing. The Fiduciary Rule will result in billions of dollars never saved, an effect not properly factored into the economic analyses.

- **Need for a Fresh Look at Previous Data**—the Department cannot simply ignore comments it receives in this current comment period that echo criticisms it has previously received. “Fresh eyes” should review those comments again in light of the empirical evidence now available that supports those criticisms. Put simply, the new review ordered by the President should be *de novo*, looking at the whole question, not simply new information. A valuable criticism previously discounted because it conflicted with an academic model’s prediction must be considered again, especially where actual data now suggests the criticism was right and the model’s prediction was inaccurate.
- **Rule Distorts Marketplace to the Detriment of Small Savers**—the Fiduciary Rule is creating perverse incentives to marginalize small savers, resulting in a rearrangement of retirement savings assistance delivery systems that limits the access of small savers to assistance and to personal relationships with financial professionals, undermining good savings habits and investment behavior. For example, we believe investors will face increased costs as a result of loss of access to commissioned based accounts. In the alternative, investors may lose access retirement assistance completely because of increased account minimums due to the rule. This results in losses in overall gross savings because those most in need of professional services are less likely to receive it.

The fundamental failure of this rulemaking process has been the Department’s failure to properly consider how its interference in the market has discouraged savings behavior in the population most in need of encouragement—small businesses and beginning and small balance savers.

Finally, the Department has leaned heavily on the sheer volume of its prior economic analyses, but the size and length of these analyses do not change the underlying problem our comments here highlight—the content remains inadequate

despite the bulk of the verbiage used to describe it. In reviewing the Fiduciary Rule anew, we urge the Department to keep this fact in mind and to honestly and critically examine the work previously done.

New Empirical Evidence from Real-World Efforts to Implement the Rule Show Department Predictions to be Wrong, Understating Costs and Overstating Benefits

The analyses performed by the Department were inherently prone to error as they were predictions of future events. However, since April 2016 when the Fiduciary Rule was promulgated, it is now possible to review empirical data regarding the responses to the Fiduciary Rule. This real-world data shows that the Department's predictions—based on selected academic studies and extrapolated far beyond appropriate limitations—are simply incorrect, grossly understating costs and overstating benefits.

To gather new empirical data, the Chamber conducted approximately ten in-depth, structured interviews over the past month with investment-advisory companies, broker-dealers, insurance companies, and others affected directly or indirectly by the rule. Each of these interviews included input from two to five persons who brought to the discussion deep knowledge and experience regarding the operations, conditions and trends affecting retirement savings markets, especially in relation to the emerging impacts of the Fiduciary Rule. These interviews provided critical information regarding the current and emerging conditions of the retirement savings market and the financial industry sector that provides services to retirement plan sponsors, plan participants and IRA retirement savers.

Department Should Review Current Surveys to Better Ascertain Facts

Unfortunately, the current 45-day comment period is too short to permit inclusion in these comments of responses from more interviews, but the information gleaned so far indicates clearly that the Department's Fiduciary Rule has already had adverse impacts on access to needed investment services, and on savings motivation, especially for small and less sophisticated savers. These findings confirm the predictions made by commenters to the proposed rule in 2015, and they reinforce the need for the Department to review new surveys to determine systematically how the conditions of the retirement-savings market have changed in the past two years, and how they are likely to continue changing in the future regardless of the decision to implement the Fiduciary Rule.

The Department should review new survey information regarding both financial professionals and savers to better understand how the investment-services market is changing and the range of adverse consequences of the Fiduciary Rule. It is clear that the Department promulgated the 2016 Fiduciary Rule without adequate empirical data regarding either the actual structure of the affected market or the trends of change in the market already underway. As this data is now available, the Department should make a real effort to review it—there is no reason to continue to rely on extrapolated predictions from academic studies when empirical data has now been generated.

Review of Department’s Methodologies Shows Fundamental Flaws in Original Analyses: Overlooked Academic Studies and Information in Previously Discounted or Ignored Comments Should Be Reviewed Anew

A review of the Department’s analyses shows selective bias in inclusion and exclusion of academic research. The Chamber has identified significant research literature that was overlooked by the Department prior to its April 2016 final rule decision, and we have found new research findings that should now be considered to inform review of the Fiduciary Rule.

The Chamber also reviewed the docket of previously submitted comments and surveyed the relevant research literature. We found significant comments in the rulemaking docket regarding the flaws in the Department’s economic impact analysis and likely effects of the rule that the Department did not adequately consider as it rushed to make a final decision.

Accordingly, we believe the Department cannot simply ignore comments it receives in this current comment period that echo criticisms it has previously received—the President’s Memorandum directs what is in essence a *de novo* review, and “fresh eyes” should review those comments again in light of the empirical evidence discussed in this comment letter. The significant research literature overlooked by the Department prior to its April 2016 decision, and the new research findings published since then should now be considered to inform review of the Fiduciary Rule. These findings are detailed below in response to relevant questions posed by the Department in the March 2, 2017, Federal Register notice.

The Department’s Uncritical Reliance on the CEM Research Paper is a Fundamental Error

At the root of the Department’s errors in the Regulatory Impact Analyses (“RIA”) for the Fiduciary Rule and the Delay Rule is its uncritical reliance on the findings of the Christoffersen, Evans and Musto (“CEM”) research paper. Far too

much stew predicting effects across the universe of retirement investing was made from this single oyster.

The CEM paper and its application by the Department in the Fiduciary Rule RIA confuse correlation with causation. There is no basis for the leap from the negative correlation supposedly shown between broker commissions and investor earnings to the causal conclusion that reducing broker commissions would cause an increase in annual earnings.

To arrive at a causal conclusion, it is necessary to show the mechanism by which the lowering of commissions leads to higher returns, which the Department has not shown by any credible evidence. An initial step would have been for the Department to have examined the empirical question of whether or not supposedly conflicted financial professionals were actually aware themselves of the commission differences between products considered for recommendation. A second step would have been to identify and interview a sample of investors who invested in higher commission paying products to determine the extent to which they were aware of the commission received by their broker or agent and what reasons induced their investment decisions. None of these basic questions was addressed by the Department.

Furthermore, the extension of the hypothetical gain from the Department's example of a single investor to a forecast of aggregate gains for millions of investors fails to consider the effects on market prices and investment returns of such substantial re-allocations of capital. The changes in relative share prices of the two securities because of the large shift in investment flows would change the relative rates of return and likely eliminate the expected gain in the aggregate.

This is not the only study relied on in error by the Department and the President's Council of Economic Advisors ("CEA"). As Vanderbilt Professor Dr. Craig Lewis, the former Securities and Exchange Commission Chief Economist, has 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.³

³ See Craig M. Lewis, "An Inflated \$17 Billion Talking Point from DOL," *Forbes* (Dec. 16, 2015).

Responses to the 20 Questions Posed in the Delay Rule NPRM

Detailed comments summarized by the themes above are organized below as responses to the 20 specific questions posed by the Department in the March 2, 2017 NPRM. However, several overarching problems with the Department's various economic analyses are worth setting out separately for clarity. In addition to the issues summarized above:

- **Analyses Vague and Lacking in Empirical Data**—Despite criticisms submitted in response to the Department's 2010 proposal (subsequently withdrawn because of analytical flaws) and the Department's 2015 proposal, the 2016 final rule and the subsequent 2017 Delay Rule RIAs continue to reflect anecdotal evidence and broad generalizations that lack the empirical basis needed to support an efficient and effective regulatory decision. The Department has described the putative problem in vague terms and has proposed an overly broad and prescriptive solution. The size and length of these analyses does not change this underlying problem—the content remains inadequate despite the verbiage used to describe it.
- **Inadequate Examination of the Interaction between Investors and Investment Service Providers**—the Department has not adequately examined the practical aspects of the interaction between investors and financial professionals. The Department assumes that professionals make recommendations that investors unquestioningly accept. The Department's justification for the rule is based on the idea that investors are being misled by self-interested financial professionals, but the Department has not investigated and shown how the process works in practice. The reality of the interactions between investors and professionals is complex, and the Department in 2016 made a critical regulatory decision without adequate evidence regarding the practical details of that relationship.
- **Myopic Focus on Investment Selection**—The Department primarily focused on a single aspect of interactions investors have with their brokers and agents, the selection of investment products, and the Department did not examine and quantify other essential aspects, such as setting and achieving saving goals, which even more dramatically contribute to the ultimate result of retirement income and consumption. By failing to examine with empirical data the multifaceted values embedded in the investor-professional relationship, the Department has created the risk that its attempt to modify a single element may

have offsetting adverse impacts on other elements of the investment services system.

- **Inadequate Consideration of Ongoing Compliance Costs and Their Effects**—Social benefits are exaggerated by the Department’s failure to recognize that compliance costs of the rule will be reflected in higher costs for investment services to the beneficiaries of the intended protections. Even if the Department were correct in its forecast of improved investment performance it claims may result from elimination of certain compensation practices, investment services are not free goods. The Department failed to review and take into account the direct costs experienced by asset managers and insurers. In particular, the Department did not take into account the effect the Rule would have on the annuity marketplace. Good investment assistance requires use of costly information, research and professional expertise, and consumers of investment assistance must pay for it one way or another. Some or all of the putative gains ascribed to the Fiduciary Rule will be offset as the market responds to the rule.
- **Financial Professionals’ Behavioral Responses**—an immediate effect of application of the rule may be to reduce individual financial professionals’ earnings from commissions. While the Department has spent considerable time discussing this as a positive effect, it will certainly have negative effects as well on the supply of investment services professionals and their willingness to engage certain clients. Individual professionals have a limited capacity—they can only advise a certain number of accounts as the time involved to develop their recommendations is similar for a small client as for a larger client. The inflexibility of the Fiduciary Rule incents financial professionals to use that limited time in service of larger accounts. Reductions in the quality and quantity of investment assistance available, specifically to small savers, are likely as financial professionals leave the transaction-based advice segment, or the qualified plan and IRA segments, of the marketplace. Remaining brokers and other professionals are likely to shift their services away from small accounts. Our interviews with affected companies show that even when the financial institution itself has not increased account minimums, individual brokers may implicitly discourage enrollment of smaller accounts and ration their time to larger accounts to earn better pay and to reduce time spent on compliance associated with smaller, transaction-based accounts.
- **Effect on Fee Structures**—financial institutions and professionals may also respond to reductions in compensation by generating off-setting increases in

other fees that replace lost earnings.⁴ This response would reduce the benefits predicted by the Department. If lost commissions are offset by increases of other service fees, the supposed earnings gain to savers is lost.

To facilitate the Department's review, we have organized the detailed comments below to correspond with the questions posed in the Delay Rule NPRM. While the questions were not numbered in the NPRM, we have numbered the responses in the order of each bullet point in the NPRM (thus, Q4. addresses the questions in the fourth bullet listed in the NPRM, and so forth).

Q1. Changes in consumer demand for investment advice and investment products

The Department's extreme aversion to investment services from certain financial professionals has led to a rule that would reduce consumer choice and lead to a decrease in the supply of valuable investment services. As recent volatility in financial markets demonstrates, such assistance is more important today, and consumers now demand more of it.

When ERISA was first implemented, consumers were struggling with how to save in a high-interest rate environment. By contrast, today's consumers have had to learn to save in a low-interest rate environment and in a highly sophisticated financial marketplace. Furthermore, households now save for a variety of different needs and in fundamentally new ways.

Households save for an assortment of needs beyond retirement, and financial professionals help prioritize between these competing priorities. Since 1974, consumers have had to learn how to manage credit cards, and in many cases, credit card debt. College costs have risen rapidly and parents face an increasingly complex array of savings vehicles. Parents must also decide how much savings to put away for themselves versus their children. Workers entering the workplace increasingly have incurred large educational debts, and must choose between saving for retirement and paying student loans.

All consumers should have emergency savings for economic downturns or sudden changes in employment. Additional needs include saving for a house, for

⁴ This effect would be avoided if financial professionals are currently earning an economic rent (receiving earnings in excess of the amount required to elicit their services), but the Department has never explicitly claimed that this is the case, nor analyzed the regulatory problem from this perspective.

travel, for financial freedom and flexibility, and for unpredictable expenses such as home repair or other emergency.

The Department's preference appears to be for consumers to purchase a passive index fund and invest for the long haul. But with the complex financial situations facing most Americans today, this one-size-fits-all approach, while reasonably sound for some retirement purposes, is insufficient to meet all of the different needs of every retirement saver. The rule is anticipated to reduce the supply of assistance and adversely affect the populations of low-income and low-balance savers who would benefit the most from financial education and assistance.

Q2. Changes in Target Markets, Especially the Small Saver Segment

The Fiduciary Rule is accelerating existing baseline trends toward segmentation of the market, giving large, wealthier savers access to a greater variety of services, more intensive and personalized assistance, and greater investment product options. Smaller and less wealthy savers are seeing their access to services and their product selection options becoming more limited. The adverse impact on small savers seems to be the result of the increased exposure to litigation risk because of the Fiduciary Rule. Companies and individual financial professionals report that the litigation concern makes it less desirable to seek and serve new small investor accounts.

One of the recurring themes in the comments to the proposed rule in 2015 was the disproportionately negative impact this rule would have on small businesses and small savers. The entrepreneurial aspect of the market for financial advice does not appear to have been adequately studied, which may be in violation of the Regulatory Flexibility Act.

With regard to small savers, commenters repeatedly emphasized the likelihood of market segmentation, an issue dismissed out of hand by the Department. Interviews with member companies reinforced our belief that market segmentation is likely to occur and that small savers will not be able to access the same type of assistance available to higher net worth clients.

The Department is unduly optimistic that advances in technology, such as the increased prevalence of so-called "robo advisers" will alleviate the need for personal interaction with a qualified professional. While the new technologies are promising and appropriate for some investors, they are not a panacea and will not be appropriate for all small savers, some of whom would benefit from the education provided by financial professionals. For example, we are not aware of a "robo-advisor" that recommends annuity products to generate retirement income, despite the clear need

for these products by many retirement savers. It is also not clear that such advice will be targeted to small-balance savers as the Department appears to assume. Further, “robo-advice” seems to be of very limited utility in finding and convincing new savers to begin saving.

In fact, the Department put forth a notice for comments in early 2016 about a proposed research project. The description states: “The Department is planning to undertake a long-term research study to develop a panel that will track U. S. households over several years in order to collect data and answer important research questions on how retirement planning strategies and decisions evolve over time. Relatively little is known about how people make planning and financial decisions before and during retirement.”⁵

Despite writing in February 2016 that “Relatively little is known about how people make planning and financial decisions...” the Department somehow concluded by April 2016 that it did not anticipate significant market segmentation or other adverse effects to small savers as a result of the Fiduciary Rule. This is especially puzzling, given that experience abroad, such as the reforms in the U.K. discussed in more detail below, had exactly this impact, and there is every reason to believe such an impact has already begun to occur in the U.S. as well.

One key indicator of the magnitude of the effect on small savers is the number of orphaned accounts. Orphaned accounts are accounts that are no longer supported by a broker-dealer or other investment professional. For example, an account could be orphaned because a financial institution raised the minimum balance required for an account to a level greater than the existing account balance. Or an investor may be orphaned when an intermediary requires transition from a commission-based account to a fee-based structure, and the customer is unable or unwilling to pay the higher resulting fees. The information reported indicates that millions of small retirement savings investors will lose access to needed investment advice because of the impending applicability of the Fiduciary Rule.

New data provided by a major provider of mutual funds reveals a sharp increase in the number of orphan accounts this year, with the number of orphan accounts nearly doubling in the first three months of 2017. These orphaned mutual fund shareholders are predominantly small retirement savers, with an average account balance of \$21,000. The spike in orphan accounts, the provider reports, is the result of changes in intermediaries’ account management policies in response to the imminent applicability of the Fiduciary Rule.

⁵ 81 FR 10,280 (February 29, 2016).

Additional information received by the provider from other broker-dealers indicates that an additional spike of a similar magnitude will occur as soon as the Fiduciary Rule applies, causing the provider to predict that 16% of the accounts it services may ultimately be orphaned. 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 Fiduciary Rule becomes applicable.

Q3. Changes in Offerings of Investment Services, Products and Pricing

The landscape of investment products, pricing, and access to investment assistance has changed dramatically since ERISA was implemented. But these changes have accelerated over the past 10 years. Technology has contributed to these changes, with “robo advisers” being the latest trend to arise. But online platforms with competitive fees and large educational resources have also been developed, providing self-directed investors with more educational resources than have ever been available.

There have also been substantive changes in response to the proposed rules from the Department. Mutual fund companies, for example, have begun efforts to create new share classes that could deliver compensation to financial institutions and financial professionals in a manner consistent with the restrictions imposed by the Fiduciary Rule. For example, Morningstar expects that each mutual fund company that currently offers an A Class share will introduce new share classes including a “T Class” share in response to the Fiduciary Rule.⁶ However, it is important to note that these share classes generally are not yet available, and it is not clear how well new share classes will serve the best interest of the retirement saver compared to existing options given the different limitations and features of different options. There is no “one-size-fits-all” investment that is right for every investor—the Fiduciary Rule ought to expand choice, not limit it due to compliance restrictions. T Class shares, and their serious downsides, are discussed in additional detail in response to question four.

⁶ Rekenhaller, John. “Lower-Cost T Shares Coming to a Fund Near You,” (January 6, 2017), Morningstar, <http://beta.morningstar.com/articles/787395/lowercost-t-shares-coming-to-a-fund-near-you.html> (last visited April 4, 2017).

Another approach comes from the Capital Group, which received approval from the SEC in January to issue “Clean Shares” through its American Funds.⁷ This new share class would not have any distribution costs, such as 12-b (1) fees, and would allow brokers to set their own commissions. The Capital Group designed Clean Shares to address the restrictions resulting from the Fiduciary Rule, intending the share class to allow broker-dealers to set compensation to manage conflicts of interest, mitigate compliance costs, and allow consumers to maintain a brokerage account rather than having to shift to a fee-based structure.

The Chamber’s interviews also revealed that firms are concerned about the adequacy of the grandfathering provisions in the Fiduciary Rule as assets may “lose grandfathering” if the assets move from one asset class into another, and then move back again as investor’s needs change. For example, some of the new share class alternatives might result in a loss of grandfathering, illustrating the limitations of these provisions under the Fiduciary Rule.

Q4. Changes in Types and Pricing of Advisory Services

Affected companies interviewed by the Chamber uniformly report that they have already restricted the choices of investment products available to retirement savers through their fee-based advisory channels, or they intend to do so when the Fiduciary Rule becomes applicable. The majority of companies interviewed have also either already raised the minimum account amounts to qualify for advisory services or have plans to do so upon applicability of the rule. Some firms have raised the minimum for advisory accounts to \$100,000 or more, clearly excluding from their services small beginning savers.

In addition to higher account minimum requirements, most affected companies are reducing the list of mutual funds or other investment products offered to retirement savers. Some companies that previously offered a wide array of investment products to retirement savers plan to limit retirement savers’ choices to a few products due to the commission or fee structure. These concerns about commission or fee structures have caused some companies to stop offering mutual funds in certain accounts until compensation issues can be resolved in the future. In some cases, restrictions involve limiting retirement savers to certain classes of mutual fund shares, such as so-called “I” shares. “I” shares may have the advantage of being compliant with the Department’s regulation, but they may harm the long-run benefit of savers

⁷ Response of the Office of the Chief Counsel Division of Investment Management, Securities and Exchange Commission, January 11, 2017. Available online: <https://www.sec.gov/divisions/investment/noaction/2017/capital-group-011117-22d.htm> (last visited April 4, 2017).

because they generally lack the accumulation rights of currently available products on which small initial savers rely for expansion of their holdings over time.

To some extent these changes in the retirement savings market are in response to market conditions and competition trends prior to the Fiduciary Rule, but it is clear that the Fiduciary Rule has magnified and accelerated the impulse of change, especially with regard to the adverse effect on smaller savers. One of the drivers of these changes is that companies are especially concerned about the exposure to new class action lawsuits under the BIC Exemption. The perceived liability risk generated by the Fiduciary Rule is especially harmful to the interests of smaller savers, whose accounts are too small to justify the costly litigation risks and ongoing compliance costs needed to mitigate litigation risks.

Q5. Investor Shifts Between Asset Classes

The Fiduciary Rule is being read by some to encourage the idea that most retirement savers are better served by self-directing their investments into low-cost index funds than by receiving “conflicted” advice from commission-compensated financial professionals. This perspective, like the RIA for the Fiduciary Rule, ignores other benefits of individual assistance regardless of the type of professional. Commission-paid brokers and insurance agents provide valuable educational, motivational and financial services for families that cannot afford the expense of fee-based advisory services. They help novice savers by monitoring adherence to a systematic saving plan. Information from interviews of financial industry experts and other sources confirms the growing reliance of self-directing retirement savers on low-expense index funds. While self-directed retirement investment accounts can be effective for individuals, they leave the investor without the help that personal assistance can provide to motivate regular saving discipline and to avoid panic during a general market downturn.

Q6. Changes in Commissions, Loads or Other Fees

The trend toward lower commissions, loads and fees has been characteristic of the retirement savings market for the past ten years. This trend is being driven by fundamental forces of economic competition: It was not caused by government intervention and it will not stop if the Fiduciary Rule is rescinded. However, as discussed above, the Fiduciary Rule is driving changes in how such commissions and fees are charged. The outcome of these changes is not beneficial to retirement investors, as the changes are being driven by compliance with the Fiduciary Rule by June 9th rather than thoughtful consideration of optimizing investor interests.

Q7. Changes in Compensation Arrangements for Insurance-Related Financial Services

This trend is parallel to the trend discussed under question 6. As the Department has noted in other contexts, lifetime income products are an important part of the retirement portfolio of millions of Americans. Different types of annuities and other lifetime income products can help retirement savers reduce major risk factors, such as longevity risk and market fluctuations. As part of the offering of these products, insurance companies have been pursuing alternative compensation arrangements for agents for many years. This, too, reflects fundamental market competition rather than government regulation. In the insurance industry also, there is concern that changes in compensation structures could have unanticipated adverse consequences for consumers who depend on long-standing personal relationships with agents for education and assistance regarding complex choices.

The Fiduciary Rule illustrates how intervention by government regulators to enforce and accelerate a change that is already occurring through normal market processes can be dangerous. The normal process of change in market operation tends to be much more gradual and thoughtful than the implementation of change by government edict to meet a 12-month (now 14-month) arbitrary deadline. The slower pace provides more opportunity for adjustments that mitigate harmful effects while optimizing benefits. Regulatory attempts to accelerate change may only accelerate the harms and lock out opportunities for adjustments that mitigate unanticipated adverse effects.

Q8. Incentives/Disincentives Regarding Use of the BIC Exemption

Despite the Department's intent that the BIC Exemption will be broadly used as the primary exemption for a wide array of transactions, interviews with affected companies indicate that the BIC Exemption will be relied upon reluctantly, with much skepticism, and only where absolutely necessary. The BIC Exemption is increasingly seen as an awkward and unwieldy instrument for compliance. Its adverse impact on small savers also is becoming apparent as use of the BIC Exemption is increasingly combined with severe restrictions on the investment products available due to the compliance costs and litigation risks associated with its use.

Q9. Innovations or Changes in the Delivery of Financial Advice.

The trend toward limited service models featuring limited or no interpersonal relations is a significant trend. The "robo-adviser" is the extreme manifestation of this trend. While these alternative service platforms are beneficial and provide gains

through lower expenses to some retirement savers, they are not the best approach for everyone, especially savers who need encouragement to increase savings rates or to avoid locking in losses during market swings. Free markets provide choices that enable individuals to find the services that they uniquely prefer. Government regulations often limit choices and force individuals into unsuitable or uncomfortable structures.

The Fiduciary Rule seems to endorse robo-advisers and low expense passive investment options as best-suited for serving retirement investors. The Department's RIA seems to ignore the reality that some small savers need personalized assistance to encourage them to save more, or to begin saving in the first place, services that neither robo-advisors nor passive investment options can provide well. Even if a few people would be better off following the Department's investment advice, others would be harmed, an impact ignored in the 2016 RIA.

Q10. Changes to Investor Education.

Application of the Rule is having a harmful impact on investor education. Currently many commission-paid brokers and insurance agents provide important educational, motivational and financial services to novice and small savers. The ability of many lower income families to start and maintain a systematic saving plan depends on their personal relationship with an insurance agent or broker who is paid on a commission basis. These savers would be deterred by direct fees, or are simply ineligible for certain accounts due to their small assets size, and they would not be as well served by robo-advisers or anonymous call centers. Interference in their existing interactions with financial professionals may result in their failure to save as much, and some may stop saving completely.

The Fiduciary Rule and its 2016 RIA seems to have been fixated on rooting out imagined fractional differences in investment earnings between favored and disfavored compensation models, but in doing so, the Department ignored as a matter of policymaking and economic forecasting the essential truth that a dollar never saved earns nothing. The fundamental failure of this rulemaking has been the Department's failure to consider the potential for its interference in the market to discourage saving behavior in the population most in need of encouragement.

Q11. Effects of Increased Litigation Risks

Companies are especially concerned about the exposure to new class action lawsuits that would be created by the BIC Exemption. The perceived liability risk generated by the Fiduciary Rule, coupled with the perceived class-action risk

generated by the BIC Exemption, are especially harmful to the interests of smaller savers, whose accounts are too small to justify the costly litigation risks that they may entail.

Another impact of the rule is that Errors and Omissions (E&O) Insurance costs—whether these policies already cover fiduciary services or must now add a rider or otherwise purchase fiduciary coverage—are widely anticipated to increase, and to increase far more than the Department’s estimation. 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 E&O coverage. Companies are very concerned that the actual number may prove far higher as the class action litigation commences. Insurers have advised that rates may increase substantially based on claims experience in these cases, but that it is very difficult to estimate how much rates will increase because the litigation theories and mechanisms are novel, and will likely result in multiple decisions of first impression in many different jurisdictions. The defense costs related to such cases, regardless of the merits of the underlying claims, will be substantial.

The results of a survey of class action cases commissioned by the Chamber shows the reality—these cases are expensive to defend (increasing costs for retirement savers) but typically result in almost no benefit to the class members of the action but big benefits for their lawyers.⁸ The review of the economic analysis of the Fiduciary Rule should properly take into account the increased costs associated with siphoning assets from the retirement system to trial lawyers.

Q12. Costs and Benefits of Further Delay

The Department has greatly overestimated the costs of delaying the applicability of the Fiduciary Rule. There are several reasons why the cost of delay is less than claimed in the March 2, 2017 or assumed in the April 7, 2017 final Delay Rule.

The earnings gains that the Department claimed as benefits of the rule were not the independent and exclusive effects of the rule. The Department did not sufficiently and accurately account for the pervasive and ongoing baseline trend

⁸ 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).

toward lower load, fee-based wealth management services, and passive strategies that has been characteristic of the retirement savings market over the past ten years. These trends are driven by fundamental conditions of economic competition, and they will likely continue regardless of the decisions of regulators in Washington. These trends and gains will continue—albeit at the gradual, market-driven pace that tends to avoid the unnecessary disruptions and costs caused by shock-and-awe regulatory changes—regardless of any delay or rescission of the Fiduciary Rule.

Delay of the rule would postpone some significant costs of the rule that the Department has ignored in its analysis. This is a two-fold issue—not recognizing significant costs in the first place, and therefore not recognizing their role in reducing the benefits claimed to be lost in a delay. A critical aspect of the Fiduciary Rule is its introduction of greater exposure to the risk of class action litigation to the retirement savings market. Increased litigation risk has been identified as a concern driving market segmentation and loss of access to personal investment services for small savers. The impact of this concern will not be effective until the rule becomes fully applicable. Many firms that have not yet taken steps that reduce access of small savers to full investment services have plans to do so as soon as the applicability date occurs. In addition, financial professionals who manage individual accounts are expected to informally discourage new small saver accounts once the rule is applicable and their concerns about personal legal liability are realized.

Furthermore, the Department has not properly considered the benefits delay would provide to retirement savers. The continued access to investment products and services that will be lost by small savers is a benefit. The additional costs due to compliance and litigation risks would be delayed, benefiting retirement savers who will pay those new costs under the Rule. Delaying of the applicability date may postpone these various adverse impacts. Rescinding the rule would remove them.

Considering all of the factors above, it is likely that the net effect of delay will be no harm at all. Allowing the 2016 rule to become fully applicable may actually result in a net social loss, instead of the benefit presumed by the Department. The hypothetical gains to some investors that the Department forecasts will be offset by losses to others that the Department has ignored, or wrongly concluded would be eliminated by the changes made from the proposed to the final Fiduciary Rule. The rule will only result in transfers of wealth between favored and disfavored investors. The added load of administrative compliance costs of the prohibited transaction exemptions to affect this wealth transfer program will result in a net economic loss.

Q13. Impact of Exposure to Class Action Lawsuits

By transforming nearly all financial intermediaries related to investment selection into fiduciaries, the Department's Fiduciary Rule will significantly increase their legal and financial risks. The Department has in the past ignored comments about impending increases in litigation costs because they have not occurred yet, finding that they are therefore not measurable. This is an unreasonable oversight on the Department's part, given its willingness to estimate the "unmeasurable" future effects of a variety of other factors in the various RIAs related to the Fiduciary Rule.

The Chamber has repeatedly expressed its concern that the BIC Exemption will dramatically increase liability risks. Michael Wong at Morningstar estimates the costs of class action lawsuits might settle in the range of \$70-\$150 million per year over the long run.⁹ We believe these estimates are actually conservative and that the effect would be even greater. As Mr. Wong writes: "the cost of class-action settlements alone could decrease the operating margin on the advised, commission-based IRA assets of affected firms by 24%–36%."¹⁰

These costs are on top of the already excessive class action costs that fall under ERISA. For 2016 the top 10 settlements alone exceeded \$800 million, well above other areas of workplace law.¹¹ All of these costs are ultimately borne by consumers, plans, plan participants, and IRA owners—while the lion's share of any settlements that may result will go to the trial lawyers bringing the cases.

Q14. Regulatory Alternatives.

The Department did not adequately analyze and consider regulatory alternatives. The Department ignored the mandate of Executive Order 12866 to analyze alternatives thoroughly, quantifying and comparing the costs and benefits of each alternative and selecting the alternative that is most cost effective so as to achieve the desired outcome at the least cost. In particular, the Department was mandated to consider the alternatives of (1) no regulation and (2) a non-prescriptive informational approach. The Department failed to adequately analyze and consider these and other possible alternatives.

⁹ Wong, Michael, "Costs of Fiduciary Rule Underestimated," Morningstar (February 9, 2017). Available: <http://news.morningstar.com/articlenet/article.aspx?id=793268> (last visited April 6, 2017)

¹⁰ Ibid.

¹¹ Seyfarth Shaw, LLC. 13th Annual Workplace Class Action Report" (January 11, 2017). Available: <http://www.workplaceclassaction.com/2017/01/its-here-seyfarths-2017-workplace-class-action-report/> (Last visited April 6, 2017).

The alternative of no regulation is important because the retirement savings retail investment distribution market was undergoing significant change before the Fiduciary Rule was proposed, and will continue to change whether the Rule is implemented or rescinded.

The retirement savings market is changing in response to fundamental competitive economic forces outside the control of government regulators. These changes appear to be beneficial to some retirement savers, helping them to accumulate more assets with which to fund their retirement consumption. These same trends may be harmful to some retirement savers, limiting access to financial professionals for those in particular need of education, motivation and assistance to start a disciplined, systematic saving plan.

The Fiduciary Rule was an attempt to intervene in the process of change that was already underway and likely to continue in the retirement savings market. Whether that intervention was prudent and what distortive effects its efforts would have are questions the Department did not adequately consider at the time.

By adding to the mix the new risk of exposure to greater litigation (especially class action litigation), the Department added a new impetus to the potential for harm to the small saver segment. Litigation is expensive regardless of the merits of the claims asserted—billions of dollars are removed from productive economic use every year simply through responding to lawsuits. The need to essentially prove innocence in civil litigation drives these expenses, especially in our system where the defendant must bear its own costs. Financial professionals are reporting today that they will increasingly avoid smaller accounts because their revenue is not sufficient to justify the risk. The Department also accelerated the trend toward consolidation in the retirement saving services market because small brokers and other professionals may be more harmed by exposure to increased litigation risk and less able to make the operational and oversight investments needed for compliance. The Department did not give adequate consideration to alternatives that would have avoided introducing the element of increased litigation risk.

Q15. Comparison to the Experience Resulting from the U.K.'s Similar Reforms

The United States is not alone in pursuing a best interest standard for investment services. There has also been some limited regulatory effort to revise how investment products are offered to consumers in other countries. The U.K. undertook regulatory efforts in recent years that, though different in some respects

from the approach taken by the Department, merit further study as they shed light on the likely responses by advisors to the Rule's new risks and costs.

Experience in the U.K. is showing that small savers are, in fact, being disadvantaged, and highlights the need for a new review of the Fiduciary Rule to properly account for this reality. The Retail Distribution Review (RDR) was created in 2006 by the Financial Services Authority (FSA), which was later split into two agencies, the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA). The FCA now oversees the RDR. The RDR came into force at the end of 2012.

Europe Economics conducted several surveys and analysis as part of an ongoing post-implementation review. While beneficial effects include increased educational levels of financial professionals,¹² public trust in those professionals did not commensurately improve.¹³

Most significantly for the Department's purposes, their analysis shows that while bans on third-party commissions have reduced some bias in investment recommendations, they are doing so at the cost of greater market segmentation (an effect the Department discounts.) The FCA found assistance is "expensive and is not always cost-effective for consumers, particularly those seeking help in relation to smaller amounts of money or with simpler needs."¹⁴ Furthermore, the proportion of firms requiring a minimum balance of more than £100,000 more than doubled to about a third of firms in 2015.¹⁵ This has led to an "advice gap" in which lower income, or lower wealth clients are increasingly unable to afford professional assistance with investment transactions and basic retirement investment services.

As the Department itself measured in 2011, there is a significant cost to participants and IRA owners who do not have access to investment assistance, more

¹² Europe Economics "Retail Distribution Review Post Implementation Review," (December 16, 2014). Available: <https://www.fca.org.uk/your-fca/documents/research/rdr-post-implementation-review-europe-economics> (last visited April 5, 2017).

¹³ Dawkins, Ross. "Post Implementation Review of the UK's Retail Distribution Review," (April 22, 2015), p. 25. Available: http://www.ascosim.it/Ascospim_doc/5Forum_5_Ross%20Dawkins_Ascospim.pdf (last visited April 5, 2017)

¹⁴ Financial Conduct Authority, "Financial Advice Market Review" (March 14, 2016), p. 5. Available: <https://www.fca.org.uk/publication/corporate/famr-final-report.pdf> (last visited April 5, 2017)

¹⁵ Ibid. p. 19.

than \$100 billion per year.¹⁶ Thus, the Department should reevaluate its estimates discounting the “advice gap” emerging in the U.K. from similar policies.

One clear takeaway from the U.K. experience is how easy it is to inflict harm on small savers, a lesson that has flowed to the Department since this project was initiated through comments that have been routinely disregarded.

Q16. New Academic Literature

Following are links to relevant studies that were overlooked by the Department in its 2016 and subsequent Delay Rule RIAs:

- Jonathan Reuter, “Revisiting the Performance of Broker-Sold Mutual Funds,” https://www2.bc.edu/jonathan-reuter/research/brokers_revisited_201511.pdf. 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 Guericio 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 over-valued.
- 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
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.

¹⁶ See, The Preamble to the final regulation implementing the Pension Protection Act investment advice provisions, 76 FR 66,151-66,153 (October 25, 2011) (“...the retirement income security of America's workers increasingly depends on their investment decisions. Unfortunately, there is evidence that many participants of these retirement accounts often make costly investment errors due to flawed information or reasoning...Financial losses (including foregone earnings) from such mistakes likely amounted to more than \$114 billion in 2010”

- Montmarquette, Claude and Nathanlie Viennot-Briot. “The Gamma Factor and the Value of Financial Advice.”
<https://cirano.qc.ca/files/publications/2016s-35.pdf>
 This paper discusses that the “gamma factors of discipline and increased savings rate that are crucial features associated with valuable financial assistance.” The paper identifies factors related to the value of assistance and the choice of financial professional that were not considered in the analysis on which the Department’s Fiduciary Rule was based.
- Montmarquette, Claude and Nathalie Viennot-Briot Montmarquette, “Econometric Models on the Value of Advice of a Financial Advisor.”
<http://econpapers.repec.org/paper/circirpro/2012rp-17.htm>; or
<http://econpapers.repec.org/RePEc:cir:cirpro:2012rp-17>
 This study finds that assistance with investments has a positive and significant impact on financial assets and that “those who stuck with an advisor for 15 years or more had 2.73 times more financial assets than those without.” This research also shows that losing access to a financial professional is associated with a significant loss of asset value: In the study sample, households who lost access to their financial professional experienced on average a 34 percent decline in asset values.
 See also, Montmarquette, Claude and Nathalie Viennot-Briot. “The Value of Financial Advice,” *Annals of Economics and Finance*, 16-1, 69-94 (2015).
- Jeffrey Wurgler, “On the Consequences of Index-linked Investing,”
<http://pages.stern.nyu.edu/~jwurgler/papers/indexing13.pdf>
 This 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.
- Charles Schwab & Co., “Communicating retirement plan benefits in a world of skeptics.” <http://www.schwab.com/public/file/P-8557214>
 This 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.

Q17. Sunk Costs and Benefits, and the Applicability Date of the Final Rule

Affected companies and financial professionals have already expended significant effort to understand the Fiduciary Rule and to prepare for its implementation. Changes in investment product offerings, in some practices and procedures, and in account management have also been made or considered in anticipation of implementation of the Rule. These changes have already had both positive and negative impacts on some participants in the retirement saving market. Sunk costs and harms cannot be recovered and some changes in offerings and operations are not likely to be reversed even if the Fiduciary Rule is rescinded or revised. Some of those who have already gained because of anticipatory changes will continue to gain and some of those who have been harmed because of anticipatory changes may continue to suffer harm even if the Rule is rescinded or revised.

However, the full impact of the Rule has not yet been felt, and there remains time to avoid future adverse effects. As affected advisers see the implementation date for the Rule approaching, they report that the greatest concern is the risk of exposure to litigation. This concern is driving decisions that will further limit the access of small savers to personal investment help and encouragement when the Rule becomes applicable. Rescinding the Rule will stop this continuing source of harm, and perhaps contribute to reversal of some harmful changes already made.

Q18. Macroeconomic Changes Since Promulgation of the Rule

Improved macroeconomic conditions mean that professionals in the commission-paid segment of the financial services industry, whose earnings may be reduced or who may be concerned about exposure to personal legal liability because of the Fiduciary Rule, have better opportunities for finding alternative employment in other industries or occupations not subject to the regulation. Improved economic conditions, therefore, increase the likelihood that the Rule will reduce the professional labor supply on which financial services to investors depends. Further, many financial professionals near retirement may accelerate their retirements to avoid significant investment of time and money into the new regulatory regime. The resulting scarcity of investment advice service providers may contribute to the other effects of this regulation to deny needed help to small savers who need the assistance that personal financial professionals provide to start and maintain a savings plan for retirement.

Q19. Social Benefits of the Rule Compared to Individual Gains

The Department's claim that social benefits will flow from the Fiduciary Rule is incorrect. To the extent that any individual may gain from the operation of the rule,

other individuals will experience offsetting losses. The Rule attempts to alter the outcomes of capital market resource allocations to increase the earnings for one segment of market participants. In an efficient capital market, the earnings of one set of investors cannot be raised without lowering the earnings of others.

Rather than generating any net social benefit, the implementation of the Rule will only result in transfers of earnings and wealth from some individuals to others. Perversely, the ultimate victims of the Department's transfer scheme will be the small retirement savers that the Department purports to protect. By disrupting these savers' access to financial services professionals, the Department risks disruption of their on-going savings discipline.

The real issue here is more fundamental than the Department's focus on small variations in return on investment. The real issue is whether or not there will be investment at all by small savers who lose their existing access to investment services because of this regulation.

Q20. Effect of Rescinding the Rule

The main effect of rescinding the rule will be to eliminate the fear and uncertainty in the retirement savings market regarding the exposure to litigation created by the Fiduciary Rule. This will remove a major factor that is currently causing loss of access to assistance for small savers. Other trends in the market that are independent of the Rule will likely continue, including the trends toward lower loads and fees, and towards fee-based compensation models. The adverse impacts on small savers implicit in these trends will likely be much less pronounced, and such impacts, if they exist, will be significantly reduced once the litigation risk entangled in the Fiduciary Rule is removed. We also believe that the withdrawal of the Rule will result in positive allocation of capital by firms as they consider new, innovative solutions to help retirement savers and small businesses.

Cost and Confusion Created by Unnecessarily Complex Grandfathering

The Department should also take into account the unnecessary expense and complexity created by the structure of the grandfather provision. While the inclusion of a grandfather provision was beneficial and necessary for existing retirement savers, its overly prescriptive requirements undermine its utility, and will result in multiple accounts for retirement savers. This is because practical compliance must be based on accounts, not assets within them.

For example, the temporary cessation of an automatic contribution by an investor would be a one-way decision—the grandfather provision would not apply when turning the contribution back on, resulting in the need for a new account to receive the contribution. Similarly, changing investments within the same fund family is permitted, but not if the new fund pays more compensation to the financial professionals. This would also, as a practical matter, result in the need for a new account.

Conclusion

Put simply, the Department has vastly overstated the predicted benefits, and vastly underestimated the predicted costs of the Fiduciary Rule. New data developed since the final Fiduciary Rule was issued confirm these conclusions. We are extremely concerned that the Department has repeated these errors in making policy decisions in the Delay Rule that should not have been made until the new review ordered by the President could be concluded. It is incumbent on the Department to reconsider the Delay Rule’s conclusions and prevent the Impartial Conducts Standards from becoming applicable until the review is completed.

The President directed the Department to review then rule and then decide—instead, it has decided and then begun to review. We believe the information in this letter is essential to the Department’s efforts to properly review the Fiduciary Rule, and we would be pleased to meet at your convenience to discuss this information. In the meantime, we urge the Department to delay further the applicability of the whole Fiduciary Rule, not just certain portions.

As we have long advocated, a minimum of an additional one-year delay is necessary in order to allow the Department to fully consider the comments it requested on the substance of the Fiduciary Rule, and to draft a proposed regulation revising or rescinding the Fiduciary Rule as authorized in the President’s Memorandum. The real-world efforts to implement the Fiduciary Rule highlighted and justified our concerns that a 12 month implementation period was never prudent, responsible or realistic, and 14 months is little better. The rush to compliance is hurting the very workers and retirees the Department ostensibly sought to protect, reducing individuals’ access to financial assistance, increasing costs for such assistance, and needlessly increasing litigation risks and expenses.

We appreciate the opportunity to provide these comments and would be happy to answer any questions you may have.

Sincerely,

A handwritten signature in black ink, appearing to read "Randel K. Johnson". The signature is fluid and cursive, with a long horizontal stroke at the end.

Randel K. Johnson
Senior Vice President
Labor, Immigration, & Employee Benefits
Competitiveness

A handwritten signature in black ink, appearing to read "David Hirschmann". The signature is cursive and somewhat stylized, with a large initial "D".

David Hirschmann
President & CEO
Center for Capital Markets