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July 30, 2020

Office of Exemption Determinations
Department of Labor
Employee Benefits Security Administration
200 Constitution Ave, NW
Washington, DC 20210

RE: Application No. D-12011, ZRIN 1210-ZA29, Proposed Exemption, entitled
“Improving Investment Advice for Workers & Retirees”

Dear Sir or Madam:

On behalf of a group of firm clients, including brokerage firms, mutual funds, insurance companies, asset managers, and banks, we are writing to provide comments on the proposed exemption, entitled “Improving Investment Advice for Workers & Retirees,” ZRIN 1210-ZA29.

We believe that the proposed exemption has a number of helpful elements that will enhance retirement security. We particularly appreciate the Department of Labor’s (“DOL’s”) efforts to align the exemption with the Securities and Exchange Commission’s (“SEC’s”) Regulation Best Interest. However, as discussed and documented below, we believe that the preamble attempts to significantly rewrite the five-part test for determining fiduciary status in a way that would effectively reinstate the 2016 fiduciary rule and thus severely harm the ability of millions of Americans to access investment assistance.

In brief, the preamble to the proposed exemption attempts to (1) effectively eliminate three core parts of the five-part test – the mutual understanding, primary basis, and regular basis tests, and (2) thus effectively reinstate the invalidated 2016 fiduciary definition. Moreover, because the preamble purports to be interpreting present law, these changes would be fully retroactive for all past years back to the 1970s.

Because these changes would effectively resurrect the 2016 fiduciary definition, they are in stark violation of (1) the Fifth Circuit decision¹ that voided the 2016 definition of a fiduciary

¹ *Chamber of Com. of U.S. of Am. v. U.S. Dept. of Lab.*, 885 F. 3d 360 (5th Cir. 2018).

and reinstated the original five-part test, (2) the Administrative Procedure Act (“APA”), (3) the President’s 2017 Fiduciary Duty Rule Memorandum, and (4) the regulatory policies and instructions announced in at least three Executive Orders issued by this Administration. For these reasons, and because the preamble language is flatly inconsistent with the language of the regulation, it is clear that the preamble language is invalid and will only create confusion.

We are also extremely concerned about the retroactive revocation of Advisory Opinion 2005-23A (“AO 2005-23A”). By declaring the analysis incorrect and withdrawing the Opinion on June 29, 2020, DOL is announcing that the Opinion is and has always been inconsistent with ERISA for all past periods. This is not only stunningly unfair, but it is also inconsistent with the prospective way that this issue was handled in 2016.

We ask that the final exemption (1) repudiate the preamble language in the proposed exemption regarding the interpretation of the five-part test, as discussed below, and (2) otherwise stay silent on the interpretation of the five-part test. The five-part test has been in effect for over 40 years and no additional guidance is needed on it. We also ask that any modification of the position taken in AO 2005-23A be done through a prospective regulatory process as was done in 2016.

Set forth below are (1) a summary of our views, starting on this page, (2) the five-part test starting on page 8, (3) a discussion of our concerns with the preamble, starting on page 9, (4) suggested changes to the proposed exemption, starting on page 21, and (5) at the end of the letter, two appendices detailing the harm done by the 2016 fiduciary rule.

SUMMARY

I. Complete rewrite of five-part test. The preamble discussion of the five-part test is not really an interpretation of the five-part test but rather it attempts to effectively repeal three components of the five-part test that was enshrined by the Fifth Circuit decision and that is included in the applicable regulations.

A. Effective elimination of the mutual understanding and primary basis tests. The preamble to the proposed exemption states that: when “financial service professionals make recommendations to a Retirement Investor, particularly pursuant to a best interest standard such as the one in the SEC’s Regulation Best Interest, or another requirement to provide advice based on the individualized needs of the Retirement Investor, the parties typically should reasonably understand that the advice will serve as at least a primary basis for the investment decision.”

Effectively, this indicates that if a financial professional makes any individualized recommendation to a retirement plan participant, IRA owner, or beneficiary, there will “typically” be a mutual understanding that the advice is at least a primary basis for the investment decision. That is simply wrong. Since millions of recommendations and sales solicitations are made without any mutual agreement of any reliance, the above preamble statement is effectively attempting to repeal the mutual understanding and primary basis tests.

The preamble also states that these prongs will typically be satisfied particularly when a recommendation is subject to Regulation Best Interest. This is also wrong. Regulation Best

Interest applies to all recommendations, without regard to whether the parties have any mutual understanding of any reliance, much less reliance that would satisfy a primary basis test.

Thus, the clear effect of the above-quoted guidance is to attempt to void the mutual understanding and primary basis tests by treating them as met where there is no mutual understanding of any reliance. This is flatly inconsistent with the Fifth Circuit decision, which enshrined all parts of the five-part test.

B. Unprecedented and unworkable new definition of regular basis. Most significantly, the preamble adopts a completely unprecedented and unworkable interpretation of the regular basis part of the five-part test, which upends a primary distinction between the brokerage and investment advisory business models:

[F]or an investment advice provider who establishes a new relationship with a Plan participant and advises a rollover of assets from the Plan to an IRA, the rollover recommendation may be seen as the first step in an ongoing advice relationship that could satisfy the regular basis prong of the five-part test depending on the facts and circumstances.²

Under this approach, assume that a broker-dealer with no prior relationship with a plan participant solicits a rollover as a salesperson, hoping that the rollover occurs and that the relationship with the customer will flourish. Under the preamble approach, if the relationship grows over the next year or two, apparently, the broker-dealer's original solicitation retroactively becomes a fiduciary act, satisfying the regular basis test and the mutual understanding and primary basis tests, which, as noted, have effectively been voided under the proposed preamble.

Please note also that under this approach, combined with the preamble's repeal of the mutual understanding and primary basis tests, ***all investment advisers soliciting rollovers or other business will be fiduciaries on the basis of their upcoming relationship, regardless of whether this solicitation represents the first contact between the adviser and the customer who is viewing the adviser as a salesperson. This is clearly a new interpretation of the law that is inconsistent with the Fifth Circuit decision.***

C. Dramatic modification of the meaning of "regular basis." The preamble also substantially modifies the definition of regular basis:

[T]he regular basis prong of the five-part test would be satisfied when an entity with a pre-existing advice relationship with the Retirement Investor advises the Retirement Investor to roll over assets from a Plan to an IRA.³

This language categorically states that if there is a pre-existing advice relationship, the regular basis test is met. That is simply wrong and unprecedented. A pre-existing advice relationship may be sporadic or episodic or occasional. A regular basis means a regular basis, which, under

² 85 Fed. Reg. 40834, 40840 (July 7, 2020).

³ 85 Fed. Reg. 40834, 40840 (July 7, 2020).

the Fifth Circuit decision, means such a frequent basis as to reflect a relationship of trust and confidence, not just any pre-existing advice relationship.

D. Effective elimination of regular basis test. The two above-quoted parts of the preamble would effectively repeal the regular basis test. Here is why. Every financial professional wants to develop an ongoing relationship with her customers. If that happens, then under the preamble language, the first recommendation is retroactively a fiduciary act, so the professional will need to treat the first recommendation as a fiduciary act and use the prohibited transaction exemption, which includes acknowledgment of fiduciary status. Effectively, financial professionals are forced into choosing between accepting fiduciary status or foregoing any future relationship with their customers. Thus, as a practical matter, under the preamble language, the regular basis test is effectively eliminated.

E. Direct conflict with descriptions in 2016 preamble of mutual understanding and primary basis tests. If DOL attempts to correct the preamble discussion of the five-part test, the guidance in the 2016 preamble with respect to the meaning of the five-part test should be followed, as discussed below, including upholding written agreements regarding whether there is a mutual understanding that the advice will serve as a primary basis for investment decisions.

II. Effective retroactive reinstatement of 2016 fiduciary guidance. With the attempted repeal of the mutual understanding, primary basis, and regular basis tests, all that would be required to trigger fiduciary status is an individualized recommendation, which was essentially the 2016 fiduciary rule. As documented below, the 2016 rule caused extensive damage to low and middle-income individuals in the brief period in which it was in effect. And such reinstatement is retroactive to the 1970s, since the preamble purports to be an interpretation of present and past law.

III. Retroactive interpretation of rollover advice. The retroactive application of DOL's new interpretations is equally alarming in the case of its sudden reversal indicating that DOL now believes that the analysis in AO 2005-23A was incorrect. Because DOL's reversal purports to interpret ERISA and the 1975 five-part test, DOL's new guidance on this issue is fully retroactive back to the 1970s.

This sudden reversal is grossly unfair because firms could not have possibly prepared for this interpretation. Any reasonable preparation for this new retroactive position would have required firms to take actions that were inconsistent with published guidance from DOL. DOL's retroactive change of heart on rollover advice is not only unfair, it is also inconsistent with the prospective modification of AO 2005-23A reflected in DOL's 2016 fiduciary rule.

IV. Overly broad interpretation of "for a fee or other compensation." The preamble continues DOL's longstanding but unfounded expansion of the statutory rule that to be fiduciary advice, the advice must be "for a fee or other compensation". For example, in the rollover context, any fees generated are not generated by the rollover but rather by investments made in the plan or IRA to which the money is rolled. That investment decision reflects a separate decision from the decision to roll over. Yet the preamble treats the investment fees as fees for the rollover advice.

The Fifth Circuit decision is very clear that only fees paid for advice are fees under the statute. Under that decision, if there is no fee for rollover advice, the advice cannot be fiduciary advice. Similarly, under that case, fees for non-advice services (such as brokerage commissions) cannot make a broker-dealer a fiduciary.

V. Effect on retirement plan sponsors and participants. By effectively resurrecting the 2016 fiduciary rule, the preamble also resurrects the host of problems raised by that rule for retirement plan sponsors and plan participants. For example, suggestions by human resources employees or call centers to plan sponsor employees regarding (1) whether to save in the plan,⁴ (2) rollovers, or (3) investments will often be fiduciary advice under the preamble. This in turn requires the plan sponsor to oversee very closely human resources employees and call centers. In the absence of such effective oversight, the plan sponsor can have (1) liability for inadequate oversight of a fiduciary, and (2) co-fiduciary liability for the fiduciary breaches of both.

The net effects of the above would be (1) far less access by employees to helpful assistance, leading to worse results, such as cashing out on termination of employment, and (2) higher costs and liabilities for plan sponsors, which translates into lower levels of benefits.

VI. Fifth Circuit: a fiduciary relationship must be a “relationship of trust and confidence,” which requires advice be provided in accordance with the five-part test. In light of the stunning new interpretation of the five-part test, it is important to review the Fifth Circuit decision and its enshrinement of the original five-part test in determining whether an individual or entity is an investment advice fiduciary. Such a review highlights why the preamble’s dismantling of the five-part test cannot be reconciled with the Fifth Circuit decision. In short, the preamble language is plainly invalid under the Fifth Circuit decision, in addition to being invalid as inconsistent with the language of the regulation.

VII. Extensive modifications of five-part test violate the Administrative Procedure Act. As discussed above, the preamble attempts to eliminate three foundational prongs of the five-part test. It is clear that DOL does not have the authority to substantively change the regulatory five-part test in this way without a formal proposal to modify the test, subject to the notice-and-comment rulemaking requirements of the APA. Even then, DOL would have no power to make this change retroactive, as it has done in the preamble.

VIII. Modification of five-part test fails to follow the President’s 2017 Fiduciary Duty Rule Memorandum and violates three Executive Orders.

A. Failure to Follow President Trump’s 2017 Fiduciary Duty Rule Memorandum. Within days of taking office in 2017, President Trump issued a memorandum ordering the Secretary of Labor to review the 2016 fiduciary rule to determine whether it would adversely affect the ability of Americans to gain access to retirement information and financial advice, and to prepare an updated economic and legal analysis of the rule.

⁴ By encouraging employees to join the plan, one is specifically recommending that employees invest in the available plan investment menu, instead of investing outside the plan menu; this does not fall within the definition of investment education under Interpretive Bulletin 96-1.

Although the Fifth Circuit’s decision invalidating the 2016 fiduciary rule made it unnecessary for DOL to rescind or revise the 2016 regulation, the preamble’s discussion of the five-part test clearly fails to follow the President’s 2017 Fiduciary Duty Rule Memorandum by attempting to effectively reinstate the 2016 rule without addressing any of the President’s concerns.

B. Violation of Executive Order 13891 prohibiting guidance documents from creating binding obligations. On October 9, 2019, President Trump issued Executive Order 13891, Promoting the Rule of Law Through Improved Agency Guidance Documents (“EO 13891”). This order is intended to prevent agencies from inappropriately using their authority to regulate the public without following the rulemaking procedures of the APA.

By effectively rewriting the five-part test for fiduciary investment advice, the preamble attempts to impose new legally binding requirements on the public without following the requirements imposed by the APA.

C. Violation of Executive Order 13771 requiring offsets for new regulatory costs. On January 30, 2017, President Trump issued Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs (“EO 13771”). This order has commonly been referred to as the President’s “2-for-1” Executive Order.

The preamble’s newly announced interpretations of the five-part test do not comply with EO 13771. Although DOL’s preamble discussion of the five-part test is a regulatory action subject to the requirements of EO 13771, there is no indication that DOL has (1) formally considered the regulatory costs associated with its new interpretations, (2) planned deregulatory actions to offset those costs, or (3) specifically identified any deregulatory action beyond its proposed exemption.

D. Violation of Executive Order 13924 instructing agencies to promote economic recovery. On May 19, 2020, President Trump issued Executive Order 13924, Regulatory Relief to Support Economic Recovery (“EO 13924”), instructing the agencies to reduce regulatory burdens to economic recovery from the current crisis. DOL’s preamble modifications of the five-part test directly contradict this policy by attempting to impose costly new fiduciary obligations on firms and individuals that would not have otherwise been regarded as fiduciaries for purposes of ERISA and the Code.

IX. DOL’s proposed exemption.

This letter only addresses a few key issues under the proposed exemption, because the focus of the letter is on the preamble language rewriting the five-part test. We generally support the concerns of the financial services trade associations regarding additional issues under the proposed exemption.

A. Acknowledgment of fiduciary status should not be required.

- **Advantages of deleting the requirement.** DOL’s policy goals and the interests of participants would be served by deleting this requirement. One of the goals of the exemption should be to maximize the amount of advice that adheres to its impartial

conduct standards and other requirements, even by firms that are not fiduciaries. By requiring acknowledgment of fiduciary status, DOL is dramatically reducing the scope of the firms that will implement the impartial conduct standards and other requirements..

- **No such requirement in other investment advice class exemptions issued by the DOL.** A review of all the investment advice class exemptions modified by DOL in 2016 reveals that none of them currently require acknowledgment of fiduciary status. This type of requirement is a remnant of the failed 2016 set of rules, which caused such damage to access to retirement assistance, as described below.
- **Fiduciary acknowledgment would increase liability for advice providers and costs for retirement investors.**
 - **Exposure to far greater liability and private causes of action under ERISA.** What does a financial institution do if it is, for example, 70% sure that it is not a fiduciary? Because the risks of being wrong are so extreme, such a financial institution may have to use the exemption and acknowledge fiduciary status. By doing so, the financial institution is opening itself up to a broad array of fiduciary liabilities and private rights of action. This is directly contrary to the statement in the preamble that “[t]he Department does not intend the fiduciary acknowledgment or any of the disclosure obligations to create a private right of action as between a Financial Institution or Investment Professional and a Retirement Investor and it does not believe the exemption would do so.”
 - **Exposure to state law fiduciary causes of action.** By accepting fiduciary status, financial institutions will make themselves vulnerable to state law fiduciary causes of action (and exacerbate the problems being created by the evolving patchwork of state fiduciary rules). This is again directly contrary to the statement in the preamble to the proposed exemption. And it is again reminiscent of the failed 2016 rule, which relied heavily on state law class actions for enforcement, which was a major reason that it led to such a large reduction in access to advice.
 - **Result of increased liability: less access to investment assistance.** The increased liability described above would have a very direct effect on access to investments assistance. The 2016 fiduciary rule’s creation of enormous new liabilities led directly to the dramatic reduction in access, as documented below.
- **Individual confusion.** There is increasing recognition that individuals do not understand the term “fiduciary,” as reflected in the extensive work done by the SEC on this issue in the preamble to the Form CRS Relationship Summary. So, the acknowledgment of “fiduciary” status will not only not provide material help to individuals and others, but may well confuse them.
- **Opposition to disclosing obligations under the exemption.** We are very concerned that a requirement to disclose the exemption requirements, as discussed in the preamble, could give rise to private rights of action, as under the 2016 fiduciary rule.

B. New regulatory burden inconsistent with Regulation Best Interest. The exemption requires financial institutions to document the basis for all rollovers. The SEC took a far more tailored approach by (1) not prescriptively requiring any specific documentation, and (2) simply encouraging documentation with respect to significant decisions, such as rollovers from plans to

IRAs. We urge DOL to align its approach with the standard adopted by the SEC to further consistency and to eliminate unnecessary burdens.⁵

C. Unworkable burden regarding rollover advice. In order to provide rollover advice, the exemption requires IRA providers to have detailed information about retirement plans that they have no access to, and that many participants are generally unable to find and provide. Nor do IRA providers have any way to make reasonable estimates to fulfill the exemption requirements. And unlike Regulation Best Interest, a failure to meet these conditions can give rise to a private right of action, including class actions. So, the proposed exemption exposes IRA providers to potential class actions without any means to avoid such actions other than not providing rollover assistance.

This is an unjustified result. The requirements for rollover advice must be based on information that IRA providers have or have legal access to.

D. Other available investments. As discussed in detail below, DOL should clarify the duty under the best interest standard to consider other available investments, which obviously does not mean consideration of all such investments. We urge DOL to clarify this issue in the same manner that the SEC did.

E.. New burdensome definition of independence. The exemption does not apply if the financial institution or investment professional providing advice to a plan is a named fiduciary or plan administrator of the plan, unless the financial institution or investment professional was selected to provide advice by an “independent” plan fiduciary. For this purpose, the preamble to the exemption establishes in a footnote an unprecedented and restrictive rule regarding the definition of independence, far more restrictive than any definition ever used by DOL. This needs to be addressed, as discussed further below.

This is the end of the summary of our concerns. Set forth below is the existing five-part test, followed by a fuller discussion of our views and concerns.

EXISTING FIVE-PART TEST

Under ERISA and the Code, a fiduciary is defined in relevant part as a person who “renders investment advice for a fee or other compensation, direct or indirect, with respect to moneys or other property of [a] plan”. The five-part regulatory test below states that a person shall be deemed to be rendering “investment advice” for this purpose, only if:

Such person renders advice to the plan as to the value of securities or other property, or makes recommendations as to the advisability of investing in, purchasing, or selling securities or other property; and . . . Such person either directly or indirectly (e.g., through or together with any affiliate) -- . . . Renders any [such] advice . . . on a regular basis to the plan pursuant to a mutual agreement, arrangement, or understanding, written or otherwise, between such person and the plan or a fiduciary with respect to the plan,

⁵ 85 Fed. Reg. 40834, 40844 (July 7, 2020).

that such services will serve as a primary basis for investment decisions with respect to plan assets, and that such person will render individualized investment advice to the plan based on the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan assets. [highlighting added]

DISCUSSION

I. Complete rewrite of five-part test. Unlike the five-part test that appears in the Code of Federal Regulations (copied above), the preamble to the proposed exemption does not, of course, have the force of law. On the contrary, on its face, it is sub-regulatory guidance that sets forth DOL's position on the interpretation of the five-part test.

However, it is not really an interpretation of the five-part test. On the contrary, as discussed below, it attempts to effectively repeal three components of the five-part test that was enshrined by the Fifth Circuit decision. As such, it is a clear violation of the APA, which requires substantive regulations (i.e., "legislative rules") to be proposed formally and subject to notice and comment. Thus, the preamble language attempting to modify the five-part test is clearly invalid.

We ask that the final exemption repudiate the preamble language in the proposed exemption and stay otherwise silent on the interpretation of the five-part test. The five-part test has been in effect for over 40 years and no additional guidance is needed on it. This repudiation could be easily done through language such as the following:

We received a number of comments regarding the language in the preamble with respect to the application of the five-part test. The intent of that preamble language was to provide additional guidance, but commentators have indicated that the language has instead resulted in confusion. Accordingly, we are withdrawing that language and urge commenters to continue to raise issues with us as to how the five-part test might apply in particular circumstances.

We also ask that any modification of the position taken in AO 2005-23A be done through a prospective regulatory process as was done in 2016.

A. Effective elimination of the mutual understanding and primary basis tests. The preamble to the proposed exemption states that: when "financial service professionals make recommendations to a Retirement Investor, particularly pursuant to a best interest standard such as the one in the SEC's Regulation Best Interest, or another requirement to provide advice based on the individualized needs of the Retirement Investor, the parties typically should reasonably understand that the advice will serve as at least a primary basis for the investment decision."

Effectively, this indicates that if a financial professional makes any individualized recommendation to a retirement plan participant, IRA owner, or beneficiary, there will "typically" be a mutual understanding that the advice is at least a primary basis for the investment decision. That is simply wrong. Since millions of recommendations are made

without any mutual agreement of any reliance, the above preamble statement is effectively attempting to repeal the mutual understanding and primary basis tests.

The preamble further states that these prongs will typically be satisfied, particularly when a recommendation is subject to Regulation Best Interest. Regulation Best Interest applies to all recommendations, without regard to whether the parties have any mutual understanding of any reliance, much less reliance that would satisfy a primary basis test. There is nothing in the hundreds of pages of guidance from the SEC that suggests in any way that any mutual understanding of any reliance is necessary for Regulation Best Interest to apply.

Thus, the clear effect of the above-quoted guidance is to attempt to void the mutual understanding and primary basis tests by treating them as met where there is no mutual understanding of any reliance.

B. Unprecedented and unworkable new definition of regular basis. The preamble adopts a completely unprecedented and unworkable interpretation of the regular basis part of the five-part test:

The Department also recognizes that advice to roll over Plan assets can occur as part of an ongoing relationship or an anticipated ongoing relationship that an individual enjoys with his or her advice provider. . . . Similarly, advice to roll assets out of the Plan into an IRA where the advice provider will be regularly giving financial advice regarding the IRA in the course of a more lengthy financial relationship would be the start of an advice relationship that satisfies the “regular basis” requirement. . . . And it is more than reasonable, as discussed below, that the advice provider would anticipate that advice about rolling over Plan assets would be “a primary basis for [those] investment decisions.” . . . [F]or an investment advice provider who establishes a new relationship with a Plan participant and advises a rollover of assets from the Plan to an IRA, the rollover recommendation may be seen as the first step in an ongoing advice relationship that could satisfy the regular basis prong of the five-part test depending on the facts and circumstances.

It is important to recognize what this is really saying. Under this approach, assume that a broker-dealer solicits a rollover as a salesperson, hoping that the rollover occurs and that the relationship with the customer will flourish. But at the time of the solicitation of the rollover, there is no relationship at all between the customer and the broker-dealer. Under the preamble approach, if the relationship grows over the next year or two, apparently, the broker-dealer’s original solicitation retroactively becomes a fiduciary act, satisfying the regular basis test and the mutual understanding and primary basis tests, which, as noted, have effectively been voided under the proposed preamble.

In the case of an investment adviser, the solicitation of any rollover will be automatically fiduciary advice under the preamble language because there is an agreement for the adviser to provide ongoing advice. This is true for both past and future solicitations, since the preamble language purports to be simply interpreting a test that has been in effect since the 1970s.

The problems with this language in the preamble extend far beyond the rollover context. For example, an investment adviser responding to a Request for Proposal would be soliciting the transfer of assets to an account over which the adviser would have discretionary control. If the solicitation is successful, and an ongoing relationship begins, the solicitation would retroactively become a fiduciary act and a prohibited transaction. Under the preamble language, this would be true both prospectively and retroactively.

In brief:

- *Retroactive application of fiduciary status based on future actions is completely unworkable.*
- *This stunning new interpretation is unprecedented.*
- *This approach is flatly inconsistent with the Fifth Circuit decision, which conditions fiduciary status on a relationship of trust and confidence; at the time of the original rollover solicitation, such a relationship simply does not exist.*
- ***This approach is flatly inconsistent with the real five-part test. At the time of the rollover solicitation, there is no regular advice being provided, and no mutual understanding that the solicitation will be a primary basis for decision-making by a customer who has no prior relationship with the broker-dealer or adviser.***

C. Dramatic modification of the meaning of “regular basis.” The preamble also substantially modifies the definition of regular basis:

For example, in circumstances in which the advice provider has been giving financial advice to the individual about investing in, purchasing, or selling securities or other financial instruments, the advice to roll assets out of a Plan is part of an ongoing advice relationship that satisfies the “regular basis” requirement. . . . ***[T]he regular basis prong of the five-part test would be satisfied when an entity with a pre-existing advice relationship*** with the Retirement Investor advises the Retirement Investor to roll over assets from a Plan to an IRA.

This language categorically states that if there is a pre-existing advice relationship, the regular basis test is met. That is simply wrong and unprecedented. A pre-existing advice relationship may be sporadic or episodic or occasional. A regular basis means a regular basis. The preamble simply changes the law retroactively in a stunning way.

D. Effective elimination of regular basis test. The two above-quoted parts of the preamble effectively repeal the regular basis test. Here is why. Every financial professional wants to develop an ongoing relationship with her customers. If that happens, then under the preamble language, the first recommendation is retroactively a fiduciary act, so the professional will need to treat the first recommendation as a fiduciary act and use the prohibited transaction exemption, which includes acknowledgment of fiduciary status. Effectively, financial professionals are forced into choosing between accepting fiduciary status or foregoing any future relationship with their customers. Thus, as a practical matter, the regular basis test under the preamble language is effectively eliminated.

E. Direct conflict with descriptions in 2016 preamble of mutual understanding and primary basis tests. As noted above, our request is to simply repudiate the preamble language and otherwise be silent on the five-part test. If the decision is made to try to correct the preamble language instead, the guidance in the 2016 preamble with respect to the meaning of the five-part test should be followed.

The 2020 preamble takes a new view of the significance of written agreements regarding whether advice is a primary basis for decision-making. The 2020 preamble states that:

the determination of whether there is a mutual agreement, arrangement, or understanding that the investment advice will serve as a primary basis for investment decisions is appropriately based on the reasonable understanding of each of the parties, if no mutual agreement or arrangement is demonstrated. Written statements disclaiming a mutual understanding or forbidding reliance on the advice as a primary basis for investment decisions are not determinative, although such statements are appropriately considered in determining whether a mutual understanding exists.⁶

On the other hand, the 2016 preamble relies heavily on the effectiveness of written disclaimers of such an understanding in justifying the need for a new fiduciary definition:

Under the five-part test, fiduciary status can also be defeated by arguing that the parties did not have a mutual agreement, arrangement, or understanding that the advice would serve as a primary basis for investment decisions. Investment professionals in today's marketplace frequently market retirement investment services in ways that clearly suggest the provision of tailored or individualized advice, while at the same time disclaiming in fine print the requisite "mutual" understanding that the advice will be used as a primary basis for investment decisions.⁷

If such disclaimers were ineffective, there would have been no reason for DOL to cite such disclaimers in justifying the 2016 rule. DOL is changing its position on the effectiveness of such disclaimers in the 2020 preamble, without any discussion of the nature of the change or the reasons for change, or even acknowledging the change. In our view, written disclaimers were effective prior to the 2016 change, as acknowledged by DOL, and they remain effective under the Fifth Circuit decision.

II. Effective retroactive reinstatement of 2016 fiduciary guidance. As explained above, because the preamble attempts to effectively repeal the mutual understanding, primary basis, and regular basis tests, all that is required to trigger fiduciary status is an individualized recommendation. This would effectively reinstate the main part of the 2016 fiduciary definition, in direct conflict with the Fifth Circuit decision. And such reinstatement would be fully retroactive to the 1970s since the preamble purports to be an interpretation of past and present law.

⁶ 85 Fed. Reg. 40834, 40840 (July 7, 2020).

⁷ 80 Fed. Reg. 21927, 21934 (April 20, 2015); 81 Fed. Reg. 20945, 20955 (April 8, 2016).

In this context, it is important to consider the damage done by the 2016 rule. There is extensive data showing the very real harm that the 2016 rule did to low- and middle-income individuals. Please see the Appendices for more complete data on this harm. But below, we provide some key examples:

- **10.2 million accounts harmed.** The national accounting firm Deloitte studied 21 financial institutions that represented 43% of U.S. financial advisors and 27% of the retirement savings assets in the market. The study found that as of the DOL rule's first applicability date on June 9th, *53% of study participants reported limiting or eliminating access to brokerage advice for retirement accounts, which the firms estimated as impacting 10.2 million accounts and \$900 billion AUM.*
- **68% report harm to small accounts.** In a Harper Polling survey of 600 financial professionals, 68% reported that they or their institutions would take on fewer small accounts.
- **75% report taking on fewer small clients.** A NAIFA survey of 1,093 members found that nearly 75% of financial professionals experienced or expected to experience an increase in the minimum account balances for the clients they serve.
- **Small employers and small accounts harmed.** A survey of Insured Retirement Institute ("IRI") members found that "more than 60 percent of the distribution firms that participated in the Survey have, are planning to, or are considering exiting or de-emphasizing target markets such as small IRA holders and small retirement plan sponsors."
- **Devastating effect on small accounts projected.** The consulting firm of A.T. Kearney projected that, by 2020, broker-dealer firms would collectively stop serving the majority of the \$400 billion then held in low-balance retirement accounts.

III. Retroactive interpretation of rollover advice. The retroactive application of DOL's new interpretations is equally alarming in the case of its sudden reversal indicating that DOL now believes that the analysis in AO 2005-23A was incorrect. Because DOL's reversal purports to interpret ERISA and the 1975 five-part test, DOL's new guidance on this issue is fully retroactive back to the 1970s.

This sudden reversal is grossly unfair because firms could not have possibly prepared for this interpretation. Any reasonable preparation would have required firms to take actions that were inconsistent with published guidance from DOL.

DOL's retroactive change of heart on rollover advice is not only unfair, it is also inconsistent with the positions reflected in DOL's 2016 fiduciary rule. That rule expanded the regulatory definition of investment advice to expressly include "recommendations with respect to rollovers, transfers, or distributions from a plan or IRA, including whether, in what amount, in what form, and to what destination such a rollover, transfer, or distribution should be made." In the preamble to the 2016 rule, DOL explained that its 2016 rule "superseded" AO 2005-23A.

DOL's characterization of the 2016 rule as "superseding" AO 2005-23A reflects two important points regarding DOL's recent reversal on rollover advice. First, the 2016 preamble discussion indicates that DOL believed a change to the Code of Regulations was necessary, or at least the most appropriate way, to reverse AO 2005-23A, given the tremendous impact that this reversal would have on regulated financial professionals. Otherwise, DOL could have simply revoked AO 2005-23A in 2016 (or earlier). Second, even DOL's 2016 rule would not have retroactively imposed fiduciary duties on financial professionals based on rollover recommendations prior to the final rule's applicability date. That appreciation for regulatory fairness was appropriate; the unfairness of a retroactive revocation of AO 2005-23A is equally inappropriate.

IV. Overly broad interpretation of "for a fee or other compensation". The preamble states:

In addition to satisfying the five-part test, a person must receive a fee or other compensation to be an investment advice fiduciary. The Department has long interpreted this requirement broadly to cover "all fees or other compensation incident to the transaction in which the investment advice to the plan has been rendered or will be rendered." The Department previously noted that "this may include, for example, brokerage commissions, mutual fund sales commissions, and insurance sales commissions." In the rollover context, fees and compensation received from transactions involving rollover assets would be incident to the advice to take a distribution from the Plan and to roll over the assets to an IRA. If, under the above analysis, advice to roll over Plan assets to an IRA is fiduciary investment advice under ERISA, the fiduciary duties of prudence and loyalty would apply to the initial instance of advice to take the distribution and to roll over the assets. Fiduciary investment advice concerning investment of the rollover assets and ongoing management of the assets, once distributed from the Plan into the IRA, would be subject to obligations in the Code. For example, a broker-dealer who satisfies the five-part test with respect to a Retirement Investor, advises that Retirement Investor to move his or her assets from a Plan to an IRA, and receives any fees or compensation incident to distributing those assets, will be a fiduciary subject to ERISA, including section 404, with respect to the advice regarding the rollover.⁸

This continues DOL's unfounded expansion of "for a fee or other compensation." For example, in the rollover context, any fees generated are not generated by the rollover but rather by investments subsequently made, which is a separate decision from the decision to roll over. If there is no fee for the rollover advice, the rollover advice cannot be fiduciary advice.

The Fifth Circuit said it best:

the [statutory definition of a fiduciary] rejects "*any* advice" in favor of the activity of "render[ing] investment advice for a fee." Stockbrokers and insurance agents are compensated only for completed sales ("directly or indirectly"), not on the basis of their

⁸ 85 Fed. Reg. 40834, 40840 (July 7, 2020) (without footnotes).

pitch to the client. Investment advisers, on the other hand, are paid fees because they “render advice.” The statutory language preserves this important distinction.⁹

DOL obliterates this distinction and treats the “fee or other compensation” requirement as met by commissions and other fees that are simply not paid for advice, as so clearly stated by the Fifth Circuit. The mistaken language in the preamble needs to be repudiated with respect to both rollovers and other advice for which compensation is not paid.

We recognize that this would be a change to DOL’s longstanding position. However, unlike the five-part test, this position is not in the regulations; moreover, DOL’s position is clearly inconsistent with the statute.

V. Effect on retirement plan sponsors and participants. By effectively resurrecting the 2016 fiduciary rule, the preamble would also resurrect the host of problems raised by that rule for retirement plan sponsors. A comprehensive list of such issues would require a far longer letter, but here are a few examples.

- **Encouragement to employees to save in a retirement plan can easily be a fiduciary act under the preamble, turning human resources employees into fiduciaries.** Many employers are actively engaged in encouraging employees to save for retirement. As demonstrated below, this can easily be a fiduciary act by a human resources employee under the preamble’s version of the five part-test.
 - **Is such encouragement advice regarding the advisability of investing in securities or other property?** Yes, since it is advice to invest in the funds available under the plan.
 - **Is it provided on a regular basis?** Yes, under the preamble, if the human resources employee has a pre-existing relationship of providing suggestions like this to the employee being encouraged to save for retirement.
 - **Is there a mutual understanding?** Yes, according to the preamble, there is generally a mutual understanding whenever there is an individualized recommendation.¹⁰
 - **Does the mutual understanding mean that the advice is a primary basis for decision-making?** Yes, according to the preamble, the primary basis test is met whenever there is an individualized recommendation.
 - **Is the advice individualized?** Increasingly, the advice being provided is being personalized based on each employee’s situation. So, yes in many situations.
 - **Is the advice being given for a fee or other compensation?** DOL has, as noted, always had an overly expansive view of this issue and made it clear in 2016 that if a human resources employee is compensated for helping plan participants, then the employee’s compensation satisfies the fee or other compensation requirement.
- Suggestions by human resources employees to participants regarding rollovers or investments can easily be fiduciary acts under the same analysis above.

⁹ *Chamber v. Dept. of Lab.*, 885 F.3d at 373.

¹⁰ The preamble’s language focuses on financial services professionals but there is no principled reason why the preamble’s analysis would not apply to a trusted human resources expert.

- Suggestions by call centers to employees regarding saving for retirement, rollovers, or investments can easily be fiduciary acts under the same analysis, thus leading to much less call center assistance.
- By reason of being the one to hire both the human resources employees and the call center, the plan sponsor has a fiduciary duty to oversee their fiduciary advice and can have (1) corresponding fiduciary exposure for inadequate oversight of a fiduciary, and (2) co-fiduciary liability for their breaches.
- The net effects of the above would be (1) far less access by employees to helpful assistance, leading to worse results, such as cashing out on termination of employment, and (2) higher costs and liabilities for plan sponsors, which translates into lower levels of benefits.

VI. Fifth Circuit: a fiduciary relationship must be a “relationship of trust and confidence,” which requires advice be provided in accordance with the five-part test. In light of the stunning new interpretation of the five-part test, *it is important to review the Fifth Circuit decision and its enshrinement of the original five-part test in determining whether an individual or entity is an investment advice fiduciary.* Such a review highlights why the preamble’s dismantling of the five-part test cannot be reconciled with the Fifth Circuit decision.

The core of the Fifth Circuit’s holding was that a fiduciary relationship, even when based on the provision of investment advice, must be a relationship of trust and confidence:

Had Congress intended to abrogate both the cornerstone of fiduciary status—the relationship of trust and confidence—and the widely shared understanding that financial salespeople are not fiduciaries absent that special relationship, one would reasonably expect Congress to say so.

The court explained that the five-part test was integral to determining whether such a fiduciary relationship existed, citing approvingly DOL’s original explanation of the regulation:

And the phrase [in the statute] “investment advice for a fee” and similar phrases generally referenced a fiduciary relationship of trust and confidence between the adviser and client.

To begin with, DOL itself reflected this understanding in its 1975 definition of an “investment advice fiduciary.” There, DOL explained that a “fee or other compensation” for the rendering of investment advice under ERISA “should be deemed to include all fees or other compensation incident to the transaction in which the investment advice to the plan has been rendered or will be rendered.” . . . DOL went on to say that this “may include” brokerage commissions, but only if the broker-dealer who earned the commission otherwise satisfied the regulation’s requirements that the broker-dealer provide individualized advice on a regular basis pursuant to a mutual agreement with his client. Later, DOL reiterated that “the receipt of commissions by a broker-dealer which performs services in addition to that of effecting or executing securities transactions for a plan is not necessarily dispositive of whether the broker-dealer received a portion of such compensation for the rendering of ‘investment advice.’” DOL Advisory Opinion 83-60A (Nov. 21, 1983) . . . Instead, ***“if, under the particular facts and circumstances,***

the services provided by the broker-dealer include the provision of ‘investment advice’ as defined by the regulation—i.e. on a regular basis pursuant to a mutual agreement to provide individualized advice—only then “may [it] be reasonably expected that, even in the absence of a distinct and identifiable fee for such advice, a portion of the commissions paid to the broker-dealer would represent compensation for the provision of such investment advice.” Id. (emphasis added).

DOL’s [2016] invocation of two dictionary definitions of “investment” and “advice” pales in comparison to this historical evidence.¹¹

The court’s approval of this analysis is clear. In order for there to be a fiduciary relationship of confidence and trust, advice must be given on a “regular basis” pursuant to the “mutual agreement” described in the regulation, which is an agreement that the advice will “serve as a primary basis for investment decisions” and will be individualized.

In short, the court very squarely held that the regular basis, mutual agreement, and primary basis, prongs of the five-part test are indispensable elements of a reasonable and valid regulatory definition of a fiduciary. The preamble to the proposed exemption would eviscerate the five-part test enshrined by the Fifth Circuit by repealing those three tests, thus resulting in an invalid definition of fiduciary investment advice under the preamble.

VII. Extensive modifications of five-part test violate the Administrative Procedure Act. The preamble’s discussion of the five-part test does not merely clarify the meaning of the five-part test. Rather, for all of the reasons discussed in this letter, the preamble attempts to effectively write out three foundational prongs of the five-part test that have long been set forth in the Code of Federal Regulations. This invalid action violates the APA.

Under the APA, “legislative” rules are subject to the APA’s notice-and-comment rulemaking requirements.¹² By comparison, “interpretive” rules are not subject to those requirements. In distinguishing “legislative rules” from “interpretive rules” for APA purposes, the United States Court of Appeals for the District of Columbia Circuit has explained that a purported “interpretive rule” is a “legislative rule” subject to the APA’s notice-and-comment requirements if: (1) *in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties*; (2) the agency has published the rule in the Code of Federal Regulations; (3) the agency has explicitly invoked its general legislative authority; or (4) *the rule effectively amends a prior legislative rule.*¹³

¹¹ *Chamber v. Dept. of Lab.*, 885 F.3d at 373-76.

¹² 5 U.S.C. 553.

¹³ *Am. Min. Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993); *see also Chao v. Rothermel*, 327 F.3d 223, 227 (3d Cir. 2003) (“Legislative” rules that impose new duties upon the regulated party have the force and effect of law and must be promulgated in accordance with the proper procedures under the Administrative Procedures Act (APA) . . . If the Guidelines have a substantive adverse impact on the challenging party, they are “legislative.”).

Under this standard, DOL’s new interpretation of the five-part test is a legislative rule that can only be promulgated in accordance with the APA’s notice-and-comment procedures because: (1) it attempts to amend the 1975 five-part test described in the Code of Federal Regulations; and (2) in its absence, there would be no legislative basis for imposing fiduciary obligations on the individuals and entities that would be covered by DOL’s new interpretation. Accordingly, the APA prohibits DOL from simply announcing this new interpretation in the preamble of its proposed exemption.¹⁴

Furthermore, the APA prohibits DOL from imposing its new interpretation on the regulated community retroactively. As the Supreme Court has explained, unless Congress has specifically conveyed retroactive rulemaking power to a federal agency, Congress’s grant of legislative rulemaking authority to such agency does not encompass the power to promulgate retroactive rules.¹⁵ This prohibition on retroactive rulemaking applies regardless of whether an agency rule is a legislative rule amending the Code of Federal Regulations or an interpretive rule.¹⁶

VIII. Modification of five-part test fails to follow the President’s 2017 Fiduciary Duty Rule Memorandum and violates three Executive Orders.

A. Failure to Follow President Trump’s 2017 Fiduciary Duty Rule Memorandum. Within days of taking office in 2017, President Trump issued a memorandum ordering the Secretary of Labor to review the 2016 fiduciary rule to determine whether it would adversely affect the ability of Americans to gain access to retirement information and financial advice, and to prepare an updated economic and legal analysis of the rule. If the review concluded that the 2016 fiduciary rule would harm investors by reducing access to financial advice, disrupt the retirement industry in a way that would adversely affect investors or retirees, increase litigation, or increase the price that investors must pay to gain access to retirement services, the President’s memorandum ordered the Labor Secretary to propose a regulation that would rescind or revise the 2016 rule. This memorandum is generally referred to as the Fiduciary Duty Rule Memorandum.¹⁷

As discussed above, the preamble’s discussion of the five-part test would attempt to resurrect the 2016 definition of fiduciary investment advice and thus would lead to many of the same harms that were created for investors and financial institutions as firms prepared to implement the 2016

¹⁴ Because the preamble to the proposed exemption is sub-regulatory guidance, which generally does not have the same force and effect as a duly promulgated regulation, DOL may mistakenly believe that its newly announced interpretation is not subject to the notice-and-comment rulemaking procedures described in 5 U.S.C. 553. This view, for the reasons discussed in this section, is wrong. For purposes of the APA’s notice-and-comment rulemaking procedures, DOL cannot impermissibly elevate the form of its new preamble interpretation over its substance – i.e. a de facto attempt to amend its 1975 five-part test.

¹⁵ *Bowen v. Georgetown U. Hosp.*, 488 U.S. 204, 208 (1988) (“Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result . . . By the same principle, a statutory grant of legislative rulemaking authority [to an agency] will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress.”).

¹⁶ *Beazer E., Inc. v. U.S. E.P.A., Region III*, 963 F.2d 603, 609 (3d Cir. 1992) (explaining that the APA expressly prohibits agencies from retroactively imposing an interpretive rule upon a regulated party).

¹⁷ 82 Fed. Reg. 9675 (February 7, 2017).

rule. Specifically, as discussed above, it would result in a reduction of financial advice, disruptions of the retirement industry in ways that would adversely affect investors and retirees, increased litigation, and an increase in the prices that investors would pay to gain access to retirement services. Although the Fifth Circuit’s decision invalidating the 2016 fiduciary rule made it unnecessary for DOL to rescind or revise the 2016 regulation, the preamble’s modifications of the five-part test clearly fail to follow the President’s 2017 Fiduciary Duty Rule Memorandum by effectively reinstating the 2016 rule without addressing the President’s concerns.

We strongly urge DOL to repudiate its attempted modifications of the five-part test in light of the President’s 2017 Fiduciary Duty Rule Memorandum and the information it collected as part of a request for information that was intended to support the study required by the President’s memorandum.¹⁸ As mentioned above, our letter includes Appendices summarizing the extensive harm created by the 2016 fiduciary rule to aid DOL in this review.

B. Violation of Executive Order 13891 prohibiting guidance documents from creating binding obligations. On October 9, 2019, President Trump issued Executive Order 13891, Promoting the Rule of Law Through Improved Agency Guidance Documents (“EO 13891”). This order is intended to prevent agencies from inappropriately using their authority to regulate the public without following the rulemaking procedures of the APA. According to EO 13891, “Agencies may impose legally binding requirements on the public only through regulations and on parties on a case-by-case basis through adjudications, and only after appropriate process, except as authorized by law or as incorporated into a contract.”

To prevent inappropriate regulation by federal agencies, EO 13891 imposes new restrictions on agencies when issuing “guidance documents.” *Specifically, EO 13891 requires agencies to treat guidance documents as non-binding both in law and in practice, except as incorporated into a contract.* For purposes of EO 13891, “guidance documents” are defined broadly to include “an agency statement of general applicability, intended to have future effect on the behavior of regulated parties, that sets forth a policy on a statutory, regulatory, or technical issue, or an interpretation of a statute or regulation.” As explained in an October 31, 2019 memorandum from the Acting Administrator of the White House’s Office of Information and Regulatory Affairs (“OIRA”), “any document that satisfies the definition of ‘guidance document’ is a guidance document, regardless of its name or format.” Thus, the preamble discussion of fiduciary investment advice clearly falls within the definition of “guidance document” for purposes of EO 13891.¹⁹

As further explained in the October 31, 2019 OIRA memorandum, “a guidance document should never be used to establish new positions that the agency treats as binding; any such requirements must be issued pursuant to applicable notice-and-comment requirements of the APA or other applicable law.” DOL’s preamble discussion of the five-part test completely disregards these

¹⁸ 82 Fed. Reg. 31278 (July 6, 2017) (“Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions”).

¹⁹ Memorandum for Regulatory Policy Officers at Executive Departments and Agencies and Managing and Executive Directors of Certain Agencies and Commissions (October 31, 2019), Q&A-2.

instructions, without explanation or justification. By effectively rewriting the five-part test for fiduciary investment advice, the preamble attempts to impose new legally binding requirements on the public without following the requirements imposed by section 553 of the APA. This action clearly defies the policies and instructions announced in EO 13891, as we presume that DOL intends to rely on these newly announced positions “in practice,” as the basis for enforcement actions.

C. Violation of Executive Order 13771 requiring offsets for new regulatory costs. On

January 30, 2017, President Trump issued Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs (“EO 13771”). This order has commonly been referred to as the President’s “2-for-1” Executive Order. Relevant to this discussion, EO 13771 states that, “whenever an executive department or agency (agency) publicly proposes for notice and comment or otherwise promulgates a new regulation, it shall identify at least two existing regulations to be repealed.” EO 13771 also states that any new incremental costs associated with new regulations shall be offset by the elimination of existing costs associated with at least two prior regulations.

Section 4 of EO 13771 defines the term “regulation” broadly to include, “an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency.” Furthermore, an April 5, 2017 memorandum from the Acting Administrator of OIRA clarifies that a regulation, for purposes of EO 13771, includes significant regulations appearing in the Code of Federal Regulations and significant guidance documents issued by federal agencies.²⁰

DOL’s preamble discussion of the five-part test clearly meets this standard because it is a significant guidance document announcing an agency statement of general applicability and future effect designed to implement, interpret, and prescribe law and policy. For purposes of the requirements imposed by EO 13771, it makes no difference that DOL has chosen to place its de facto attempt to regulate in the preamble of a proposed exemption, as opposed to formally publishing it as a proposed amendment to the Code of Federal Regulations.

The preamble’s attempted modifications of the five-part test do not comply with the policies and instructions announced in EO 13771. Although, as explained above, DOL’s preamble modifications of the five-part test are a regulatory action subject to the requirements of EO 13771, there is no indication that DOL has formally considered the regulatory costs associated with its new interpretations, planned deregulatory actions to offset those costs, or specifically identified any deregulatory action beyond its proposed exemption. A failure to perform these requisite actions would violate the policies and instructions announced in EO 13771 and should be remedied to the extent that these regulatory cost considerations have not be reviewed.

²⁰ Memorandum for Regulatory Policy Officers at Executive Departments and Agencies and Managing and Executive Directors of Certain Agencies and Commissions (April 5, 2017), Q&A-2. “Significant guidance documents” include guidance documents that may reasonably be anticipated to lead to an annual effect on the economy of \$100 million or more and guidance documents that raise novel legal or policy issues arising out of legal mandates or the President’s priorities. The preamble’s discussion of the five-part test falls within this category.

D. Violation of Executive Order 13924 instructing agencies to promote economic recovery.

On May 19, 2020, President Trump issued Executive Order 13924, Regulatory Relief to Support Economic Recovery (“EO 13924”). Through EO 13924, the President instructed agencies to address the current economic emergency created by the COVID-19 pandemic “by rescinding, modifying, waiving, or providing exemptions from regulations and other requirements that may inhibit economic recovery, consistent with applicable law and with protection of the public health and safety, with national and homeland security, and with budgetary priorities and operational feasibility.” The DOL’s preamble discussion of the five-part test directly contradicts the policy announced in EO 13924 by attempting to impose fiduciary obligations on firms and individuals that would not have otherwise been regarded as fiduciaries for purposes of ERISA and the Code. By announcing these new interpretations, DOL’s expansive definition of investment advice would increase regulatory costs imposed on those firms and individuals, thereby inhibiting economic recovery.

IX. DOL’s proposed exemption.

We appreciate the opportunity to comment on the proposed exemption, which represents an overall positive development in comparison to the amended class exemptions that DOL finalized in 2016. Further, we appreciate DOL’s efforts to align this proposal with Regulation Best Interest. To enhance investor choice, we encourage the dialogue with the SEC to continue as the DOL refines this proposal and the SEC begins the compliance phase of Regulation Best Interest, and beyond.²¹

This letter only addresses a few key issues under the proposed exemption, because the focus of the letter is on the preamble language rewriting the five-part test. We generally support the concerns of the financial services trade associations regarding additional issues under the proposed exemption.

A. Acknowledgment of fiduciary status should not be required. This requirement is onerous and unnecessary.

- **Advantages of deleting the requirement.** DOL’s policy goals and the interests of participants would be served by deleting this requirement. One of the goals of the exemption should be to maximize the amount of advice that adheres to its impartial conduct standards and other requirements, even by firms that are not fiduciaries. By requiring acknowledgment of fiduciary status, DOL is dramatically reducing the scope of the firms that will implement the impartial conduct standards and other requirements.
- **No such requirement in other investment advice class exemptions issued by the DOL.** A review of all the investment advice class exemptions modified by DOL in 2016

²¹ See the June 29, 2020 statement of SEC Chair Jay Clayton on the DOL’s proposal: “I commend the Department of Labor for their efforts to clarify and align the standards of conduct that investment professionals must follow in providing advice to Main Street investors. The proposed exemption announced today reflects in part the Commission’s constructive and ongoing engagement with the Department. I look forward to continuing our work with the Department so that collectively we can enhance investor choice and increase investor protections.”

reveals that none of them currently require acknowledgment of fiduciary status.²² This type of requirement is a remnant of the failed 2016 set of rules, which caused such damage to access to retirement assistance, as described above.

- **Fiduciary acknowledgment would increase liability for advice providers and costs for retirement investors.**

- **Exposure to far greater liability and private causes of action under ERISA.** The five-part test is the right test for fiduciary status, but it is not always clear in every situation whether it is satisfied or when it is satisfied, such as: when is advice so frequent that it satisfies the regular basis test? So, what does a financial institution do if it is, for example, 70% sure that it is not a fiduciary? Because the risks of being wrong are so extreme, such a financial institution may have to use the exemption and acknowledge fiduciary status. By doing so, the financial institution is opening itself up to a broad array of fiduciary liabilities and private rights of action that would not exist in the absence of the exemption. This is directly contrary to the statement in the preamble that “[t]he Department does not intend the fiduciary acknowledgment or any of the disclosure obligations to create a private right of action as between a Financial Institution or Investment Professional and a Retirement Investor and it does not believe the exemption would do so.”²³ On the contrary, this unnecessary requirement to acknowledge fiduciary status does give rise to a private right of action by effectively compelling many non-fiduciaries to accept fiduciary status to gain the protection of the exemption.
- **Exposure exacerbated by retroactive nature of new regular basis test.** The need for advice providers to unnecessarily acknowledge fiduciary status is only exacerbated by DOL’s new interpretations of the regular basis test. Even though clearly invalid, like the other modifications of the five-part test, such interpretations could influence behavior until officially invalidated. For example, as discussed elsewhere in this letter, the preamble to the proposed exemption indicates that an initial sale conversation between a financial professional and a retirement investor can retroactively be treated as a fiduciary act, if that initial sales recommendation flourishes into a fiduciary relationship of trust and confidence. Because advice providers cannot possibly know how their relationship will develop after the initial recommendation, advice providers will effectively be compelled to acknowledge fiduciary status just in case their initial recommendation, which was not a fiduciary act when made, is subsequently deemed to be fiduciary investment advice (i.e., as the first step in some later fiduciary relationship). In that case, the proposed condition requiring fiduciary acknowledgment would create a new private right action where no such action would exist in the absence of the exemption.
- **Preamble statement has no effect.** As illustrated above, the preamble statement regarding private rights of action has no effect. It is true that the exemption does not create a *new* right to sue based on a fiduciary breach, since that right already exists. But by effectively forcing many financial institutions to acknowledge

²² See Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, 84-24, 86-128.

²³ 85 Fed. Reg. 40834, 40844 (July 7, 2020).

fiduciary status even if they are probably not a fiduciary, the exemption is exposing many financial institutions to liabilities and private rights of action that would not otherwise exist, as illustrated above.

- **Technical foot faults under the exemption give rise to fiduciary liability.** Assume the same facts above – a firm is 70% sure that it is not a fiduciary but uses the exemption to be safe or uses the exemption in case its relationship with the customer flourishes. Due to the acknowledgment of fiduciary status, harmless technical failures to comply with every detail of the exemption can create a prohibited transaction and thus exposure to liabilities and private rights of action.
- **Exposure to state law fiduciary causes of action.** By accepting fiduciary status, financial institutions will make themselves vulnerable to state law fiduciary causes of action (and exacerbate the problems being created by the evolving patchwork of state fiduciary rules). This is again directly contrary to the statement in the preamble to the proposed exemption. And it is again reminiscent of the failed 2016 fiduciary rule, which relied heavily on state law class actions for enforcement, which was a major reason that it led to such a large reduction in access to advice.
- **Individual confusion.** There is increasing recognition that individuals do not understand the term “fiduciary,” as reflected in the extensive work done by the SEC on this issue in the preamble to the Form CRS Relationship Summary. So, the acknowledgment of “fiduciary” status will not only not provide material help to individuals and others, but may well confuse them.
- **Opposition to disclosing obligations under the exemption.** We are very concerned that a requirement to disclose the exemption requirements, as discussed in the preamble, could give rise to private rights of action.

B. New regulatory burden inconsistent with Regulation Best Interest. The exemption requires financial institutions to:

[document] the specific reasons that any recommendation to roll over assets from a Plan to another Plan or IRA . . . , from an IRA . . . to a Plan, from an IRA to another IRA, or from one type of account to another (*e.g.*, from a commission-based account to a fee-based account) is in the Best Interest of the Retirement Investor.²⁴

The SEC took a far more tailored approach by (1) not prescriptively requiring any specific documentation, and (2) simply encouraging documentation with respect to significant decisions, such as rollovers from plans to IRAs.

Similarly, we encourage broker-dealers to record the basis for their recommendations, especially for more complex, risky or expensive products and significant investment decisions, such as rollovers and choice of accounts, as a potential way a broker-dealer could demonstrate compliance with the Care Obligation.²⁵

²⁴ Proposed Exemption Section II(c)(3).

²⁵ 84 Fed. Reg. 33318, 33360 (July 12, 2019).

Clearly, some simple rollovers, like IRA to IRA rollovers, would not qualify as meriting any documentation under the more appropriate standard set forth by the SEC. We urge DOL to align its approach with the standard adopted by the SEC to further consistency and to eliminate unnecessary burdens.

C. Unworkable burden regarding rollover advice. The preamble to the exemption imposes the following requirements regarding rollover advice:

For purposes of compliance with the exemption, a prudent recommendation to roll over from an ERISA-covered Plan to an IRA would necessarily include consideration and documentation of the following: The Retirement Investor's alternatives to a rollover, including leaving the money in his or her current employer's Plan, if permitted, and selecting different investment options; the fees and expenses associated with both the Plan and the IRA; whether the employer pays for some or all of the Plan's administrative expenses; and the different levels of services and investments available under the Plan and the IRA. For rollovers from another IRA or changes from a commission-based account to a fee-based arrangement, a prudent recommendation would include consideration and documentation of the services that would be provided under the new arrangement.

In evaluating a potential rollover from an ERISA-covered Plan, the Investment Professional and Financial Institution should make diligent and prudent efforts to obtain information about the existing Plan and the participant's interests in it. If the Retirement Investor is unwilling to provide the information, even after a full explanation of its significance, and the information is not otherwise readily available, the Investment Professional should make a reasonable estimation of expenses, asset values, risk, and returns based on publicly available information and explain the assumptions used and their limitations to the Retirement Investor. The Department requests comment on whether there are any other actions the Department should or could take with respect to disclosure or reporting that would promote prudent rollover advice without overlapping existing regulatory requirements.²⁶

These requirements are simply unworkable. IRA providers have no way to obtain the needed information, and the clear experience of IRA providers is that many participants are generally unable to find and provide the information. Nor do IRA providers have any way to make reasonable estimates to fulfill the requirements. And unlike Regulation Best Interest, a failure to meet these conditions can give rise to a private right of action, including class actions. So, the proposed exemption exposes IRA providers to potential class actions without any means to avoid such actions other than not providing rollover assistance.

This is an unjustified result. The requirements for rollover advice must be based on information that IRA providers have or have legal access to.

²⁶ 85 Fed. Reg. 40834, 40845 (July 7, 2020).

D. Other available investments. DOL states in the preamble with respect to the exemption’s best interest standard:

Financial Institutions and Investment Professionals providing investment advice on proprietary products or on a limited menu would satisfy the standard provided they give complete and accurate disclosure of their material conflicts of interest in connection with such products or limitations and adopt policies and procedures that are prudently designed to prevent any conflicts of interest from causing a misalignment of the interests of the Financial Institution and Investment Professional with the interests of the Retirement Investor. This would include policies applicable to circumstances where the Financial Institution or Investment Professional prudently determines that its proprietary products or limited menu do not offer Retirement Investors an investment option in their best interest *when compared with other investment alternatives available in the marketplace.*²⁷ (emphasis added)

This language can be read to suggest that the policies must require a comparison with all available investment alternatives, which, of course, is completely unrealistic and could not have been the intent. We would suggest clarifying this issue in a manner similar to how it was clarified by the SEC in the preamble to Regulation Best Interest.

We are clarifying that an evaluation of reasonably available alternatives does not require an evaluation of every possible alternative (including those offered outside the firm) nor require broker-dealers to recommend one “best” product, and what this evaluation will require in certain contexts (such as a firm with open architecture). . . .

In terms of conducting such an evaluation, a broker-dealer does not have to conduct an evaluation of every possible alternative, either offered outside of the firm (such as where the firm offers only proprietary or other limited range of products) or available on the firm’s platform. We appreciate commenter concerns about the impracticality and potential impossibility of such a comparative evaluation, particularly where the firm offers numerous different products, many of which may have similar strategies but with other varying characteristics, including cost structures, that may apply differently based on the particular retail customer. . . . In particular, we are not requiring a natural person who is an associated person of the broker-dealer to be familiar with every product on a broker-dealer’s platform, particularly where a broker-dealer operates in an open architecture framework or otherwise operates a platform with a large number of products or options. . . . Such a requirement might not allow an associated person of a broker-dealer to develop a proper understanding of every security or investment strategy’s potential risks, rewards, or costs, and thus it might not be possible to fulfill the obligation set forth in paragraph (a)(2)(ii)(A). Furthermore, such a requirement could encourage broker-dealers to limit their product menus or otherwise restrict access to products and services currently available to retail customers, which is contrary to the purpose and goals of Regulation Best Interest. As discussed above, the determination of whether a recommendation is in the “best interest” of the retail customer and does not place the

²⁷ 85 Fed. Reg. 40834, 40847 (July 7, 2020).

interests of the broker-dealer ahead of the retail customer's interest must be based on information reasonably known to the associated person (based on her reasonable diligence, care, and skill) at the time the recommendation is made. Accordingly, in fulfilling the Care Obligation, the associated person should exercise reasonable diligence, care, and skill to consider reasonably available alternatives offered by the broker-dealer. This exercise would require the associated person to conduct a review of such reasonably available alternatives that is reasonable under the circumstances. . . . What will be a reasonable determination of the scope of alternatives considered will depend on the facts and circumstances, at the time of the recommendation, including both the nature of the retail customer and the retail customer's investment profile, and the particular associated persons or groups of associated persons that are providing the recommendations.²⁸

E. New burdensome definition of independence. The exemption does not apply if the financial institution or investment professional providing advice to a plan is a named fiduciary or plan administrator of the plan, unless the financial institution or investment professional was selected to provide advice by an "independent" plan fiduciary. For this purpose, the exemption establishes in a footnote in the preamble an unprecedented and restrictive rule regarding the definition of independence:

For purposes of this exemption, the Department would view a party as independent of the Financial Institution and Investment Professional if: (i) The person was not the Financial Institution, Investment Professional or an affiliate, (ii) the person did not have a relationship to or an interest in the Financial Institution, Investment Professional or any affiliate that might affect the exercise of the person's best judgment in connection with transactions covered by the exemption, and (iii) ***the party does not receive and is not projected to receive within the current federal income tax year, compensation or other consideration for his or her own account from the Financial Institution, Investment Professional or an affiliate, in excess of 2% of the person's annual revenues based upon its prior income tax year.***²⁹ (emphasis added)

The 2% test for independence buried in a footnote is unprecedented. For example, in Advisory Opinion 2001-09A, DOL found independence under a 5% test. DOL has also often looked to a 10% or 20% of assets under management test as a reasonable proxy for independence of an investment manager.³⁰ For example, Class Exemption 91-38 provides an exemption for transactions with parties in interest to an employee benefit plan that invests in a collective investment trust, so long as the interest of that plan (and other plans maintained by the same employer) do not exceed 10% of the assets of the collective investment trust. The use of 2% is a huge step in a restrictive new direction.

We thank you for your consideration of our views on the above issues.

²⁸ 84 Fed. Reg. 33318, 33326, 33380-82 (July 12, 2019) (footnotes omitted).

²⁹ 85 Fed. Reg. 40834, 40841 n. 46 (July 7, 2020).

³⁰ See, e.g., Class Exemption 2002-12 (20%); Individual Exemption 2015-08 (20%); Class Exemption 91-38 (10%); Class Exemption 95-60 (10%).

Sincerely,

A handwritten signature in blue ink, appearing to be 'Kent A. Mason', written in a cursive style.

Kent A. Mason

APPENDIX A: GENERAL HARM CREATED BY THE FIDUCIARY RULE

1. Deloitte & Touche Study (August 9, 2017), as described in SIFMA's August 9, 2017 comment letter

- a. *Description: a study of a cross-section of SIFMA's members, consisting of 21 financial institutions that represent 43% of U.S. financial advisors and 27% of the retirement savings assets in the market.*
- b. “[A]s of the Rule’s first applicability date on June 9th, 53% of study participants reported limiting or eliminating access to brokerage advice for retirement accounts, which the firms estimate impact 10.2 million accounts and \$900 billion AUM.”
- c. “Roughly 95% of study participants indicated that they have reduced access to or choices within the products offered to retirement savers because of efforts to comply with the Rule. Products affected include mutual funds, annuities, structured products, fixed income, private offerings, and more, impacting an estimated 28.1 million accounts. Examples of the reduction in mutual fund availability include: 1) the elimination of no-load funds from brokerage platforms; 2) the elimination of mutual funds held directly at the mutual fund company; 3) reduced product offerings; and 4) elimination of other share classes.”
- d. “Across the industry, broker-dealers will have spent more than \$4.7 billion in start-up costs relating to the Rule, much of which has already been spent.”
- e. “The ongoing costs to comply are estimated at over \$700 million annually....”

2. Harper Polling (July 2017), as described in the Financial Services Roundtable's August 10, 2017 comment letter (report and survey slides attached to letter)

- a. *Description: a national survey of 600 financial professionals conducted by phone and through online interviews from July 7-12, 2017 (July 17, 2017).*
- b. A majority of respondents reported the Rule is restricting them from serving their clients’ best interests.
- c. “Only 12% of respondents report the Rule is helping them to serve their clients best interest and 33% report there has been no impact, yet those respondents still report more complicated paperwork and fewer small accounts.” “For those who reported the Rule is helping or has had no impact on their ability to serve their clients best interests, many reported negative changes to client services by (i) servicing fewer small accounts, (ii) offering fewer investment options, (iii) including fewer mutual fund options, and (iv) higher compliance costs, including additional fees for Retirement Investors.”
- d. “Only 10% of Certified Financial Planners (CFP) report that the Rule is helping them to serve their clients best interests, and 55% report the Rule is restricting them from serving their clients best interests. This runs counter to the claim by the CFP Board of Standards that the Rule is workable for their members.”
- e. 75% of respondents whose “typical clients have starting assets under \$25,000 report that they will take on fewer small accounts due to increased compliance costs and legal risks.”
- f. 63% reported that “the fiduciary standard will definitely/probably/or has already limited investment options/products they can provide to clients.”
- g. 56% said “their firms would offer fewer mutual fund products to consumers.”

- h. "...68% reported that they or their institutions will take on fewer small accounts."
- 3. American Action Forum (AAF) (March 16, 2017 comment letter)**
- a. *Description: AAF's comments are based on: (1) an AAF staff survey of the available literature in 2015 on the likely impact of the DOL rule, as discussed in an August 4, 2015 article; (2) a September 17, 2015 AAF article; and (3) AAF research as discussed in a February 22, 2017 article.*
 - b. Found reported compliance costs of at least \$106 million in 2016, representing up-front costs from just four companies.
 - c. "[A]lmost all retail investors will see their costs increased by 73 to 196 percent due to a mass shift toward fee-based accounts."
 - d. "[F]irms providing investment advice will see an average of \$21.5 million in initial compliance costs and \$5.1 million in annual maintenance costs."
 - e. "[U]p to 7 million Individual Retirement Accounts (IRAs) would fail to qualify for an advisory account due to the balance too low to be sustainable for the advisor. In the shorter term, we found that the fiduciary rule, as written, will result in over \$1500 of duplicative fees charged per household retirement account."
 - f. "...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."
- 4. Meghan Milloy / American Action Forum (AAF) Research (April 2017), as stated on AAF's website**
- a. *Description: a research article by Meghan Milloy, Director of Financial Services Policy.*
 - b. The Rule will result in additional charges to retirement investors of approximately \$816 annually per account or over \$46 billion in aggregate.
 - c. "Although the rule has not yet become effective, AAF research has found that three major companies have left part of the brokerage business, and six more are drawing down their business or switching to a fee-based arrangement. From these companies alone, reported compliance costs have already topped \$100 million, affecting 92,000 investment advisors, \$190 billion in assets, and at least 2.3 million consumers."
- 5. Chamber of Commerce's Monitoring of Rule's Impact, as described in the Chamber's August 16, 2017 comment letter**
- a. *Description: outreach conducted by the Chamber to 14 firms that collectively manage \$10 trillion in assets.*
 - b. "[N]early all of the institutions reported excluding some investment products from retirement investors in response to the rule, largely due to concerns about the pending 'level' fee requirements of the 'full' BIC Exemption."
 - c. "Most of the institutions also reported using the 'grandfathering' provisions included in the final rule, meaning that a substantial number of investors would be prevented from receiving new investment advice going forward, unless they decide to change the type of account they have (e.g. change from a transaction-based account to a fee-based account)."

6. **NAIFA Survey of 1,093 Members (April 2017)**
 - a. Nearly 75% of financial professionals have experienced or expect to experience an increase in the minimum account balances for the clients they serve.
 - b. Nearly 90% of advisors believe consumers will need to pay more for their financial advice services.
 - c. More than 90% of financial professionals have already experienced or expect to experience restrictions of product offerings to their clients.
 - d. 68% of NAIFA's members have been told that they cannot recommend certain mutual fund classes or types to clients, and almost 70% say they cannot recommend certain annuities.

7. **LIMRA Secure Retirement Institute's Second Quarter 2017 U.S. Retail Annuity Sales Survey, as described in an August 23, 2017 LIMRA press release**
 - a. Total annuity sales for the first half of 2017 decreased 10% over the first half of 2016, the lowest first half sales since 2001.
 - b. Q2 2017 is the:
 - i. 5th consecutive quarter of decline in overall annuity sales.
 - ii. 6th consecutive quarter in which fixed annuity sales have been greater than variable annuity sales, which "hasn't happened in almost 25 years."
 - c. "A closer look at what's driving the drop in VA sales reveals qualified VA sales have experienced a more significant decline than non-qualified VAs.... VA qualified sales were down 16 percent in the second quarter, while nonqualified sales were actually up 5 percent. This could be in reaction to the DOL fiduciary rule," according to the director of annuity research.
 - d. Variable annuity sales are forecast to drop 10-15% in 2017, returning to levels not seen since 1998.

8. **LIMRA Secure Retirement Institute's First Quarter 2017 U.S. Retail Annuity Sales Survey, as described in a May 18, 2017 LIMRA press release**
 - a. Indexed annuity sales are forecast to decline 5-10% in 2017 and "another 15-20 percent in 2018 when the BICE goes into effect."

9. **LIMRA Secure Retirement Institute Study (2017), as described in NAIFA's August 4, 2017 comment letter**
 - a. "LIMRA estimates that access to guaranteed income products will decline 29% under the Rule/PTEs."

10. **Morningstar Report (2017), as described in the Insured Retirement Institute's April 17, 2017 comment letter**
 - a. Variable annuity sales declined nearly 22% from 2015 to 2016 despite a rising stock market.

11. **Survey of Insured Retirement Institute (IRI) Member Firms (July 2017), as described in IRI's August 7, 2017 comment letter**

- a. *Description: IRI surveyed a representative sampling of its insurance company and distributor members from July 18-31, 2017.*
- b. “More than 60 percent of the distribution firms that participated in the Survey have, are planning to, or are considering exiting or de-emphasizing target markets such as small IRA holders and small retirement plan sponsors.”
- c. A number of distributors reported that “approximately 155,000 of their clients have already been ‘orphaned,’ and a number of our insurer members told us that both the adviser and the firm have dissociated from the accounts of hundreds of their annuity contract owners. Far more accounts are expected to be impacted as implementation of the Rule proceeds.”

12. CoreData Report, CoreData Research UK (2016), as described in comment letter and attachment submitted by Kent Mason (August 3, 2017)

- a. *Description: a non-commissioned report based on an October 2016 survey of 552 U.S. financial advisors.*
- b. 71% of financial professionals will disengage from at least some retirement savers because of the Fiduciary Rule.
- c. 64% of financial professionals 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).
- d. On average, financial professionals estimate they will no longer work with 25% of their mass-market clients, creating an advice gap for low-balance investors.
- e. 39% of advisors believe the cost of personal financial advice will become too expensive for most investors.
- f. 32% of advisors believe that shifting away from certain products, such as annuities and non-traded REITs, is one of the biggest challenges posed by the fiduciary rule.
- g. 57% of advisors “believe increased paperwork stemming from reporting and disclosure requirements will be one of the top three challenges of the fiduciary rule.”
- h. 18% of advisors “believe preparing for potential litigation will be one of the biggest challenges they must overcome.”

13. A.T. Kearney Study (October 2016), as described in comment letter and attachment submitted by Kent Mason (August 3, 2017)

- a. *Description: a study of the effects of the Fiduciary Rule published in connection with a discussion of how the global management consultant can help financial institutions adjust to the rule.*
- b. Concludes that “[a]s firms move toward fee-based advisory, many low-balance accounts will no longer be served, shifting many assets to formats such as robo-advice and self-directed.”
- c. Recommends that broker/dealers should “[a]ccelerate the transition to fee-based services and advisory, and evaluate account thresholds to continue serving (for example, accounts greater than \$200,000).”

- d. States that “[c]ertain high-cost investment products (such as variable annuities) will be phased out as the business model is no longer viable under the new rule....”
- e. By 2020, broker-dealer firms will collectively stop serving the majority of the \$400 billion currently held in low-balance retirement accounts.
- f. Implementing the DOL’s new fiduciary rule for retirement accounts will cost the brokerage industry \$11 billion over the next four years.

14. Large Mutual Fund (2017 data), as described in the Chamber of Commerce’s April 17, 2017 comment letter

- a. *Description: an interview the Chamber conducted with a large mutual fund provider.*
- b. One mutual fund’s number of orphaned accounts (i.e., accounts without an advisor) nearly doubled in the first three months of 2017, and the average account balance in these orphan accounts is just \$21,000. The fund projects that “ultimately 16% of the accounts it services will be orphaned this year because of the Fiduciary Rule.” “Extrapolating this prediction suggests that at least 1.6 million small retirement savers have already lost access to investment assistance since January 2017, and an additional 1.6 million are likely to lose access after the Rule becomes applicable.”

15. Fidelity Clearing & Custody Solutions Poll (August 2016), as described in September 28, 2016 ThinkAdvisor article

- a. *Description: A blind online poll of 459 advisors conducted from August 18-26, 2016. Respondents consisted of 30% independent broker-dealer reps, 21% RIAs, 19% regional BD reps, 15% from wirehouse firms, 11% insurance BD reps, and 3% from banks.*
- b. 10% of advisors responding to the survey 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.”

16. 2016 Global Survey of Financial Advisors commissioned by Natixis Global Asset Management, as described on Natixis website and in survey whitepaper

- a. *Description: a survey of 2,550 advisors (including 300 in the U.S.) in 15 countries in Asia, Europe, the United Kingdom, and the Americas conducted in July 2016. The online quantitative survey was developed and hosted by CoreData Research.*
- b. 38% of respondents said they will likely “disengage with smaller clients” as a result of new regulations.
- c. Almost 80% of respondents are “concerned that more stringent regulations could limit access to financial advice for lower balance and mid-tier clients.”
- d. More than 75% of advisors surveyed “believe increased regulations could even lead to higher costs for clients.”

17. The Cerulli Report – U.S. Broker/Dealer Marketplace 2016, as described in Lincoln Financial Group’s March 17, 2017 comment letter

- a. *Description: an “in-depth analysis of broker/dealers (B/Ds) with financial advisors serving retail investors.” Available for purchase.*
- b. 66% of advisors believe that small investors will have less access to professional financial advice as a result of the rule.

18. NERA Economic Consulting’s comment on the Department of Labor Proposal and Regulatory Impact Analysis (July 17, 2015)

- a. *Description: SIFMA retained NERA Economic Consulting to review and comment on the proposed fiduciary rule. To conduct its cost study of the proposal, NERA gathered account-level data from several financial institutions, representing tens of thousands of IRA accounts that were observed from 2012 through Q1 2015.*
- b. “Using [a] conservative minimum account balance of \$25,000, over 40% of commission-based accounts in our dataset would not be able to open fee-based accounts. Using a \$50,000 threshold, over 57% of accounts would not meet minimum balance requirements for a fee-based account. If the effective threshold is \$75,000, two-thirds of account holders would be left without any professional investment advice.”

19. Chamber of Commerce company interviews, as described in the Chamber’s April 17, 2017 comment letter

- a. *Description: In-depth, structured interviews of two to five persons with about 10 investment-advisory companies, broker-dealers, insurance companies, and others affected directly or indirectly by the Fiduciary Rule.*
- b. Interviewed companies “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.”
- c. “[E]ven 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.”
- d. Insurance costs could exceed two to three times the cost estimated by the Department. Some respondents cited numbers as high as \$10,000 per professional per year for Errors and Omissions coverage.
- e. The Chamber is unaware of any “robo-advisor” that recommends annuity products to generate retirement income, despite the clear need for these products and the Department’s reliance on robo-advisors to alleviate the potential loss of access to retirement advice for small savers.

20. SIFMA survey, as described in document “New Data Shows DOL Fiduciary Rule Harming Small Retirement Savers”

- a. *Description: a survey of 25 member financial firms impacted by the Fiduciary Rule.*
- b. “More than half the firms are considering moving IRA brokerage clients to call center services only.”
- c. “44% of the respondents anticipate that more than half of their clients could see a change in services (e.g., limitation of product choice, shift to fee-based account, or shift to online only, etc.). More than 50% of responding firms anticipate offering only advisory services to a subset of their current IRA brokerage customers.”
- d. “... 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.”

21. Wall Street Journal Reports (February and April 2017), as described in the Financial Services Roundtable’s April 17, 2017 comment letter

- a. Firms have responded to the Rule by taking actions that include: (1) moving clients to fee-based accounts; (2) eliminating commission-based IRAs; (3) raising investment minimums for commission-based IRAs; (4) eliminating variable annuity products; and (5) excluding certain products from commission-based IRAs (e.g., annuities, mutual funds, and exchange-traded funds).

22. Jonathan Reuter updated analysis, as described in the American Bankers Association’s (ABA) March 15, 2017 comment letter

- a. *Description: ABA recommendations of key developments that an updated DOL analysis of the Fiduciary Rule should account for.*
- b. The author of one of the academic studies cited by the Council of Economic Advisers (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.”

APPENDIX B: HARM TO THE ANNUITY MARKET FROM THE FIDUCIARY RULE

1. **LIMRA Secure Retirement Institute's Second Quarter 2017 U.S. Retail Annuity Sales Survey, as described in an August 23, 2017 LIMRA press release**
 - a. Total annuity sales for the first half of 2017 decreased 10% over the first half of 2016, *the lowest first half sales since 2001.*
 - b. Q2 2017 is the:
 - i. 5th consecutive quarter of decline in overall annuity sales.
 - ii. 6th consecutive quarter in which fixed annuity sales have been greater than variable annuity sales, which “hasn’t happened in almost 25 years.”
 - c. “A closer look at what’s driving the drop in VA sales reveals qualified VA sales have experienced a more significant decline than non-qualified VAs.... VA *qualified sales were down 16 percent in the second quarter, while nonqualified sales were actually up 5 percent. This could be in reaction to the DOL fiduciary rule,*” (emphasis added) according to the director of annuity research.
 - d. *Variable annuity sales are forecast to drop 10-15% in 2017, returning to levels not seen since 1998.*
2. **LIMRA Secure Retirement Institute's First Quarter 2017 U.S. Retail Annuity Sales Survey, as described in May 18, 2017 LIMRA press release**
 - a. Indexed annuity sales are forecast to decline 5-10% in 2017 and “another 15-20 percent in 2018 when the BICE goes into effect,” referring to the “Best Interest Contract Exemption” under the DOL fiduciary rule.
3. **LIMRA Secure Retirement Institute Study (2017), as described in NAIFA's August 4, 2017 comment letter**
 - a. “LIMRA estimates that access to guaranteed income products will decline 29% under the [DOL Fiduciary] Rule/PTEs.” (The reference to “PTEs” is to the exemptions from the application of the Fiduciary Rule, which substantially all qualified annuities must use.)
4. **Morningstar Report (2017), as described in the Insured Retirement Institute's April 17, 2017 comment letter**
 - a. Variable annuity sales declined nearly 22% from 2015 to 2016 despite a rising stock market, which “has traditionally led to increased sales” of VAs.
5. **Insured Retirement Institute (IRI) member survey (July 2017), as described in IRI's August 7, 2017 comment letter**
 - a. “Half of the participating insurance companies reported that some of their distribution partners have already dropped the insurer’s products from their shelf as part of their efforts to implement the [Fiduciary] Rule.”
 - b. “Nearly 60 percent of the participating insurance companies expect that fee-based annuities manufactured in response to the [Fiduciary] Rule will result in higher overall fees to the consumer.”
 - c. “[A] number of our distributor members reported that approximately 155,000 of their clients have already been ‘orphaned,’ and a number of our insurer members told us that both the adviser and the firm have dissociated from the accounts of

hundreds of their annuity contract owners. Far more accounts are expected to be impacted as implementation of the Rule proceeds.”

6. Independent Insurance Agents & Brokers of America, Inc. (IIABA) Member Survey (July 2017), as described in IIABA’s August 3, 2017 comment letter

- a. “38%, or 315 respondents, answered that they personally and/or the insurance agency they work for had stopped selling or giving advice related to products impacted by the fiduciary rule, or planned to do so on or before January 1, 2018 when the [fiduciary] rule takes full effect.”
- b. “[M]ore than one third of independent insurance agents who responded to the survey will exit the market on or before January 1, 2018; and for those that remain some will offer more limited services to clients.”

7. ACLI (August 7, 2017 comment letter)

- a. “One ACLI member informed us that it has reduced its proprietary insurance product offerings by 54 percent and its non-proprietary variable annuity offerings available through its broker-dealers by 76 percent.”
- b. Consequences of the Fiduciary Rule as reported by ACLI members:
 - i. “Some banks are no longer offering access to fixed and indexed annuities, even when they are used outside the context of an employee benefit plan or IRA.”
 - ii. “Some broker-dealers are no longer offering variable annuities even to savers and retirees with non-qualified assets not subject to the Regulation.”
 - iii. “Some broker dealers are reducing the number of insurers and annuity products available on their platforms.”
 - iv. “Some firms are inquiring how quickly they can be removed as the broker dealer of record from existing annuity business.”
- c. “[T]he Regulation has already resulted in a dramatic increase of ‘orphaned’ accounts. Several ACLI member companies have already been notified by distribution partners that they will resign as agent of record to IRA and ERISA plan annuity holders. For example, one ACLI member has informed us that, since the Regulation’s June 9, 2017 applicability date, it has received ‘disassociation’ requests for 84 annuity contracts, and the reason provided for each action was the Regulation. By comparison, this member received only 3 disassociation notices during 2016, none of which included the Regulation as the basis for the disassociation.”
- d. One member reported that it has “identified over 250 small retirement plans that have lost access to guidance and advice as a result of the Regulation.”

8. NAIFA Survey of 1,093 Members (April 2017)

- a. 70% of NAIFA’s members say they cannot recommend certain annuities.

9. CoreData Report, CoreData Research UK (2016), as described in comment letter and attachment submitted by Kent Mason (August 3, 2017)

- a. *Description: a non-commissioned report based on an October 2016 survey of 552 U.S. financial advisors.*
- b. 32% of advisors believe that shifting away from certain products, such as annuities and non-traded REITs, is one of the biggest challenges posed by the fiduciary rule.

10. A.T. Kearney Study (October 2016), as described in comment letter and attachment submitted by Kent Mason (August 3, 2017)

- a. *Description: a study of the effects of the Fiduciary Rule published in connection with a discussion of how the global management consultant can help financial institutions adjust to the rule.*
- b. States that “[c]ertain high-cost investment products (such as variable annuities) will be phased out as the business model is no longer viable under the new rule....”

11. Chamber of Commerce (April 17, 2017 comment letter)

- a. The Chamber is unaware of any “robo-advisor” that recommends annuity products to generate retirement income, despite the clear need for these products and the Department’s reliance on robo-advisors to alleviate the potential loss of access to retirement advice for small savers.

12. Wall Street Journal Reports (February and April 2017), as described in the Financial Services Roundtable’s April 17, 2017 comment letter

- a. Firms have responded to the Rule by taking actions that include: (1) moving clients to fee-based accounts; (2) eliminating commission-based IRAs; (3) raising investment minimums for commission-based IRAs; (4) eliminating variable annuity products; and (5) excluding certain products from commission-based IRAs (e.g., annuities, mutual funds, and exchange-traded funds).

13. Cerulli Associates Research, as reported in December 15, 2016 ThinkAdvisor article

- a. “U.S. variable annuity and fixed indexed annuity sales are expected to decline by at least 10% through 2018 as the industry struggles to adapt to upcoming regulations put forth by the Department of Labor.”
- b. Cerulli views insurers’ “biggest challenge for the foreseeable future” as being the Fiduciary Rule.

14. Insured Retirement Institute (IRI) First-Quarter 2017 Annuity Sales Report, as described in June 6, 2017 press release

- a. *Description: sales results based on data reported by Beacon Research and Morningstar, Inc.*
- b. Industry-wide annuity sales declined 18% in the first quarter of 2017 as compared to the first quarter of 2016.
- c. Fixed annuity sales during the first quarter of 2017 declined 13.9% as compared to the first quarter of 2016, and variable annuity sales declined 10.2% for the same period.

15. Insured Retirement Institute (IRI), as reported in December 15, 2016 ThinkAdvisor article

- a. IRI “found that industrywide annuity sales in the third quarter totaled \$51.3 billion, an 8.2% drop from sales of \$55.9 billion during the second quarter of 2016, and a 12.3% decline from \$58.5 billion in the third quarter of 2015.”