BETTER MARKETS

April 17, 2017

Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Attention: Fiduciary Rule Examination

Re: Definition of the Term "Fiduciary" – Proposed Delay of Applicability Date, RIN 1210-AB79 ("Proposed Delay"), 82 Fed. Reg. 12319 (Mar. 2, 2017) ("Release")

Dear Madam/Sir:

On March 17, 2017, we[1] submitted a comment letter to the Department of Labor ("DOL") strongly opposing the proposed delay of the fiduciary duty rule ("Rule").[2] Unfortunately, on April 3rd, the DOL did in fact push back the initial applicability date of the Rule for 60 days, from April 10, 2017, to June 9, 2017. *See* Final Rule Extending Applicability Date, 82 Fed. Reg. at 16903 (Apr. 7, 2017) ("Delay Rule"). That step will cost workers and retirees tens of millions of dollars in lost retirement savings, while affording dilatory members of the financial services industry additional time that they never truly needed to comply with the Rule. And all of this was to facilitate an unnecessary, misguided, and potentially disastrous re-examination of the Rule.

In this letter, we urge the DOL to refrain from any further delays in the implementation of the Rule. In addition, we address the other issues raised in the Release accompanying the Proposed Delay, including the three specific questions that President

1 Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system, one that protects and promotes Americans' jobs, savings, retirements, and more.

2 In this letter, unless the context indicates otherwise, we generally use the term "Rule" to refer to the entire collection of reforms clarifying and strengthening the application of the fiduciary duty to advisers, including the PTEs.

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Trump ordered the DOL to re-examine. *See* Presidential Memorandum, 82 Fed. Reg. 9675 (Feb. 3, 2017) ("Presidential Memo").

Our position is clear: The Rule is an extraordinarily important and carefully crafted measure that warrants no re-examination, no amendment, and no additional delay of any duration whatsoever. The re-examination of the Rule is an indefensible pretext for suspending its implementation and contriving new but imaginary problems to justify either outright repeal or significant dilution of the Rule. This dramatic reversal reflects the ardent desire of some powerful members of the financial services industry to preserve the easy profits they have been siphoning away from the retirement accounts of hard-working Americans for decades.

The massive rulemaking record compiled by the DOL establishes that the agency has already fully addressed and reasonably resolved all three of the specific issues raised in the February 3rd Presidential Memo. It is clear that the Rule will not restrict access to products or advice, unduly disrupt the retirement services industry, or spawn excessive litigation. Numerous federal district courts have reached those very conclusions, and recent events only confirm the value, wisdom, and workability of the Rule.

Any future attempts to pursue these de-regulatory goals must scrupulously adhere to the substantive and procedural requirements arising under ERISA and the law governing the rulemaking process. Otherwise, such measures will be vulnerable to challenge in court as contrary to law and arbitrary and capricious.[3]

SUMMARY OF COMMENTS

I. THE OVERVIEW: Every economic, legal, and policy consideration bearing on the Rule supports its full and prompt implementation.

Before addressing the specific issues set forth in the Presidential Memo, we review the entire context in which the Rule has been developed and the overwhelmingly positive contribution it will make to the wellbeing and financial independence of millions of American workers and retirees. This review of the economic, legal, and public policy considerations

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[3] The ongoing rulemaking process must be evaluated in light of the entire rulemaking record. Therefore, we hereby incorporate by reference, as if fully set forth herein, that entire rulemaking record, including, without limitation, the Rule and the accompanying Prohibited Transaction Exemptions ("PTEs"), the releases accompanying the Rule and the PTEs, the Regulatory Impact Analysis, the comment letters on the proposed Rule, the testimony delivered at the four-day hearing convened by DOL in August of 2015, the Proposed Delay and accompanying release, the Delay Rule and accompanying release, and all of the comment letters filed in response to the Proposed Delay or addressing the issues in the Presidential Memo. We also incorporate by reference, as if fully set forth herein, all of the decisions issued by the courts that have ruled on challenges to the Rule. *See* cases cited *supra,* at n. 4.

bearing on the Rule—including its enormous net benefits, its sound legal and historical foundation, and its affirmation by every court to consider it—confirms that the Rule deserves full implementation as soon as possible.

II. <u>THE SCOPE OF THE RE-EXAMINATION: The Presidential Memo specifies the criteria the DOL must apply in its re-evaluation and it expressly preserves various substantive and procedural requirements the DOL must follow.</u>

The Presidential directive to the DOL is extremely broad but also bound by certain parameters. Under its explicit terms, the re-examination of the Rule must remain focused on whether the Rule may adversely affect the ability of Americans to gain access to "retirement information and financial advice." Presidential Memo, at Section 1, para. (a). And the DOL's authority to rescind or revise the Rule is contingent on a finding that the Rule will either (1) interfere with such access to information and advice, or (2) undermine the ability of Americans to "make their own financial decisions," to "save for retirement," and to build "individual wealth." *Id.* at para. (b) (referring to preceding sections). Far from undermining or interfering with any of these goals, the Rule is essential to their fulfillment. Thus, under the explicit terms of the Presidential Memo, no basis exists on the current record for any revisions to the Rule. Furthermore, opponents will be unable to muster credible support for changes to the Rule, much less its repeal. In addition, the Presidential Memo expressly preserves applicable law and the role of the Office of Management and Budget ("OMB") in reviewing administrative proposals. And, in the event the DOL purports to make any of the requisite determinations, the Presidential Memo expressly requires the DOL to afford notice and an opportunity to comment on any proposed rule that rescinds or revises the Rule. *Id.* at Section 1.

III. <u>THE THREE QUESTIONS: The DOL has already considered the issues raised in the Presidential Memo, the courts have validated the DOL's conclusions, and recent events provide new and compelling evidence that the Rule will cause none of the posited harms to investors.</u>

With respect to the three specific questions raised in the Presidential Memo, the rulemaking record along with the most recent trends reflecting industry preparations for compliance make clear that the Rule will not restrict access to products, information, or advice; unduly disrupt the retirement services industry; or spawn excessive litigation. Predictions to the contrary represent the typically speculative, unsupported, and hyperbolic fear-mongering that the financial services industry has made a staple of its advocacy for over 80 years. And even if the re-examination were to unearth some evidence that the three criteria in the Presidential Memo were met in some measure, that alone would not justify delay, dilution, or repeal of the Rule. The Presidential Memo cannot and does not rewrite the law, and any changes to the Rule must be justified in terms of the standards governing reasoned rulemaking and every agency's obligation to ensure that its rules do more good than harm overall.

IV. <u>THE UPDATED ECONOMIC ANALYSIS: By extremely conservative estimates, the benefits of the Rule far outweigh its costs, and any proffered evidence to the contrary must be rigorously scrutinized and countered with a more complete analysis the full range of harm investors will continue to suffer absent the Rule.</u>

With respect to the updated economic analysis the Presidential Memo requires, the record as well as recent events make clear that the likely impact of the Rule will be hugely beneficial, far outweighing any costs that it will impose, by several multiples. To the extent industry opponents proffer supposedly new evidence of costs and burdens associated with the Rule, or its component parts, it will be encumbent on the DOL to take two steps. First, it must discount data or studies that are biased, opaque, or otherwise lacking in credibility. Second, it must broaden the already robust analysis in the Regulatory Impact Analysis ("RIA") and create a more complete assessment of the benefits the Rule will provide to millions of retirement savers. That analysis must take into account the toll that **all** types of conflicts of interest take on **all** types of retirement accounts through the sale of **all** types of investment products. Finally, to the extent the DOL contemplates any rescission, revision, or further delay of the Rule, it must attempt to justify each of those measures by showing that the benefits outweigh the costs based on the more complete economic analysis.

V. <u>THE UPDATED LEGAL ANALYSIS: Multiple courts have disposed of a broad range of legal challenges to the Rule, and going forward, the DOL must ensure that its actions are consistent with ERISA as well as the dictates of reasoned decision making under the APA.</u>

With respect to the updated legal analysis called for in the Presidential Memo, there is little for the DOL to do except leave the Rule intact and allow it to take full effect. The extensive and thoughtful judgments rendered by three federal district courts have already rejected the broad range of legal challenges aimed at the Rule.[4] Those courts have repeatedly held that the rule is legally sound under the U.S. Constitution, ERISA, and the APA. Most important, those courts have affirmed the key **legal** imperative underlying the Rule: It eliminates a fundamental conflict between ERISA and the old rule. The DOL cannot legally rescind the Rule and restore this impermissible conflict. In fact, the chief legal concern of the

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[4] *See Chamber of Commerce v. U.S. Dep't of Labor,* No. 17-10238, 2017 WL 1284187 (5th Cir. Apr. 5, 2017) ("*Chamber III*"); *Chamber of Commerce v. Hugler*, No. 3:16-cv-1476-M, 2017 WL 1062444 (N.D. Tex. Mar. 20, 2017) (*"Chamber II"); Mkt. Synergy Grp., Inc. v. U.S. Dep't of Labor*, No. 16-CV-4083-DDC-KGS, 2017 WL 661592 (D. Kan. Feb. 17, 2017) ("*Market Synergy II")*; *Chamber of Commerce v. Hugler*, No. 3:16-cv-1476-M, 2017 WL 514424 (N.D. Tex. Feb. 8, 2017) (*"Chamber")*; *Mkt. Synergy Grp., Inc. v. U.S. Dep't of Labor*, No. 16-CV-4083-DDC-KGS, 2016 WL 6948061 (D. Kan. Nov. 28, 2016) ("*Market Synergy I"); Nat'l Ass'n for Fixed Annuities v. Perez*, No. 16-1035-RDM, 2016 WL 6902113 (D.D.C. Nov. 23, 2016) ("*NAFA II")*; *Nat'l Ass'n for Fixed Annuities v. Perez*, No. 16-1035-RDM, 2016 WL 6573480 (D.D.C. Nov. 4, 2016) ("*NAFA I*").

DOL now must be to ensure that whatever rulemaking process it pursues adheres faithfully to the substantive and procedural requirements imposed by well-established principles of administrative law. It must refrain from arbitrary and capricious rulemaking and above all follow the letter and spirit of its organic statute, ERISA.

VI. <u>THE PROCESS: Given the extraordinary importance and complexity of the issues now before the DOL, it must afford ample notice and opportunity for comment, a full explanation and justification for its decisions, and the requisite pause before any final delay or modification of the Rule takes effect.</u>

If the DOL decides to propose a rule to that would rescind, amend, or further delay the Rule, it must follow the procedural dictates of the APA and related provisions of law—just as the agency did when it promulgated the Rule. With respect to any future rule proposal, it must afford an adequate comment period, fully engage with all stakeholders, provide a rational explanation for its choices, and abide by the time periods stipulated in the law for the effective dates of all new rules. If the DOL invokes any exceptions to the applicable procedural mandates, which are intended for use only in rare situations where the public interest faces genuine peril, it must fully and persuasively justify its actions.

VII. <u>THE POSSIBLE CHALLENGE: Any proposal to delay, dilute, or rescind the Rule faces legal challenge if it does not adhere scrupulously to the law.</u>

Throughout the long process that culminated in the Rule, industry opponents insisted that the DOL strictly adhere to all of the substantive and procedural requirements applicable to agency rulemaking. They caviled with everything from the length of the comment period to the basic provisions of the Rule. And they brought multiple lawsuits to challenge the outcome. The court decisions discussed below confirm that the industry's arguments were meritless—in some instances frivolous.

Those who support and defend the Rule will also hold the DOL to its obligation to abide by the law as it develops any proposal that would weaken, further delay, or rescind the Rule. If any such rulemaking follows a truncated process or produces a result that conflicts with the law, does more harm than good, or otherwise constitutes arbitrary and capricious rulemaking, then it too will be challenged in court.

<u>COMMENTS</u>

I. <u>OVERVIEW: Every economic, legal, and policy consideration bearing on the Rule supports its full implementation in accordance with the original applicability dates.</u>

A. <u>The basic principle underlying the Rule is time-honored and undeniably appropriate for anyone purporting to be a financial adviser.</u> The Rule is fundamentally simple and intuitive: It requires all financial advisers to give advice about retirement assets that is in their clients' best interest. No longer will broker-dealers, insurance agents, and other advisers be allowed to recommend investments that pay them handsome fees and commissions but saddle clients with high costs, poor returns, and sometimes catastrophic risks and losses. And the fiduciary standard is hardly novel. It is firmly rooted in the centuries old law of trusts, which applies in many contexts to this day. In one form or another, it governs the conduct of registered investment advisers, doctors, and lawyers, all professionals who perform critically important services for their clients. All of those professionals have thrived notwithstanding—indeed, largely thanks to—the requirement that they scrupulously act in the best interest of their clients. Financial advisers who profess to help workers and retirees invest their life savings for a secure and dignified retirement perform an equally critical role, and they too should be subject to a best interest standard. Congress agreed and therefore mandated the imposition of the highest possible standard of loyalty on those advisers in ERISA.

B. The benefits of the Rule are enormous, dwarfing its costs. The Rule will confer huge benefits on the American people, far outweighing its costs to the relatively narrow segment of the regulated industry so desperately opposed to it. Without the Rule in place, American workers and retirees will continue to lose tens of billions of dollars every year in hard-earned savings. That estimate is extremely conservative, as it reflects losses just from conflicted mutual fund recommendations to IRA owners, without accounting for the harm to 401(k) accountholders arising from other conflicts of interest and other investment products. These conflicts of interest in the adviser realm are increasingly harmful as traditional pension plans fade away and hardworking Americans are left to rely on their own judgment and those they turn to for advice about managing their retirement assets.

C. The Rule helps resolve an even larger problem facing our country: The retirement crisis. The Rule is an important component of the solution to the larger retirement crisis in this country. The retirement outlook for many Americans is bleak.[5] Every day, 10,000 Baby Boomers turn 65, but the majority of them lack sufficient savings for retirement. For example, 36 percent of all Americans report they have no retirement savings.[6] The solution to this problem has multiple components. First, it is critical to encourage and enable American workers to set aside as much as they can for retirement. But equally important is making sure that people get the most out of what they have managed to set aside on a tax advantaged basis. That is why the Rule is so important. If financial advisers incentivized by conflicts of interest are allowed to continue bleeding off a large portion of their clients' retirement savings, then the prospects for a secure, dignified, and independent retirement will continue to fade for too many Americans.

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5 House Committee on the Education and the Workforce, *Time to Modernize Multiemployer Pension System* (Apr. 29, 2015), *available at* http://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=398799

6 Nanci Hellmich, *A third of people have nothing saved for retirement*, USA TODAY (Aug. 18, 2014), *available at* http://www.cnbc.com/id/101926802#_gus

D. The Rule fulfills the letter and spirit of ERISA and removes a material conflict between the old rule and the statute. In 1974, Congress passed ERISA to ensure that Americans' critically important retirement assets were protected with the highest possible standards of loyalty and care imposed on advisers and others who deal with retirement plans. One year later, in 1975, the DOL adopted a rule defining in detail when an adviser becomes a fiduciary by virtue of giving investment advice about retirement assets. However, the rule was riddled with loopholes and almost never enforceable. And it deviated substantially from the plain language of ERISA and its underlying remedial purposes. As the courts have recently observed, the new Rule eliminates these conflicts with ERISA and much more effectively serves its remedial purposes. It would be unlawful for the DOL to reinstate this conflict with "applicable law" by abandoning the new Rule and leaving the old rule intact.

E. The rulemaking process was extraordinarily thorough and inclusive. The Rule resulted from one of the most lengthy, data-driven, and open rulemakings in history. It included years of consultation with industry and public interest stakeholders; a robust economic analysis detailing the costs and benefits of the Rule; over 100 days of public comment; the consideration of over 3000 comment letters and 30 petitions containing over 300,000 submissions; and four full days of hearings at which over 75 speakers testified. The comments received and carefully reviewed by the DOL came from a broad spectrum of stakeholders, including consumer groups, plan sponsors, financial service companies, academics, elected government officials, trade and industry associations, and others. Accompanying the final Rule, the related exemptions, and the RIA were extensive federal register releases detailing the need for the rule and the exemptions, the factors the DOL considered, and the basis for all of the decisions it made in crafting the final regulation. In light of this extensive process, it is laughable to suggest, less than a year after its conclusion, that the Rule requires a re-examination. Not surprisingly, the Presidential Memo offered not a shred of evidence to support its directive that the DOL re-evaluate the Rule and its likely impact.

F. The DOL generously accommodated the industry in the final Rule by granting discretionary exemptions and affording ample time to comply. The final Rule reflected significant accommodations to industry. For example, ERISA actually prohibits the conflicts of interest that arise from adviser recommendations incentivized by the prospect of commission payments. However, rather than banning commission payments outright, the DOL fashioned a new exemption allowing such commission-based sales to continue, provided advisers adhere to the fiduciary standard and comply with other requirements. Moreover, the DOL provided ample time for the industry to comply, allowing a full year before the core requirements of the Rule would take effect, and an additional eight months, until January 1, 2018, before the balance of the requirements would become applicable.

G. The Rule has been upheld by every court to consider it. The Rule has survived fully intact after a series of court challenges advancing a wide range of legal theories. Every one of the three federal district courts to reach the merits has rejected all of the legal attacks advanced by the industry members and their trade association representatives. On three separate occasions, those district courts, along with one federal appellate court, have also rejected attempts to enjoin the Rule pending litigation or appeal. In the words of the United States District Court for the District of Kansas, "Any injunction will produce a public harm that outweighs any harm that plaintiff may sustain from a rule change." *Market Synergy I* at *30.

H. The Rule has won widespread support, even among some industry segments. The Rule received the strong and unequivocal support of the prior Administration; a broad swath of organizations representing the country's workers and retirees, including the AARP and the AFL-CIO; and many members of Congress. And large segments of the financial services industry either already operate under the fiduciary standard or are prepared to embrace the Rule and to ensure that their advisers provide advice that is solely in their clients' best interest. The breadth and intensity of support for the Rule is clearly shown in the response to the proposed delay: The DOL received approximately 193,000 comment letters and petitions; 178,000, or nearly 90 percent, opposed any delay of the Rule whatsoever. *See* Delay Rule, 82 Fed. Reg. at 16903.

I. Recent events show that the Rule is eminently workable. Major sectors of the adviser industry have, through their public statements, advertisements, and actions, clearly indicated that the Rule is eminently workable and in fact, good for business. Some firms are planning to maintain commission-based accounts, in conformity with the Rule. Some are shifting to fee-based accounts, while reducing account minimums and fees so they can serve even the most modest retirement savings. Some are simply reducing their fee and cost structures on existing products to be more competitive. In addition, firms are evolving new product lines that will enhance the role of commission-based accounts under the Rule. These include new classes of mutual fund shares that reduce loads and help minimize conflicts of interest in compensation structures. And even in the litigation challenging the Rule, affidavits from some members of the insurance industry conceded that insurance firms and Independent Marketing Organizations ("IMOs") were taking steps to comply with the Rule. *See* discussion of cases *infra.* Plainly, the industry will adapt, and retirement savers will benefit from ample access to vastly better investment advice.

II. THE SCOPE OF THE RE-EXAMINATION: The Presidential Memo specifies the criteria the DOL must apply in its re-evaluation and expressly preserves other substantive and procedural requirements that DOL must follow.

The Presidential directive to the DOL is extremely broad but also bound by certain parameters. Under its explicit terms, the re-examination of the Rule must remain focused on whether the Rule may adversely affect the ability of Americans to gain access to "retirement information and financial advice." Presidential Memo, at Section 1, para. (a). And the DOL's authority to rescind or revise the Rule is contingent on a finding that the Rule will either (1) interfere with such access to information and advice, or (2) undermine the ability of Americans to "make their own financial decisions," to "save for retirement," and to build "individual wealth." *Id.* at para. (b) (referring to priorities referenced in a preceding section). Far from undermining or interfering with any of these goals, the Rule is essential to their fulfillment. Therefore, under the explicit terms of the Presidential Memo, no basis exists for any changes to the Rule.

The Presidential Memo also expressly preserves applicable law and the role of the OMB the rulemaking process. For example, it states that—

(a) Nothing in this Presidential Memorandum shall be construed to impair or otherwise affect:

(i) The authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This Presidential Memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

Accordingly, any "implementation" of the Presidential Memo through the promulgation of a new rule must still be reviewed by OMB to ensure that it satisfies the criteria set forth in various executive orders, including the duty to ensure that any such rule can be justified in terms of its net benefits. This language from the Presidential Memo is also a reminder that any rulemaking arising from the re-examination must conform to "applicable law," including the provisions of ERISA that clearly define those who become fiduciaries by virtue of giving advice about retirement assets. *See also* Presidential Memo, Section 1, para. (b) (any proposed rule rescinding or amending the Rule must be "appropriate and as consistent with law"). Leaving the old rule intact would clearly violate applicable law, the executive order requirements, and the Presidential Memo itself. And weakening the Rule on the pretext of protecting access to advice or sparing industry some "disruption," while ignoring the enormous net benefits it will confer on retirement savers, would violate the core requirements of reasoned decision making as well as the executive order requirements pertaining to cost-benefit analysis.

Finally, the Presidential Memo makes very clear that any proposal to rescind or revise the Rule must be published "for notice and comment." Section 1, para. (b). Thus, the public must have an opportunity to evaluate and comment on whatever the DOL may propose to do with the Rule.

III. THE THREE QUESTIONS: The DOL has already considered the issues raised in the Presidential Memo, the courts have validated the DOL's conclusions, and recent events provide new and compelling evidence that the Rule will cause none of the posited harms to investors.

The February 3rd Presidential Memo requires the DOL to consider three specific questions, focusing on whether the Rule will restrict investor access to products, information, or advice; disrupt the industry to the detriment of investors; or increase litigation that in turn increases the cost of retirement services for investors. Unfortunately, the Presidential Memo has embraced some of the classic talking points that the industry habitually deploys whenever it faces the prospect of new regulation. They have no more validity now than they did when Wall Street railed against the advent of securities regulation in the 1930s. Furthermore, these inquiries are pointless, since the DOL has already amply considered all of these issues, as demonstrated in the extensive RIA and the release accompanying and explaining the Rule and the exemptions. The courts have similarly found that the DOL discharged its duty to consider these factors. The Presidential Memo, just over a single page in length, offers no evidence whatsoever in its preamble or text to justify the imposition of this burdensome and time-consuming exercise on the DOL. In addition, these concerns about the Rule are groundless, given the industry's powerful incentives to adapt and many alternative channels for sound advice available to investors. In fact, the most recent and credible evidence points ineluctably to the conclusion that the Rule will have none of these deleterious effects.

A. All three questions reflect the industry's unfounded and disingenuous attacks on the Rule, epitomizing a sky-will-fall strategy that has been repeatedly discredited.

All three of three questions set forth in the Presidential Memo echo the core arguments that were incessantly lodged against the Rule throughout the rulemaking process. They represent the very epitome of biased and unsubstantiated projections, and they are precisely the type of sky is falling exaggerations that the financial services industry has launched against new regulation for almost a century. Time and time again, they have ominously warned that new regulatory requirements will have a devastating impact by upending their industry, exposing them to unsupportable liabilities, and ultimately harming investors by increasing costs and restricting access to products and services.

Yet Wall Street has invariably absorbed those reforms, consistently remaining one of the most profitable sectors in our economy. For example, a century ago, when securities regulation first emerged at the state level, Wall Street railed against it as an "unwarranted" and "revolutionary" attack upon legitimate business that would cause nothing but harm.[7]

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[7] *See* Marcus Baram, *The Bankers Who Cried Wolf: Wall Street's History of Hyperbole About Regulation*, THE HUFFINGTON POST (Jun. 21, 2011, 6:56 PM),

However, in the years following this early appearance of financial regulation, banks and their profits grew handsomely.[8] The same pattern has been repeated with each new effort to strengthen financial regulation, including the federal securities laws, deposit insurance, the Glass-Steagall Act, mutual fund reform, and the national market initiatives of the mid-1970s.[9]

Two more recent examples stand out. The mortgage lending industry fiercely opposed new mortgage underwriting standards to be administered by the Consumer Financial Protection Bureau. In messaging that is strikingly similar to what many advisers have said about the Rule, the lending industry hysterically predicted that the new rules would "cripple credit availability and spur banks, credit unions, and mortgage lenders to **quit the business entirely."[10]** However, the available data show that this simply has not happened, and that in fact, lending activity has increased.[11]

And when the SEC was considering whether to regulate fee-based accounts as advisory accounts, the broker-dealer industry claimed that they would face excessive litigation risk and increased costs rendering them unable to offer such accounts to investors. However, since the U.S. Court of Appeals for the D.C. Circuit ruled in 2007 that fee-based accounts are advisory accounts, *Fin. Planning Ass'n. v. Sec. & Exch. Comm'n*, 482 F.3d 481 (D.C. Cir. 2007), none of the parade of horrors that the broker-dealer industry predicted actually unfolded. In fact, the number of fee-based accounts and the level of assets in fee-based accounts at broker-dealers grew dramatically. Even after the broad market declines of 2008, client assets in non-discretionary advisory accounts rose by almost 75 percent from approximately $329.6 billion at the end of the conversion process in 2007 to $574 billion in

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http://www.huffingtonpost.com/2011/06/21/wall-street-historyhyperbole-regulation_n_881775.html.

8 Paul G. Mahoney, *The Origins of the Blue-Sky Laws: A Test of Competing Hypotheses*, 46 J.L. & ECON. 229, 249 (2003) ("In the 5 years following adoption of a merit review statute [the most stringent type of blue sky law statute], bank profits increased on average by nearly 5 percentage points . . .").

9 Marcus Baram, *supra* note 4; *see also* Nicholas Economides et al., *The Political Economy of Branching Restrictions and Deposit Insurance: A Model of Monopolistic Competition Among Small and Large Banks*, 39 J. L. & ECON. 667, 698 (1996) ("The American Bankers Association fights to the last ditch deposit guarantee provisions of Glass-Steagall Bill as unsound, unscientific, unjust and dangerous. Overwhelmingly, the opinion of experienced bankers is emphatically opposed to deposit guarantee which compels strong and well-managed banks to pay losses of the weak . . .The guarantee of bank deposits has been tried in a number of states and resulted invariably in confusion and disaster . . . and would drive the stronger banks from the Federal Reserve System.") (quoting Francis H. Sisson, president of the American Bankers Association).

10 John Heltman, *Mortgage Rules Not Chilling Market as Feared, Data Shows,* American Banker (Sep. 24, 2015), http://www.americanbanker.com/news/law-regulation/mortgage-rules-not-chilling-market-as-feared-data-shows-1076899-1.html (emphasis added).

11 *Id.*

the third quarter of 2012.[12] Meanwhile, the level of fees charged to customers for this service model at the major national firms has stayed flat or decreased since 2007.

Opponents of the DOL rule are following this familiar pattern, as reflected in the Presidential Memo, and their attempts to defeat or weaken the Rule must be similarly discounted.[13]

B. The DOL and the Courts have already considered and dismissed all three of the concerns in the Presidential Memo.

All three of the issues cited in the Presidential Memo were thoroughly examined by the DOL during the rulemaking process. Decisions from multiple federal district courts issued since just last November confirm that the DOL not only analyzed those issues in depth, but also arrived at reasonable conclusions when it adopted the final Rule notwithstanding those concerns.

The Chamber case.

For example, in the *Chamber* case, the court found that the DOL had "assessed the Plaintiffs' concerns that the rules would decrease **access** to investment advice." *Chamber* at *34 (emphasis added).[14] The court held that "after analyzing the relevant evidence," the DOL had reasonably concluded that "fewer conflicts of interest, more transparency, and a more efficient market would 'increase the availability of quality, affordable advisory services for

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12 *See* Financial Planning Coalition letter to the SEC, Cerulli Associates, Cerulli Quantitative Update: Advisor Metrics, Exhibit 1.02 (2012).

13 Bradley Keoun & Jonathan D. Salant, Obama Plan Gets Wary Reception from Banks, Lawmakers (Update1), BLOOMBERG (June 18, 2009), http://www.bloomberg.com/apps/news?pid=20601087&sid=ae85nCexFOv0 ("The brewing legislative battle recalls the industry's reluctance to accept reforms after the 1929 stock-market crash. I don't think anyone can buy the argument that by regulating too tightly, we'll choke off capitalism. . . That argument is as shallow now as it was then.") (citing Charles Geisst, Professor, Manhattan College). Those seeking to block reform based on such dire warnings are not only exaggerating the impact of regulation, but also submitting incomplete, misleading, or inaccurate cost estimates. *See, e.g.*, John E. Parsons & Antonio S. Mello, *Nera Doubles Down*, BETTING AGAINST THE BUSINESS, Mar. 19, 2012, http://bettingthebusiness.com/2012/03/19/nera-doubles-down/ (challenging industry estimates of the cost of margin requirements in derivatives transactions).

14 The claim that the Rule will restrict access to advice has always been disingenuous. Historically, large brokerage firms have had little interest in serving small account holders. For instance, "[m]any of the larger brokerage firms possess minimums of $100,000 to $250,000 to work with a broker, face-to-face." Ron Rhoades, *Wall Street's Complaints About DOL Fiduciary Rulemaking Don't Withstand Scrutiny* (Feb. 23, 2015), *available at* http://scholarfp.blogspot.com/2015/02/wall-streets-complaints-about-dol.html.

small plans and IRA investors,' and that [the Rule] would not have 'unintended negative effects on the availability or affordability of advice.'" *Id.* (citing to and quoting from the administrative record). The court further pointed to the DOL's reliance on data from the United Kingdom's "more aggressive regulatory regime, which banned all commissions on retail investment products." *Id.* In the court's view, because those more comprehensive regulatory changes "did not result in advisers abandoning consumers, the DOL reasonably found its less burdensome rulemaking would not cause a material number of advisers to leave the market or negatively impact access to investment advice." *Id*.

The court in *Chamber* also found that the DOL had appropriately addressed allegations that the Rule and the exemptions would prove to be unworkable and would therefore cause **disruption** in the industry. For example, the court noted that the DOL had outlined several ways the industry can innovate and adapt with respect to compensation models, including the use of asset-based, hourly, or flat fee arrangements. In addition, the court noted, firms may rely more on salary than commission to compensate advisers. *Id.* at *19. The court also concluded that the conditions of the BICE were in fact reasonable and workable, as evidenced by the experience of almost 80,000 members of the Financial Planning Coalition, who continue to serve middle-income investors using all types of compensation models, and by the stated intention of major annuity and other financial companies to use the BICE. *Id.* at *20.

More generally, the court found that the BICE was workable for a variety of reasons. *Id.* at *29-30. As the court noted, the DOL discussed various ways IMOs and independent agents could respond to the new rules: IMOs could petition for individual exemptions from the definition of financial institution, and agents could affiliate with a broker or investment adviser to serve as the financial institution. *Id.* at *30. DOL anticipated that the most common distribution model would remain workable. *Id.* As to the meaning of "reasonable compensation," it provided references to guidance on the meaning of the term, noted that industry could request guidance from DOL, and highlighted cases over the years in which courts have had little trouble applying the concept. *Id.* at 30-31; *see also id.* at *32 (finding that the DOL had "considered the relevant factors for BICE's workability, addressed commenter concerns, and reasonably justified its conclusions, thereby satisfying the APA's requirements"); *32 ("The Court finds that the DOL adequately weighed the monetary and non-monetary costs on the industry of complying with the rules, against the benefits to consumers. In doing so, the DOL conducted a reasonable cost-benefit analysis.").[15]

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[15] The court in *Chamber* also laid to rest the plaintiffs' contention that the DOL's obligation to ensure its exemptions were "administratively feasible" required the DOL to ensure that its exemptions were "workable" for industry. The court flatly rejected the argument, holding that in this context, the phrase refers to whether or not the **DOL** can administer the exemption and ensure that it serves the interests of plan participants. *Chamber* at *35-36.

The court in *Chamber* also found that the DOL had addressed issues surrounding potential **litigation** liability, finding that DOL had reasonably considered and addressed those concerns. *Id.* at *31, *34. For example, the court rejected claims that the best interest standard was vague and would therefore lead to inconsistent state enforcement and potentially "staggering" liability." *Id.* at *31. It noted that the best interest standard is not in fact vague, as it "is drawn from the duties of loyalty and prudence, which are 'deeply rooted in ERISA and the common law of agency and trusts.'" *Id.,* citing release. The court further observed that the plaintiffs had failed to explain why court decisions should be expected to diverge widely when they are applying common legal principles of contract law, *id.,* or why litigation risk should be expected to increase given that IRA participants have long had litigation rights under state law to remedy wrongs occurring in IRA transactions, *id.* Moreover, the court observed that the class action provisions in the BICE do not "drastically change the regulatory regime," since transactions regulated by FINRA have long been subject to class actions. *Id.* And it noted that, as the DOL observed, the plaintiffs' fears were exaggerated because "courts impose significant hurdles for bringing class actions." *Id.,* quoting release. In short, the court concluded that the DOL had considered litigation costs and concluded that the Rule would not have unintended negative effects on the availability or affordability of advice. *Id.*

The court also cited to DOL's reasoning that certain features of the BICE "should temper concerns about the risk of excessive litigation." *Id.* at *31 (quoting release). As the DOL had explained, the BICE allows advisers to insist on mandatory arbitration of individual claims that do not involve systemic abuse or entire classes of investors. *Id.* The BICE also allows waivers of the right to punitive damages or rescission that would otherwise arise from a violation of the contract. Finally, the court also observed that the DOL had considered the positive effects of potential litigation in terms of incentivizing compliance. *Id.*; *see also id.* at *19 ("The DOL weighed the pros and cons of the class action provision, and reasonably found it was in the best interest of retirement savers, helped prevent systemic fiduciary misconduct, and provided an incentive for the industry to comply with BICE.")

<u>*The NAFA case.*</u>

The court in *NAFA* provided an extensive analysis of the plaintiff's claims relating to the potential for **disruption**, especially in the insurance industry and among the independent agents who rely heavily rely on commissions from the sale of fixed indexed annuities ("FIAs"). The court made three important rulings. First, it rejected the notion that the Rule would prove unworkable. For example, the court upheld the DOL's determination that the BICE would not impose "impossible" supervisory obligations on insurance companies overseeing independent agents. *Id.* at *36-37. And it rejected the contention that the BICE would force independent agents and insurers to provide advice regarding the purchase of securities and thus to become registered investment advisers under the securities law. *Id.* at *37; *see also id.* at *24 (observing that alternatives to commission compensation for insurance agents were not "illusory," and any choice to move in that direction, while posing challenges, was "real.")

Second, the court found that the DOL had closely analyzed the costs and benefits that the Rule would impose, both under the general requirements of reasoned decision making and under the Regulatory Flexibility Act. *Id.* at *35; *39, *40-41. The court held that contrary to plaintiff's claims, the DOL had indeed addressed "how inclusion of fixed-indexed annuities [in the BICE] would affect the industry." *Id.* at *35. And it highlighted the many ways in which the DOL had worked hard to minimize any possible disruptions caused by the Rule and the exemptions. For example, the court rejected the plaintiff's claims that the DOL "ignored the concerns regarding disclosure and distribution methods," *id.,* and it recited a litany of adjustments that the DOL made to "so that the conditions identified by commenters are less burdensome and more readily complied with," *id.* The DOL, it explained, revised the pre-transaction disclosure requirements, adjusted the "reasonable compensation" condition, "crafted" the BICE so that it would harmonize with state insurance regulation, and included a provision allowing IMOs and others to petition for individual exemptions. *Id.*

Finally, the court addressed the very heart of the matter by explaining that the DOL had carefully weighed the impact that the Rule would have on the industry and had determined that whatever burdens or disruptions it might impose were outweighed by the need for investor protections:

> But [NAFA's] concerns were not lost on the Department, which concluded that the risk that retirement investors would suffer significant losses due to conflicted investment advice raised even greater concerns.

Id. at *39; *see also id.* at *22 (imposing heightened obligations on IRA advisers paid by commission and not those paid by management fees is "far from irrational;" that is "precisely the point" since "those who are paid on a commission basis may be tempted to make investment recommendations that maximize *their* compensation while disserving the interests of plan *participants and beneficiaries*.") (emphasis in original).

Moreover, the court observed, the DOL had expressly determined that even if some advisers left the market, "consumer **access** to investment advice would not be adversely affected by any departures from the markets." *Id.* at *39.

<u>*The Market Synergy case.*</u>

The court in *Market Synergy* similarly found that the DOL had amply considered the effects of the Rule and the exemptions on independent insurance agent distribution channels. The court noted that in the RIA, the DOL had acknowledged that the Rule would impose costs on independent insurance agents and others and that they would "face choices" about how best to respond. *Id.* at *26. But it also observed that the DOL had predicted that firms "will gravitate toward structures and practices that efficiently avoid or manage conflicts to deliver impartial advice consistent with fiduciary conduct standards." *Id.,* citing release. The DOL had further noted that firms that achieve these ends most efficiently will gain market share. *Id.,* citing release. In particular, the court noted the DOL's conclusion that entities within the distribution channel could adapt to the Rule. It highlighted the DOL's observation that the market for financial advice and financial products was "highly dynamic," where advisers could migrate to firms well-situated to provide advice in accordance with the Rule. *Id.* And, as in *Chamber*, the court found noteworthy that in the DOL's estimation, advisers would not "leave the market or otherwise adversely affect consumers' access to investment advice," as shown by the experience in the United Kingdom. *Id.*

The court also carefully analyzed the DOL's reasons for concluding that the BICE would in fact be workable for IMOs and independent agents. *Id.* at *27. Insurers would be able to serve as the required "financial institution;" agents could affiliate with a broker-dealer; and IMOs could seek individual exemptions to come within the definition of "financial institution," something that three of the plaintiff's IMO members had already undertaken. *Id.* In short, the court noted, the DOL recognized the changes the Rule would impose but provided alternative options for entities engaged in the distribution channel to pursue. *Id.* And it determined that the significant benefits to investors would outweigh whatever costs the industry might have to absorb notwithstanding the modes of adapting available under the Rule. *Id.* at *28. Against these potential costs, the court cited the DOL's calculation of the significant benefits for consumers that the Rule would provide, on the order of $3.6 billion per year by conservative estimates. *Id.* at *26, citing RIA.

This wealth of judicial analysis confirms that the DOL has already thoroughly and correctly addressed the three issues on which the Presidential Memo focuses. Any deviation from the agency's own analysis, as squarely upheld by the courts, must be thoroughly explained and justified if possible—a tall order.

IV. THE UPDATED ECONOMIC ANALYSIS: By extremely conservative estimates, the benefits of the Rule far outweigh its costs, and any proffered evidence to the contrary must be rigorously scrutinized and countered with a more complete analysis of the full range of harm investors will continue to suffer absent the Rule.

The Presidential Memo requires the DOL to prepare an "updated economic and legal analysis of the likely impact of the Fiduciary Duty Rule," with a particular but not exclusive focus on whether the Rule may affect access to advice, cause disruption, or increase litigation. Presidential Memo at Section 1. As demonstrated above, the DOL has already demonstrated, and the courts have affirmed, that the benefits of the Rule vastly outweigh its costs, both overall and with respect to the three issues flagged in the Presidential Memo.

A. **<u>The DOL must carefully scrutinize industry evidence of cost.</u>**

During the pending comment period and in response to any future proposal to repeal, amend, or delay the Rule, industry proponents can be expected to submit comment letters offering supposedly fresh evidence that the costs of the Rule actually out strip the benefits. We reiterate our prior comment that often, such evidence is wholly unreliable, coming in the form of biased, paid-for studies; based on selective and incomplete data sets; and relying on hidden or erroneous assumptions. If the record in any future rulemaking is similarly infused with such meaningless support for amendment or delay, the DOL must closely scrutinize and discount it.

B. **<u>The DOL must expand its economic analysis to include the full range of harms resulting from the full range of conflicts of interest, including qualitative harm.</u>**

Furthermore, it will be critical for the DOL to develop a more complete economic analysis, both as to the Rule overall and as to each of the three questions. In short, the DOL must fully examine, describe, and quantify **all** of the investor harms that would flow from a delay, repeal, or dilution of the Rule, in addition to the damaging effects on IRAs already examined at length in the RIA. Such an analysis would have to include a quantified assessment of all costs associated with all types of conflicts of interest, exacted from all types of retirement accounts, from the sale of all types of investment products. Only then will the DOL have a sufficiently complete and accurate cost-benefit analysis with which to evaluate any changes or further delays of the Rule.[16]

The DOL's RIA in support of the Rule has always been extraordinarily conservative, focusing solely on one type of conflict of interest, in recommendations for one type of product, as applied to one type of account (IRA owners). Without question, conflicts of interest have a much broader and deeper impact on retirement savers, and any delay in the application of the new Rule or weakening of its protections would pose a commensurately greater threat to investors. These additional losses are enormous, not just minor adjustments to the estimates already used to quantify the benefits of the Rule. The Release itself aptly describes the litany of additional investor losses that would have to be evaluated and quantified to achieve anywhere near a complete cost-benefit analysis of the Proposed Delay:

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[16] In addition, because any repeal, revision, or further delay of the Rule would likely be economically significant under Section 3(f)(1) of E.O. 12866, the DOL must also develop and provide to OIRA an "assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation . . . and an explanation why the planned regulatory action is preferable to the identified potential alternatives." E.O. 12866 at § 6(3)(C)(iii).

> The illustration [of investor losses] is incomplete because it represents only one negative effect (poor mutual fund selection) of one source of conflict (load sharing), in one market segment (IRA investments in front-load mutual funds). Not included are additional potential negative effects of the proposed delay that would be associated with other sources of potential conflicts, such as revenue sharing, or mark-ups in principal transactions, other effects of conflicts such as excessive or poorly timed trading, and other market segments susceptible to conflicts such as annuity sales to IRA investors and advice rendered to ERISA-covered plan participants or sponsors.

Release at 12320-21.

And the DOL must adequately account for qualitative harms that will arise from delay or dilution of the Rule. E.O. 12866 makes clear that such unquantifiable costs or benefits are "essential to consider," and it requires agencies to evaluate them in any cost-benefit analysis. E.O. 12866 at § 1(a). In this context, the non-monetary costs of delaying implementation of the Rule include a wide variety of very real and damaging effects on quality of life arising from a shortage of adequate resources in retirement. Among them are poor nutrition; loss of access to medical care and medication; anxiety and depression; impaired self-esteem; guilt and remorse stemming from reliance on family members for basic needs; substandard housing; inadequate day-to-day care that is commonly essential in the later years of life; and many others.

C. <u>These concerns are especially relevant to any further delay of the Rule.</u>

The release accompanying the Delay Rule contains encouraging indications that further delay of the Rule and the Impartial Conduct standards is unlikely, since it would be both unnecessary for industry and costly for investors. For example, it notes that there is "little bases for concluding that advisers need more time to give advice that is in the retirement investor's best interest and free from misrepresentations in exchange for reasonable compensation." 82 Fed. Reg. at 16905. In addition, the release notes that "a longer delay of the Rule and the Impartial Conduct Standards cannot be justified based on the public record to date. . . . Losses arising from a delay of longer than 60 days would quickly overshadow any additional compliance cost savings." Id. at 16906. Of course, the record actually shows that losses from the 60-day delay now in place are already greater than any cost savings to industry, but at least the DOL acknowledges the threat of harm posed by **further** delay.

Nevertheless, the release cautions that once the examination is over, "some or all of the Rule and PTEs may be revised or rescinded, including the provisions scheduled to become applicable on June 9, 2017. This document's delay of the applicability dates as described above should not be viewed as prejudging the outcome of the examination." *Id.*

In addition, the release specifically warns that it "retains the ability to further extend the January 1, 2018 applicability dates." *Id.* Thus, the need to weed out unreliable evidence of industry cost and to expand the analysis of harm arising from conflicts of interest is key for purposes of any delay under consideration, whether it be of the Rule and Impartial Conduct Standards or the PTEs.

We further reiterate our concern that delays of any duration can inflict substantial harm on investors. For example, a single financial transaction, such as a rollover of all retirement savings at the end of a career, can have long-lasting and extremely damaging effects on investment returns if prompted and guided by an adviser with conflicts of interest. And to the extent that the current delay does actually portend a series of additional delays, as suggested in the Release, the harm to investors will be that much greater. *See* Release at 12325 (noting that the DOL may issue a further extension of the applicability date).

D. <u>The court decisions on the question of delay militate strongly against further delay, and the Fifth Circuit's recent refusal to stay the Rule pending appeal is telling.</u>

Three courts have recently rejected attempts to enjoin the Rule pending litigation or appeal, holding that the harm to investors from a delay in implementation would far exceed the benefits to the complaining industry. For example, in *Market Synergy I*, the Kansas federal district court concluded that "**Any injunction will produce a public harm that outweighs any harm that plaintiff may sustain from a rule change.**" *Market Synergy I* at *30 (emphasis added). The court went on to emphasize the absence of any basis in the administrative record for questioning the DOL's conclusion that the Rule would produce valuable net benefits:

> The DOL has determined that the rule changes will benefit retirement investors throughout the United States by requiring investment advisers to act in the best interest of those investors. Congress authorized the DOL to evaluate these competing interests and it has concluded that significant public interests favor the proposed regulatory changes. **As already explained, evidence in the administrative record supports the DOL's determination and the court finds no basis for contradicting those findings**."

Id. (emphasis added).

As discussed above, in *NAFA I*, the D.C. district court squarely rejected all of the plaintiff's claims against the Rule. The plaintiff then sought a stay pending appeal, and the court rejected that request as well in *NAFA II*, with a special focus on the need to ensure that the "core protections" in the Rule go into effect no later than April of 2017:

> Second, this [is] not a case in which other interested parties or the public will suffer "little if any harm" if the new rules are enjoined pending appeal. The fundamental premise of the challenged rules is that those who provide investment advice to ERISA plans and IRAs on a commission basis have a conflict of interest that, absent further protections, the plan and IRA owners who they advise will suffer economic losses. It was for this reason that the [DOL] rejected requests—similar to the request that NAFA now makes—that the transition period extend over a period of two to three years. [citations omitted] Although the Department did agree that certain requirements would not take effect until January 1, 2018, it required that "certain core protections"—most notably, the requirement that financial institutions and advisers abide by the duties of prudence and loyalty—go into effect on April 20, 2017, in order to address "concerns about ongoing harm to [r]etirement [i]nvestors."

NAFA II at *3.

The court in *Chamber II* also rejected the plaintiff's attempt to obtain an injunction pending appeal, relying in part on a finding that the public interest would not favor such relief. As the court explained:

> The premise of the DOL's rules are that those who provide investment advice to ERISA and IRA plans have conflicts of interest, and absent further protection, the public will be harmed. During the rulemaking, the DOL concluded that consumers needed protections from conflicted advice with respect to fixed indexed and variable annuities due to their complexity and risks. The Court found that the DOL acted reasonably in so concluding. In the Court's view, Plaintiffs have not provided significant evidence in contravention of the DOL's reasonable conclusions. . . ."

Id. at *7.

And recently, on April 5, 2017, the United States Court of Appeals for the Fifth Circuit summarily denied the plaintiffs' emergency motion for an injunction pending appeal, and it further denied their alternative motion to expedite the appeal. *See Chamber III,* at *1. The matter is not a close call, and further delay of the Rule, the Impartial Conduct Standards, or the PTEs cannot be justified.

E. <u>**The DOL must actually heed its cost-benefit analysis.**</u>

Even if the DOL takes these and other comments to heart as it conducts the new economic analysis in accordance with the Presidential Memo, they will do little good if the DOL fails to apply the results to guide its decisions about possible future delays or alterations in the Rule. A particularly troubling facet of the Delay Rule was the agency's decision to implement the delay in the face of compelling evidence that it would in fact inflict significant harm on retirement savers.

Drawing on the RIA, the proposed delay Release provided quantified estimates of costs to investors that were nearly four times the savings that the industry was expected to derive from the delay. The DOL projected that a 60-day delay could lead to a reduction in estimated investment gains of $147 million in the first year and $890 million over 10 years using a three percent discount rate. In contrast, the DOL projected cost savings to firms of $42 million during those 60 days. Release at 12320-21. And there was no credible evidence in the record to counter these projections showing the vastly greater harm that delay would inflict on retirement savers relative to the industry. On the contrary, the record included a persuasive analysis from the Economic Policy Institute ("EPI") showing that retirement savers receiving conflicted advice would actually suffer vastly greater harm from the 60-day delay than DOL projected, amounting to some $3.7 billion. *See* Final Delay release at 16909.

Yet, notwithstanding these estimates, including the EPI study, the DOL proceeded to finalize the delay. In so doing, it quantified the expected cost savings to industry, but offered only conclusory explanations regarding the expected harm to investors. For example, it simply stated that "The Department now believes that investor losses from the 60-day extension will be relatively small." 82 Fed. Reg. 16907. And the basis for that prediction was the ironic point that members of industry were not prepared yet to comply with the Rule, and investors would not therefore be deprived of additional gains by virtue of the delay.

As it evaluates any further delays, or any other actions that might lead to dilution or repeal of the Rule, the DOL must actually be guided by what the economic analysis reveals. Otherwise, it will surely be engaging in arbitrary and capricious rulemaking and violating the core principles of the Executive Orders governing cost-benefit analysis. *See* E.O. 12866 at § 1(b)(6) (each agency shall "propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.").

V. UPDATED LEGAL ANALYSIS: Multiple courts have disposed of a broad range of legal challenges to the Rule, and going forward, the DOL must ensure that its actions are consistent with ERISA as well as the dictates of reasoned decision making under the APA.

The Presidential Memo also requires the DOL to prepare an updated "legal analysis" of the Rule. Presidential Memo at Section 1. However, the three federal district courts discussed above have addressed the merits of the Rule and they have rejected each and every one of a broad assortment of legal attacks against it, including but not limited to claims surrounding the three issues raised in the Presidential Memo. The DOL therefore need not devote significant attention to its "updated legal analysis." As it considers possible changes to the Rule, its primary concerns should be threefold: avoiding any conflict with applicable law, including ERISA; remaining faithful to the dictates of rational rulemaking, guided by its economic analysis; and, as argued below, faithfully adhering to all applicable procedural requirements.

A. <u>The courts have rejected a wide variety of legal challenges.</u>

Federal district courts in D.C., Kansas, and Texas have issued thorough and thoughtful opinions disposing of all claims against the rule, which were predicted on the U.S. Constitution, various statutes, the common law of trusts, and executive orders. A brief outline of the key holdings in just one case, *Chamber,* confirms the shear breadth of the claims as well as their facial weaknesses. In short, the district court in Texas ruled that—

- The DOL acted within its authority under ERISA;
- The DOL was not bound by the common law of trusts;
- Various provisions of the securities laws did not constrain the DOL as it crafted the Rule;
- Congress never ratified the old 5-part test by amending ERISA but leaving the old rule intact;
- The regular basis test better comports with the text, history, and purposes of ERISA;
- The DOL acted within its authority in crafting the exemptions;
- The BICE does not create a private right of action;
- The DOL provided adequate notice and opportunity to comment;
- Placing FIAs under the BICE was reasonable;
- The DOL appropriately extrapolated from mutual fund data to inform its economic analysis;
- The BICE is not unworkable;
- The DOL's cost-benefit analysis was reasonable;
- The BICE met the three-part test for exemptive relief under ERISA;
- In the context of exemptions, "administratively feasible" refers to the DOL's ability to administer the exemption for the protection of plan participants, not the ability of industry to operate under an exemption;
- The Rule does not violate the First Amendment, as it regulates professional conduct, not commercial speech; and
- The ban on class action waivers does not violate the Federal Arbitration Act, as it does not invalidate any agreement to arbitrate; rather it simply conditions exemptive relief on the absence of class action waivers.

These opinions, including specifically the holdings on the three issues identified in the Presidential Memo, discussed *supra,* show that the re-examination of the Rule, at least on a legal level, is wholly unnecessary and could not justify any amendments.

B. The DOL's paramount concern should be avoiding conflict with applicable law and arbitrary and capricious rulemaking.

The 60-day delay was indefensible in part because it perpetuated a fundamental conflict that currently exists between the old fiduciary duty rule and the plain language and remedial purposes of ERISA. In ERISA, Congress used broad, clear, and unconditional wording to impose the fiduciary duty on any person that "renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property" of a covered plan. 29 U.S.C. § 1002(21).

ERISA also articulated the important purposes of the law, observing that "the continued well-being and security of millions of employees and their dependents are directly affected by" retirement plans; that "adequate safeguards" were not in place to protect those assets; and that it was therefore important to establish "standards of conduct, responsibility, and obligation for fiduciaries" of such plans. 29 U.S.C. § 1001(a), (b).

Congress did not condition the application of the fiduciary duty on any considerations surrounding the magnitude of the costs or disruption to the adviser industry, its impact on access to advice, or potential litigation risk.[17] Congress had already determined that retirement assets required the strongest possible protections under the law, regardless of the impact those protections might have on the regulated industry. [18]

Against this backdrop, the original rule, adopted in 1975, was essentially unlawful. It betrayed both the letter and spirit of these ERISA provisions. It established an elaborate five-part test that an adviser must satisfy before being subject to the fiduciary duty, including a requirement that advice be given on a regular basis. In the 1975 rule, the DOL thus in effect re-wrote the law and severely restricted its application to advisers. The new Rule resolves this conflict by voiding the old five-part test and replacing it with one that much more closely reflects and promotes the language and purposes of ERISA. Any further delay beyond June

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17 To the contrary, Congress clearly intended retirement savers to have meaningful remedies in court when ERISA fiduciaries violate applicable standards of conduct. The Congressional declaration of policy in ERISA expressly provides that the law is designed to protect plan participants and beneficiaries by "establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, **and by providing for appropriate remedies, sanctions, and ready access to the Federal courts**." 29 U.S.C. Sec. 1001.

18 *See also Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105, 106 (2008) ("ERISA imposes higher-than-marketplace quality standards . . . requiring a plan administrator to 'discharge [its] duties' in respect to discretionary claims processing 'solely in the interests of the [plan's] participants and beneficiaries.'").

9, or any changes to the Rule that restore such restrictive requirements, will unlawfully perpetuate a conflict between the regulation and ERISA.

The court opinions directly support this argument. In two of those cases, the courts have expressly found that the new Rule more closely adheres to ERISA than the old rule does. Specifically, in *NAFA I,* the federal district court in D.C. rejected the plaintiff's claim that the Rule exceeded the DOL's authority under ERISA by removing the five-part test and replacing it with a different interpretation governing when a person "renders investment advice" for purposes of being held to the fiduciary standard. *NAFA I* at *14-15. The court explained that the Rule is actually more in line with ERISA than the old rule: "**Indeed, if anything, it is the five-part test—and not the current rule—that is difficult to reconcile with the statutory text.** Nothing in the [statutory] phrase 'renders investment advice' suggests that the statute applies only to advice provided on a regular basis." *Id.* at *15 (emphasis added).

The federal district court in Texas was equally emphatic in ruling that the new Rule "better comports with the text, history, and purposes of ERISA." Specifically, in *Chamber,* the court rejected the plaintiffs' claim that ERISA requires regular contact between an investor and an adviser to trigger the fiduciary duty:

> Plaintiffs argue the DOL's interpretation of what it means to render investment advice is entitled to no deference, because ERISA requires regular contact between an investor and a financial professional to trigger a fiduciary duty. **If anything, however, the five-part test is the more difficult interpretation to reconcile with who is a fiduciary under ERISA.** The broad and disjunctive language of ERISA's three prong fiduciary definition suggests that significant one-time transactions, such as rollovers, would be subject to a fiduciary duty. Under the five-part test, however, such a transaction would not trigger a fiduciary duty. This outcome is seemingly at odds with the statute's text and broad remedial purpose . . . . An interpretation covering such transactions better comports with the text, history, and purposes of ERISA.

Chamber at *13 (emphasis added); *see also id.* at *12 (the DOL has decided that its new interpretation "is more suitable given the text and purpose of ERISA"); at *14 ("The DOL's new rules comport with Congress' expressed intent in enacting ERISA"); *18 (rejecting claim that the Rule brings about an enormous expansion of DOL authority, since the "new rules are compatible with the substance of Congress' regulatory scheme, as the broad remedial purpose of ERISA is to protect retirement savers").[19]

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[19] Any further delay of the Rule or reinstatement of the old rule's requirements would also violate Executive Order 12866. Executive Order 12866 established the principles and specific requirements that all executive branch agencies, including the DOL, must follow in

VI. THE PROCESS: Given the extraordinary importance and complexity of the issues now facing the DOL, it must afford ample notice and opportunity for comment, a full explanation and justification for its decisions, and the requisite pause before any final delay or modification of the Rule takes effect.

So far in the re-examination process, the DOL has failed to provide adequate notice and opportunity to comment. The Delay Rule was subject to a mere 15 days of public comment on a proposal that will cost American savers millions of dollars in lost retirement savings over just 60 days. That comment period was simply inadequate to allow everyone with a stake in the Rule to develop and submit meaningful and comprehensive input on the Proposed Delay, which was fraught with deficiencies. It also conflicted with E.O. 12866, which obligates agencies to "afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include **a comment period of not less 60 days**." E.O. 12866 at § 6(a)(1) (emphasis added).

In the Delay Rule release, the DOL suggested that the enormous volume of comments on the proposed delay, some 193,000 in just 15 days, was evidence that the public did indeed have "a meaningful opportunity to comment on the delay proposal." 82 Fed. Reg. at 16904, n. 6. This is erroneous. The fact that so many comments were submitted simply reflects the enormous importance of the issue—and the overwhelming public support for the Rule, since nearly 90% of those comments opposed any delay. From this alone, nothing can be inferred about how many additional comments might have been submitted had the comment period been longer. Much more telling, in fact, is a revelation in the same release. The DOL noted that "The Department **continues to receive a very high volume** of comment and petition letters on a daily basis**,** both on the delay and on the more general questions that the Department set forth in its NRPM." *Id.* at 16903. The fact that commenters continued to submit their views well after the comment period had closed is compelling evidence that the comment period was inadequate.

The 45-day comment period on the issues raised in the Presidential Memo is also inadequate. The Delay Rule release actually invites comment not only on the three substantive issues raised in the Presidential Memorandum, but also on virtually every other aspect of the Rule and the RIA: "The Department invites comments that might help inform updates to its legal and economic analysis, including **any issues** the public believes were

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the rulemaking process. Exec. Order No. 12866, Regulatory Planning and Review, September 30, 1993, 58 Fed. Reg. 51735 (Oct. 4, 1993) ("E.O. 12866"). It expressly obligates agencies to ensure that their regulations are "**consistent with applicable law**." *Id.* at § 2(a) (emphasis added); *see also* Preamble at 1 ("the regulatory process shall be conducted so as to meet applicable statutory requirements"). The DOL must avoid allowing a clear, judicially-recognized conflict between the old rule and applicable law (ERISA) to persist.

inadequately addressed in the RIA and particularly with respect to the issued identified in the President's Presidential Memorandum." Release at 12324 (including a full page of specific questions) (emphasis added).

Similarly, the Presidential Memo invites the DOL to consider an open-ended set of issues encompassing virtually every aspect of the Rule:

> If you make an affirmative determination as to any of the [three] considerations identified [above]—or if you conclude **for any other reason** after appropriate review that the Fiduciary Duty Rule is inconsistent with the priority identified earlier in this Presidential Memorandum—then you shall publish for notice and comment a proposed rule rescinding or revising the Rule as appropriate and consistent with law.

Presidential Memo at 1 (emphasis added).

The Release and the Presidential Memo thus essentially reopen the entire Rule to re-evaluation and comment, yet the Release provides for only a 45-day comment period. That is woefully inadequate to allow meaningful public input on such a broad range of vitally important and complex issues. It is also grossly out of proportion to the extensive comment period that the industry opponents of the Rule insisted upon, and that the DOL provided, after it proposed the Rule. *See, e.g.,* Letter dated Apr. 20, 2015, from the Financial Services Institute to DOL (requesting, at a minimum, an additional 45 days in which to comment on the proposed Rule, to allow for a comment period totaling 120 days, given the "size, scope, and importance of the Proposal" and its "momentous effect on a large swath of the financial services industry").

Because virtually the entire Rule and RIA are now the subject of a re-examination, and because the outcome of that process is likely to have a "momentous" impact on retirement savers as well as the financial adviser industry, the DOL should extend the comment period for at least another 75 days, to make it more commensurate with the comment period established for the proposed Rule itself.

Finally, if the DOL believes it has grounds under the Presidential Memo for rescinding or revising the Rule, it must afford an appropriate notice and comment period for any such rule proposal. Clearly, in any such rulemaking, the DOL cannot rely solely on the comments received pursuant to the general invitation for comment in the Delay Rule. The law and the Presidential Memo itself require that such notice and comment be afforded, and all interested parties—industry and the public alike—must have an opportunity to evaluate any specific proposals that spring from the re-examination, which may inflict enormous and long-lasting harm on millions of American workers and retirees.

VII. <u>THE POSSIBLE LEGAL CHALLENGE: Any proposal to delay, dilute, or rescind the Rule faces legal challenge if it does not adhere scrupulously to the law.</u>

Throughout the long process that culminated in the Rule, industry opponents insisted that the DOL strictly adhere to all of the substantive and procedural requirements applicable to agency rulemaking. They caviled with everything from the length of the comment period to the basic provisions of the Rule, even though the comment period was extraordinarily generous and the provisions of the Rule were the epitome of rational rulemaking in accordance with applicable law. And they brought multiple lawsuits to challenge the outcome. The court decisions discussed above confirm that the industry's arguments were meritless—in some instances even frivolous.

Those who support and defend the Rule will also hold the DOL to its obligation to abide by the law as it develops any proposal that would weaken, further delay, or rescind the Rule. If any such rulemaking follows a truncated process, or produces a result that conflicts with the law, does more harm than good, or otherwise constitutes arbitrary and capricious rulemaking, then it too will be challenged in court.

<u>CONCLUSION</u>

Thank you for the opportunity to submit our views.

Sincerely,

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