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***Via* e-mail: rule-comments@sec.gov**

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

Re: Comments on Standards of Conduct for Investment Advisers and Broker-Dealers

Wells Fargo & Co. ("Wells Fargo") commends the Securities and Exchange Commission ("SEC" or "Commission") for requesting public comment on standards of conduct for investment advisers and broker-dealers (the "Request for Comment"). We hope our comments below reiterating our long-held support of a best interest standard of conduct for the provision of personalized investment help inform the Commission's ongoing assessment of investment advice standards.

Wells Fargo is one of the largest wealth management, brokerage, recordkeeper and retirement providers in the United States. This places us in a unique position to provide insight into how financial regulation may impact the ability of ordinary Americans to save and invest. Furthermore, as a leading provider of financial solutions to millions of people of varying means and needs, we are committed to providing individuals and their families with the advice and guidance they need to plan and save for their future.

Executive Summary

Retail investors deserve a best interest standard of conduct when receiving personalized investment advice. We have been consistent on this point in our comments to the SEC[1] and the Department of Labor ("DOL"), concerning its definition of the term "fiduciary" and related exemptions (collectively, the "Fiduciary Rule"), since 2010.[2]

We have found and studies show that Americans working with an investment professional generally save more,[3] enjoy greater investment returns[4] and have greater wealth at retirement than those who do not.[5] Investment professionals add significant value in helping clients understand their goals, develop financial strategies to achieve those goals and, importantly, to adhere to those strategies during times of uncertainty.[6] Therefore, it is critical that the SEC discourage regulations that eliminate or reduce investor access to investment professionals.

Unfortunately, to this very point, multiple regulators, including the DOL and the State of Nevada, have added new and different standards of conduct on the provision of investment advice. The existence of different standards of conduct across accounts and state-lines is already harming investors as financial services providers have mitigated their associated risks by limiting access to financial information and advice as well as to certain products and services.

The DOL's current re-examination of its Fiduciary Rule provides the Commission with the opportunity to take the lead to address these harms.[7] The SEC's unique position within this nation's regulatory framework, with jurisdiction over both retirement and non-retirement accounts, makes it the only regulator that can formulate a best interest standard of conduct that ensures retail investors' interests are always put first, while preserving investors' access to the financial information and advice and the products and services they need to achieve their savings goals.

To accomplish this objective, we recommend the SEC establish and enforce a best interest standard of conduct for broker-dealers when they provide personalized investment advice to retail investors that is aligned with the standard of conduct applicable to registered investment advisers. Essential to the SEC establishing such a standard is coordinating with the DOL during its reexamination of the Fiduciary Rule to either:

> (1) Create a prohibited transaction exemption for broker-dealer recommendations to retail investors in non-discretionary brokerage accounts subject to a best interest standard of conduct by another federal regulator, such as the SEC (or the Financial Industry Regulatory Authority ("FINRA")), or
>
> (2) Facilitate the establishment of a best interest standard of conduct for broker-dealers by streamlining the Fiduciary Rule's Best Interest Contract ("BIC") Exemption such that exemptive relief is based principally on the BIC Exemption's Impartial Conduct Standards.[8]

Either of the above exemptions would ensure retail investors retain access to the personalized assistance of an experienced investment professional and restore regulation and enforcement of financial services providers to their primary regulators. Furthermore, given the DOL's re-examination of the Fiduciary Rule, the Commission's involvement can help assure that the standard of conduct for broker-dealer recommendations does not revert to the suitability standard that continues to govern recommendations made to investors in non-retirement accounts.[9]

In our opinion, all investors should be given protections that are consistent with the Impartial Conduct Standards. As such, we recommend that under any circumstance, the Commission formulate a best interest standard of conduct for all accounts at broker-dealers based on the DOL Fiduciary Rule's Impartial Conduct Standards. The resulting standard would, in conjunction with the approaches to exemptive relief outlined above, eliminate the investor confusion created by separate standards of conduct for retirement and non-retirement accounts as well as ensure investors receive the following protections:

- Advice is in the best interest of the retail investor, meaning broker-dealers must act with care, skill and prudence and without regard to their own financial interests,
- No more than reasonable compensation is charged, and
- Materially misleading statements are avoided.

These standards should be accompanied by enhanced up-front disclosures, similar to the current Form ADV. Such a principles- and disclosure-based standard of conduct in combination with either of the new exemptions described above could reshape the market dynamics that are currently negatively affecting investors as a result of the uncertainties created, in general, by the DOL Fiduciary Rule and, in particular, by the BIC Exemption. Furthermore, the resulting standard of conduct would be consistent with the decades-old standard of conduct for registered investment advisers, which requires duties of loyalty and care, reasonable fees and up-front disclosure, and would give retail investors the "clarity and consistency" the Commission seeks to provide.[10]

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Discussion

1. The Changing Regulatory Environment Is Harming Retail Investors (Question Nos. 1 & 4-7)

In the absence of SEC action and regulatory coordination, the standards of conduct for investment advice are, to the detriment of investors, only becoming more disparate. Multiple regulators, including individual states, have changed, or are contemplating changes to, standards of conduct for investment advice, each with their own compliance requirements and market impact. The result is, as Chair Clayton recently remarked, "we're in a position where we could have different standards for the individual investor – that doesn't seem right."[11] In fact as many as six or more standards of conduct can apply to investment advice provided by an investment professional for a single customer.[12] These differences are based on whether a financial advisor provides investment advice concerning assets in (1) an employer plan, (2) an individual retirement account ("IRA") or (3) a taxable account. Each of the three account types is then subject to different standards of care based on whether the account is serviced by (1) a broker-dealer or (2) a registered investment adviser.

A. <u>The Impact of the DOL Fiduciary Rule on the Marketplace</u>

Developments in the market for retirement savings services and products since the Fiduciary Rule's issuance have reinforced our initial concern that this regulation would cause "investors, particularly middle-class savers, [to] receive less individualized retirement education and have fewer choices when preparing for retirement."[13] We have seen our concern borne out as financial services providers have responded to the Fiduciary Rule, and the higher costs and litigation risks it poses, by limiting the availability of professional investment advice, eliminating service model choices and narrowing the range of products available to retail investors.[14] We described these changes in detail in two recent letters to the DOL.[15]

These limits on available retirement services are principally due to the litigation risks created by the Rule's BIC Exemption and Class Exemption for Principal Transactions in Certain Debt Securities between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs ("Principal Transactions Exemptions"). In order to avail themselves of the BIC and Principal Transactions Exemptions, broker-dealers are required to agree to certain contractual provisions and warranties. This requirement was created to address the DOL's limited enforcement jurisdiction over IRAs,[16] but the imposition of new contractual provisions and warranties has undermined the certainty of established dispute practices and exposed broker-dealers to uncertain, and potentially significant, litigation risks.

In an effort to minimize these risks and to cover their associated costs, financial services providers have increased account minimums for commission-based accounts, encouraged investors to move to asset-based advisory arrangements, reduced their product platforms and, in some cases, eliminated commission-based accounts altogether. These changes are particularly harmful for small balance, buy-and-hold retirement savers. In sum, the Insured Retirement Institute estimates that approximately 70 percent of investment professionals will disengage with at least some lower balance retirement savers because of the Fiduciary Rule.[17]

B. The Proliferation of Other Standards of Conduct

The issue of inconsistent standards of conduct is only becoming more complex and urgent as more regulators become involved. For example, the State of Nevada recently adopted a new fiduciary duty pertaining to "financial planners," which includes broker-dealers.[18] Other states are indicating that they may soon follow the course set by Nevada.[19] Furthermore, the CFP Board, which is a non-profit, non-regulatory organization, has sought comment on proposed changes to its standards of conduct, including the expansion of fiduciary duty to cover all financial advice by professionals holding the CFP® designation.[20] These conduct standards differ significantly from the standard of conduct applicable to investment advisers registered under federal and state securities laws;[21] the duty of fair dealings under the Securities Exchange Act of 1934 and FINRA rules applicable to broker-dealers;[22] and the Impartial Conduct Standards related to the DOL's Fiduciary Rule, which apply only to retirement accounts.[23]

Problematically, these new standards of conduct are specific to a type of account (e.g., only retirement accounts), select investment professionals (e.g., only CFP® certificants) or persons in a particular jurisdiction (e.g., residents of Nevada). This is particularly troublesome in that investors do not expect that the standards of conduct to which their investment professional is held should differ based on account type, any professional designation their investment professional may hold or where they live in the United States.[24]

Inconsistent standards of conduct can also confuse even the most compliant-oriented investment professional and, as the reaction to the DOL Fiduciary Rule illustrates, financial services providers will attempt to mitigate the risks associated with multiple standards of conduct by limiting the availability of advice and choice.[25] As noted above, these changes are already harming retail investors as financial services providers narrow their range of services and product platforms to comply with the most restrictive regulatory standard and raise account minimums and fees to cover increased costs. The ultimate impact of this trend will be that the rules governing significant parts of the financial marketplace will be determined not by the SEC but by other regulatory bodies**.**

2. The Need for SEC Action (Question Nos. 9, 10, 15 & 17)

We hope the SEC's Request for Comment is recognition there is only a short window of opportunity for the SEC to act on this critical issue and to resolve the market dynamics already adversely affecting retail investors. Unless there is swift action by the Commission, the DOL will have effectively assumed the SEC's role as the primary regulator for oversight of personalized investment advice for retirement accounts. Most importantly, the opportunity for the SEC to influence regulation that according to Chair Clayton "may have significant effects on retail investors and entities regulated by the SEC" will have passed.[26]

A. The SEC Is Best Positioned to Create a Best Interest Standard of Conduct

The breadth of SEC experience in protecting investors and maintaining fair, orderly and efficient markets, as well as its responsibility for overseeing both broker-dealers and registered investment advisers, positions the Commission as the only regulator that can address the investor issues detailed above and establish a best interest standard of conduct for the provision of personalized investment advice. Congress was aware of the SEC's unique role when it asked the SEC to study and consider rulemaking regarding the obligations of broker-dealers and registered investment advisers in Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").

We believe a best interest standard of conduct for all accounts at broker-dealers based on the DOL Fiduciary Rule's Impartial Conduct Standards would be consistent with Section 913's requirement that the standard of conduct for broker-dealers be "no less stringent" than the existing standard for registered investment advisers.[27] The establishment of such a standard of conduct, either through Commission rulemaking or via a directive to FINRA to amend its Suitability Rule,[28] would align the basic principles of the standards of conduct for broker-dealers and investment advisers without altering the rules applicable to advisory relationships under the Investment Advisers Act of 1940.

In addition, this course of action would acknowledge the inherent differences between the activities and practices of broker-dealers and registered investment advisers, which have the potential to benefit investors.[29] For example, commission-based accounts can be the most cost-effective option for investors who trade relatively infrequently. In addition, allowing broker-dealers to effect trades on a principal basis provides investors with a wide range of fixed income securities offerings and liquidity for these positions, including situations where there are limited markets for the underlying securities.

We encourage the Commission to coordinate its efforts with the DOL. We noted that Chair Clayton and DOL Secretary Alexander Acosta have agreed "to engage constructively" to develop solutions to the standard of conduct issue.[30] The opportunity for the SEC and the DOL to harmonize the standard of conduct for broker-dealers across retirement and non-retirement brokerage accounts is one of the principal reasons we asked the DOL for an extension of its January 1, 2018 applicability date for certain provision of the BIC Exemption, Principal Transactions Exemption and Prohibited Transaction Exemption 84-24.[31]

B. How the SEC Could Coordinate with the DOL

We are largely in agreement with the standard of conduct outlined in the SEC's 2013 request for information and have been supportive of the basic tenets of the DOL Fiduciary Rule's Impartial Conduct Standards, with which financial services providers began complying on June 9, 2017. As such, our suggestions are designed to minimize the compliance burden of any SEC rulemaking and still result in a workable best interest standard of conduct for broker-dealers.

Two possible formulations of an exemption that could result from SEC and DOL coordination related to the Fiduciary Rule and still put investors' interests first are:

1. Create an Exemption for Accounts Subject to a Best Interest Standard

The SEC could work with the DOL to create a prohibited transaction exemption for brokerage accounts, including IRAs, subject to a best interest standard of conduct for the provision of personalized investment advice under the regulatory jurisdiction of the SEC (or FINRA) at the same time as the SEC creates such a standard for non-retirement accounts. For example, the SEC could instruct FINRA to amend its Suitability Rule to include a best interest standard that mirrors the elements of the Impartial Conduct Standards (with the minor modifications suggested below). The DOL could then provide that the application of and compliance with this standard of conduct would be sufficient to meet the requirements of a prohibited transaction exemption.

2. Revise the BIC Exemption to Permit Broad Adoption of the Impartial Conduct Standards

The SEC could coordinate with the DOL to streamline the BIC Exemption such that exemptive relief is based principally on a revised version of the Impartial Conduct Standards with enforcement through existing processes and without a contract requirement. Such coordination to adopt and then enforce a modified version of the Impartial Conduct Standards will mitigate the overlap between regulatory frameworks under the Fiduciary Rule without removing or diluting any of the current investor protections and reduce the litigation risks created by the current BIC Exemption, which are leading to reduced access to investment advice and choice.

The creation of either alternative best interest exemption, when combined with SEC action to establish a best interest standard of conduct for all brokerage accounts, would benefit retirement *and* non-retirement retail investors by providing a uniform standard of conduct for personalized investment advice provided by broker-dealers without sacrificing or weakening investor protections. Both approaches also have the enduring flexibility to promote and adapt to marketplace innovation and would be aligned with the standard of conduct for registered investment advisers. Further, enforcement for either alternative would be achieved through current regulatory oversight activities and through established dispute resolution practices for customer grievances.[32]

C. <u>How the SEC Could Coordinate with States</u>

The SEC should also coordinate with state regulators through the North American Securities Administrators Association ("NASAA") in accordance with Section 19(d) of the Securities Act of 1933. This coordination could achieve the Section 19(d)(2)(B) policy aim of "maximum uniformity in Federal and State regulatory standards," which should include a harmonized standard of conduct for broker-dealers across states.

3. Principles-Based Approach to Developing a Standard Of Conduct Is Most Appropriate (Question No. 8)

We believe a standard of conduct that includes the following principles will be flexible enough to accommodate new service models and products, such as the continued development of robo-advice platforms, while ensuring that retail investors receive investment advice that is in their best interest:

Best interest standard-

> Investment advice will be provided that is in the best interest of the client. This advice must consider the investor's investment profile as well as product- or strategy-related factors in addition to cost, such as the product's or strategy's investment objectives, characteristics (including any special or unusual features), liquidity, risks and potential benefits, volatility and likely performance in a variety of market and economic conditions without regard to the financial or other interest of the investment professional providing the advice.

This formulation of the best interest standard retains the "without regard to the financial or other interest of the broker, dealer, or investment adviser providing the advice" requirement of Section 913 of the Dodd Frank Act and is consistent with the fiduciary duty applicable to registered investment advisers.[33] At the same time, the standard makes clear that broker-dealers can recommend a product or service that is in the investor's best interest, whether it is the least expensive option or not, which is critical for application of the standard to broker-dealers.

This approach also aligns the best interest standard with existing regulations and ensures that brokerage accounts continue to be viable options for investors. For example, the language reflects FINRA guidance regarding its Suitability Rule. This includes Regulatory Notice 12-25 in which FINRA provides a list of the appropriate factors to be considered in making a recommendation and to ensure brokers "make only those recommendations that are consistent with the customer's best interests." [34] The above language also mirrors DOL guidance that "[a] responsible plan fiduciary should not consider any one factor, including the fees or compensation to be paid to the service provider, to the exclusion of other factors."[35]

Reasonable Compensation-

> An asset will not be recommended if the total amount of compensation anticipated to be received by the investment professional will exceed reasonable compensation (i.e., compensation that is normally charged for similar transactions in the marketplace).

The definition of "reasonable compensation" as "compensation that is normally charged for similar transactions" is consistent with DOL guidance[36] and FINRA rules,[37] and is in line with standards for reasonable fees applicable to registered investment advisers.[38] Again, we believe that to the extent practicable, the terms used should be consistent with existing regulations.

Misleading Statements-

Statements about an asset, fees, material conflicts of interest or other matters relevant to a client's investment decisions will not be misleading.

Finally, the prohibition on misleading statements is a straightforward element of the standard of conduct with which no financial services provider could reasonably disagree and is consistent with existing FINRA rules[39] and Employee Retirement Income Security Act of 1974 ("ERISA") fiduciary duty[40] as well as the standard of conduct applicable to registered investment advisers.[41]

4. When the Standard of Conduct Should Apply (Question Nos. 13 & 14)

The standard of conduct should apply when a retail investor materially relies on personalized investment advice and the investment professional or his or her firm receives compensation for that advice (but may be limited in scope thereafter as agreed to by the retail investor). Most logically, this would occur at the time an account is opened or a product is purchased by an investor. This means that access to investment, distribution and other assistance would be preserved while investors are protected through the application of a best interest standard of conduct when the investor opens an account, deposits funds, acquires a specific product, enters into a mutually agreed upon fiduciary relationship with an investment professional or reviews specific investment recommendations from the investment professional.

This application of the standard of conduct in this manner is consistent with FINRA guidance concerning its Suitability Rule, which states that the rule applies to recommendations to a "potential investor" who then becomes a "customer." Thus, the Suitability Rule's investor protections extend to prospective clients *if* that individual executes transactions through the broker-dealer that made the recommendation or if the broker-dealer receives or will receive compensation as a result of the transaction.[42] Under this guidance, financial services providers do not escape liability for a recommendation made prior to account opening but later implemented at or after account opening.[43]

On the other hand, and as set forth in our 2013 letter to the Commission,[44] a fiduciary standard of conduct should not apply to activities that have not been traditionally considered personalized investment advice, including sales and marketing efforts, transactions among institutional investors or financial intermediaries, investment education, general information about a firm's products and services, transactions undertaken by investors independently (e.g., via on-line services), affiliate referrals and non-securities products (e.g., fixed annuities, bank deposits, CDs, futures or commodities).

Establishing a bright line for when the standards of conduct apply encourages the free flow of information between a retail investor and an investment professional and provides retail investors with the ability to access information about the products and services available to them. This should include access to asset allocation models and interactive investment materials with specific plan investment alternatives. Such an approach would be consistent with longestablished securities regulations regarding investor education, including FINRA rules[45] and DOL guidance.[46]

5. Disclosure Should Be Part of the Standard of Conduct (Question Nos. 2, 8 & 17)

Any potential SEC action should also include disclosures-based elements. In 2013, the SEC sought comment on a general relationship guide akin to Part 2A of Form ADV, the form registered investment advisers currently provide to advisory clients. We continue to support this proposal and recommend retail investors receive a straightforward disclosure containing a:

- Description of fees and the scope of services,
- Disclosure of material conflicts of interest,
- Disclosure of proprietary or other limited ranges of products, and
- Disclosure of the circumstances in which principal trades may take place.

Furthermore, retail investors should be informed of the right to obtain complete information about the direct fees currently associated with their investments. This disclosure could take a form similar to the current ERISA Section 408(b)(2) disclosure.

6. Enforcement of the Standard of Conduct (Question No. 11)

Responsibility for enforcing this principles- and disclosure-based standard of conduct should reside with SEC and/or FINRA. This includes the Commission's and FINRA's robust examination, oversight and enforcement regime, which has no corollary under the DOL regulation. The focus in such an approach would be solely on protecting the interests of all investors as opposed to Fiduciary Rule's reliance upon litigation, which, by its nature, disproportionately benefits those who pursue claims. Furthermore, the continued oversight of personalized investment advice by financial services providers' primary regulators will minimize the risk mitigation strategies that financial services providers have adopted in response to the litigation potential of the Fiduciary Rule.

Conclusion

We recommend the SEC work with the DOL to modify the Fiduciary Rule's Impartial Conduct Standards to permit the establishment of a uniform best interest standard for broker-dealers that:

- Requires personalized investment advice rendered for a fee be in the best interest of the investor;
- Ensures compensation is reasonable with respect to services provided;
- Mandates disclosure of fees and material conflicts of interest (via a Form ADV Part 2-like relationship guide and ERISA § 408(b)(2)-like direct fee information); and
- Holds advice providers accountable through a common dispute resolution process.

We thank the SEC for this opportunity to respond to the Request for Comment. We restate our desire to stay engaged with the Commission on this important topic and stand ready to work with the SEC to achieve a workable outcome for retail investors. If you would like to further discuss any of Wells Fargo's comments, please contact Robert J. McCarthy, Director of Regulatory Policy for Wells Fargo Advisors, at [redacted] or ([redacted].

Sincerely,

David Kowach
Head of Wells Fargo Advisors
Wells Fargo & Company

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[1] *See* Correspondence from Robert J. McCarthy, Director of Regulatory Policy at Wells Fargo Advisors, LLC, to Elizabeth M. Murphy, Secretary of SEC, *regarding* File No. 4-606; Release No. 34-69013; IA-3558; Duties of Brokers, Dealers and Investment Advisers (July 5, 2013) ("Wells Fargo to SEC 2013 Letter"), at 2-7, *available at:* https://www.sec.gov/comments/4-606/4606-3127.pdf.

[2] *See, e.g.,* Correspondence from Joseph Ready, Executive Vice President of Wells Fargo Institutional Retirement and Trust to the Office of Regulations and Interpretations ("ORI"), Employee Benefits Securities Admin. ("EBSA"), Dep't of Labor ("DOL"), *regarding* RIN 1210-AB32, Definition of Fiduciary Proposed Rule (Feb. 3, 2011); Correspondence from Robert J. McCarthy, Director of Regulatory Policy at Wells Fargo Advisors, LLC, to Elizabeth M. Murphy, Secretary of SEC, *regarding* File No. 4-606; Release No. 34-69013; IA-3558; Duties of Brokers, Dealers and Investment Advisers (July 5, 2013), at 2-7, *available at:* https://www.sec.gov/comments/4-606/4606-3127.pdf.; Correspondence from David M. Carroll, Senior Executive Vice President, Wealth, Brokerage & Retirement, Wells Fargo, to John J. Canary, Director, ORI and Office of Exemption Determinations ("OED"), EBSA, DOL, *regarding* Comments on Proposed Conflict of Interest Rule and Related Proposals [RIN: 1210-AB32 and ZRIN: 1210-ZA25] (July 21, 2015) ("Wells Fargo to DOL July 2015 Letter"), at 2-3, *available at:* https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/00647.pdf; Correspondence from David M. Carroll, Senior Executive Vice President, Wealth, Brokerage & Retirement, Wells Fargo, to John J. Canary, Director, ORI and OED, EBSA, DOL, *regarding* Comments on Proposed Conflict of Interest Rule and Related Proposals [RIN: 1210-AB32 and ZRIN: 1210-ZA25] (Sept. 24, 2015), at 2-3, *available at:* https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/03063.pdf; and Correspondence from David M. Carroll, Head of Wealth and Investment Management, Wells Fargo, to ORI, EBSA, DOL, *regarding* Reexamination of Definition of the

Term "Fiduciary" and Related Exemptions (RIN 1210-AB79) (April 17, 2017) ("Wells Fargo to DOL Apr. 2017 Letter"), at 1-2 and 6-7, *available at*: https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/01378.pdf; Correspondence from David Kowach, Head of Wells Fargo Advisors, Wells Fargo, to OED, EBSA, DOL, *regarding* Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions – Questions 2 through 18 (RIN 1210-AB82) (Aug. 7, 2017) ("Wells Fargo to DOL Aug. 2017 Letter"), *available at*: https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00525.pdf.

[3] *See*, *e.g.*, Claude Montmarquette and Nathalie Viennot-Briot, *Econometric Models on the Value of Advice of a Financial Advisor*, Centre for Interuniversity Research and Analysis on Organizations (CIRANO) (July 2012), at 9, 15-35, 56, *available at:* http://www.cirano.qc.ca/pdf/publication/2012RP-17.pdf ("[O]n average, participants retaining the service of a financial advisor for more than 15 years have about 173% more financial assets (in other words, 2.73x the level of assets) than non-advised respondents.").

[4] *See*, *e.g.*, David Blanchett and Paul Kaplan, *Alpha, Beta, and Now…Gamma*, Morningstar Investment Management (Aug. 28, 2013), at 16, *available at:* https://corporate1.morningstar.com/uploadedFiles/US/AlphaBetaandNowGamma.pdf ("[W]e estimate a retiree can be expected to generate 22.6% more certainty-equivalent income utilizing" more intelligent financial planning decisions.).

[5] *See*, *e.g.*, Oliver Wyman, *The Role of Financial Advisors in the US Retirement Market* (June 18, 2015) ("Oliver Wyman 2015 Study"), at 16, *available at:* http://fsroundtable.org/wp-content/uploads/2015/07/The-role-of-financial-advisors-in-the-US-retirement-market-Oliver-Wyman.pdf (advised individuals have a minimum of 25% more assets that non-advised individuals).

[6] *See*, *e.g.*, *id*., at 16-34. As a recent Vanguard study found, an advisor's added value "is more aptly demonstrated by the ability to effectively act as wealth manager, financial planner, and behavioral coach – providing discipline and reason to clients who are often undisciplined and emotional – than efforts to beat the market." Donald G. Bennyhoff and Francis M. Kinniry Jr., "Advisor's Alpha," Vanguard Research (Apr. 2013), at 3, *available at:* https://advisors.vanguard.com/iwe/pdf/ICRAA.pdf?cbdForceDomain=true. In other words, people facing difficult, and critical, financial choices benefit when working with an investment professional – and not just from technical advice on particular investments.

[7] The February 3, 2017 *Fiduciary Duty Rule* Presidential Memorandum directs the DOL to consider whether the Rule: (1) "has harmed or is likely to harm investors due to a reduction of Americans' access to retirement savings information [and] related financial advice;" (2) "has resulted in dislocations and disruptions within the retirement services industry that may adversely affect investors;" and (3) "is likely to cause an increase in litigation" and "in the prices investors…pay to gain access to retirement services." The Presidential Memorandum further directs the DOL to publish for notice and comment a proposed rule that rescinds or revises the Rule should it make an affirmative determination as to any of these considerations. 82 Fed. Reg. 9,675 (Feb. 7, 2017).

[8] *See* 81 Fed. Reg. 44,773, at 44,776-44,777 (July 11, 2016).

> "(1) When providing investment advice to the Retirement Investor, the Financial Institution and the Adviser(s) provide investment advice that is, at the time of the recommendation, in the Best Interest of the Retirement Investor. [S]uch advice reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party;
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> (2) The recommended transaction will not cause the Financial Institution, Adviser or their Affiliates or Related Entities to receive…compensation for their services that is in excess of reasonable compensation…;
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> (3) Statements by the Financial Institution and its Advisers to the Retirement Investor about the recommended transaction, fees and compensation, Material Conflicts of Interest, and any other matters relevant to a Retirement Investor's investment decisions, will not be materially misleading at the time they are made."

[9] *See FINRA*, *Rule 2111*, *Suitability*.

[10] Chair Jay Clayton, "Public Comments from Retail Investors and Other Interested Parties on Standards of Conduct for Investment Advisers and Broker-Dealers," Public Statement (June 1, 2017), *available at*: https://www.sec.gov/news/public-statement/statement-chairman-clayton-2017-05-31.

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[11] "Clayton, Piwowar Criticize DOL Fiduciary Rule," Thomson Reuters (July 27, 2017), *available at*: https://tax.thomsonreuters.com/media-resources/news-media-resources/checkpoint-news/daily-newsstand/clayton-piwowar-criticize-dol-fiduciary-rule/.
[12] *See* Correspondence from Marcia E. Asquith, Senior Vice President and Corporate Secretary, FINRA, to ORI and OED, EBSA, Dep't of Labor, *regarding* Proposed Conflict of Interest Rule and Related Proposals, RIN 1210-AB32 (July 17, 2015) ("FINRA Letter"), at 4, *available at*: https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/00405.pdf.
[13] *See* Wells Fargo to DOL July 2015 Letter, at 2.
[14] *See, e.g.*, Michael Wursthorn, "A Complete List of Brokers and Their Approach to 'The Fiduciary Rule'," Wall St. Journal (Feb. 6, 2017), *available at*: https://www.wsj.com/articles/a-complete-list-of-brokers-and-their-approach-to-the-fiduciary-rule-1486413491.
[15] *See* Wells Fargo to DOL Apr. 2017 Letter, at 3-4; Wells Fargo to DOL Aug. 2017 Letter"), at 3-5.
[16] As the DOL states, "[w]ithout a contract, the possible imposition of an excise tax provides…inadequate incentive to ensure compliance with the [Rule]." 81 Fed. Reg. 21,002, at 21,022 (Apr. 8, 2016).
[17] *See, e.g.*, Correspondence from Catherine J. Weatherford, President & CEO, Insured Retirement Institute, to ORI and OED, EBSA, DOL *regarding* Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice; Best Interest Contract Exemption (Prohibited Transaction Exemption 2016-01); Prohibited Transaction Exemption 84-24 RIN 1210-AB79 (Apr. 17, 2017), at 15, *available at*: https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/01413.pdf (New studies have shown that more than 70 percent of investment professionals will disengage from retirement savers with less than $300,000 in investable assets because of the Fiduciary Rule.).
[18] Barbara K. Cegavske, Nevada Secretary of State, "NEW! Fiduciary Duty – SB 383," *available at*: http://nvsos.gov/sos/licensing/securities/new-fiduciary-duty (last accessed Aug. 16, 2017).
[19] *See, e.g.*, Michael Thrasher, "Other States Considering Their Own 'Fiduciary Rules' After Nevada's Becomes Law," Wealth Management (June 26, 2017), *available at*: http://www.wealthmanagement.com/industry/other-states-considering-their-own-fiduciary-rules-after-nevada-s-becomes-law.
[20] CFP Board, "Proposed Revisions to CFP Board's *Standards of Professional Conduct*," *available at*: https://www.cfp.net/about-cfp-board/proposed-standards. Moreover, the National Association of Insurance Commissioners ("NAIC") recently convened a new working group to consider changes to the NAIC's Suitability in Annuity Transactions Model Regulation, including the adoption of a "best interest" standard, among other possibilities. *See, e.g.*, NAIC, Annuity Suitability (A) Working Group, Meeting Summary Report (Aug. 6, 2017), available at: http://www.naic.org/meetings1708/cmte_a_aswg_2017_summer_nm_summary.pdf?1502150543769.
[21] *See, e.g.*, *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963) (construing the Advisers Act as imposing a federal fiduciary duty on RIAs). *See also Transamerica Mortgage Advisors, Inc.*, 444 U.S. 11, 17 (1979) ("[T]he Act's legislative history leaves no doubt that Congress intended to impose enforceable fiduciary obligations.").
[22] *See* SEC Study on Investment Advisers and Broker-Dealers (January 2011), at iv, *available at*: https://www.sec.gov/news/studies/2011/913studyfinal.pdf.
[23] 82 Fed. Reg. 16,902, at 16,902 (Apr. 7, 2017).
[24] *See* Oliver Wyman 2015 Study, at 19 (investors value holistic investment advice).
[25] *See, e.g.*, Michael Wursthorn, "A Complete List of Brokers and Their Approach to 'The Fiduciary Rule'," Wall St. Journal (Feb. 6, 2017), *available at*: https://www.wsj.com/articles/a-complete-list-of-brokers-and-their-approach-to-the-fiduciary-rule-1486413491.
[26] *See* Chair Jay Clayton, "Public Comments from Retail Investors and Other Interested Parties on Standards of Conduct for Investment Advisers and Broker-Dealers," Public Statement (June 1, 2017), *available at*: https://www.sec.gov/news/public-statement/statement-chairman-clayton-2017-05-31.
[27] Section 913 provides that the standard of conduct for broker-dealers "shall be no less stringent that the standard applicable to investment advisers."
[28] *See supra* note 9.
[29] *See also* Office of the Investor Advocate, Report on Objectives (Fiscal Year 2018), at 11, *available at*: https://www.sec.gov/files/sec-office-investor-advocate-report-on-objectives-fy2018.pdf (describing harmful outcomes for retail investors that could follow from Section 913 rulemaking, including diluting "the existing standard for registered investment advisers" and causing "even greater confusion").

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[30] *See* Alexander Acosta, "Deregulators Must Follow the Law, So Regulators Will Too," Wall St. J. (May 23, 2017), at A19, *available at* https://www.wsj.com/articles/deregulators-must-follow-the-law-so-regulators-will-too-1495494029.

[31] Correspondence from David Kowach, Head of Wells Fargo Advisors, Wells Fargo, to OED, EBSA, DOL, *regarding* Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions – Extending January 1, 2018 Applicability Date (RIN 1210-AB82) (July 21, 2017) , *available at*: https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00258.pdf; Correspondence from David Kowach, Head of Wells Fargo Advisors, Wells Fargo, to OED, EBSA, DOL, *regarding* Extension of Transition Period and Delay of Applicability Dates (RIN 1210-AB82) (Sept. 12, 2017) , *available at*: https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA27/00023.pdf.

[32] *See*, *e.g.*, FINRA, Rule 12200, *Arbitration Under Arbitration Agreement or the Rules of FINRA*.

[33] *See*, *e.g.*, *SEC v. Capital Gains*, 375 U.S. 180, 194 (1963) (espousing the principles of loyalty and care applicable to investment advisers); *see also* SEC, Division of Investment Management and Office of Compliance Inspections and Examinations, "Information for Newly-Registered Investment Advisers" (Nov. 23, 2010), *available at*: https://www.sec.gov/divisions/investment/advoverview ("As an investment adviser, you are a 'fiduciary' to your advisory clients. This means that you have a fundamental obligation to act in the best interests of your clients and to provide investment advice in your clients' best interests. You owe your clients a duty of undivided loyalty and utmost good faith.").

[34] *See* FINRA, Regulatory Notice 12-25, *Suitability* (May 2012), at 3 (FAQ 1).

[35] *See, e.g.*, DOL, EBSA, *Reasonable Contract or Arrangement Under Section 408(b)(2) – Fee Disclosure*, 72 Fed. Reg. 70,988, at 70,993 Dec. 13, 2007).

[36] *See*, *e.g.*, DOL, Advisory Opinion No. 2002-08A, letter from Louis Campagna, Chief, Division of Fiduciary Interpretations, Office of Regulations and Interpretations to Michael A. Crabtree, Esq., Central Pension Fund of the International Union of Operating Engineers and Participating Employers (Aug. 20, 2002) ("With regard to the selection of service providers under ERISA…the responsible plan fiduciary must engage in an objective process designed to elicit information necessary to assess the qualifications of the provider, the quality of services offered, and the reasonableness of the fees charged in light of the services provided."), *available at*: http://www.dol.gov/ebsa/regs/AOs/ao2002-08a.html.

[37] *See*, *e.g.*, FINRA, Rule 2121, *Fair Prices and Commissions* ("Charges, if any, for services performed, including, but not limited to, miscellaneous services such as collection of monies due for principal, dividends, or interest; exchange or transfer of securities; appraisals, safe-keeping or custody of securities, and other services shall be reasonable and not unfairly discriminatory among customers.").

[38] *See*, *e.g.*, Shareholder Service Corp., SEC No-Action Letter (Feb. 3, 1989) ("[T]he appropriateness of a particular fee should be determined by the adviser, in light of the fiduciary duties an adviser owes its clients, based upon a general standard of reasonableness under the circumstances.").

[39] *See*, *e.g.*, FINRA Rule 2210 (d)(1) ("No member may omit any material fact or qualification if the omission, in light of the context of the material presented, would cause the communications to be misleading.")

[40] *See*, *e.g.*, *Varity Corp. v. Howe*, 516 U.S. 489, 506 (1996) (employer fiduciary breached its fiduciary duty when it intentionally misled employees about the chance of financial success and security benefits of a new subsidiary to persuade them to transfer to the subsidiary with the goal of terminating their benefits and reducing costs).

[41] *See* Investment Advisers Act § 206, 15 U.S.C. § 80b-6 (2010); *Capital Gains*, 375 U.S. at 194 (investment advisers have an obligation to employ reasonable care to avoid misleading their clients).

[42] *See* FINRA, Regulatory Notice 12-55, *Suitability* (Dec. 2012), at 2 (FAQs 6(a) and 6(b)), *available at:* https://www.finra.org/sites/default/files/NoticeDocument/p197435.pdf.

[43] *See id.*, at 6 (FAQ 6(b), n.10) ("[For a] recommendation to a *potential investor*, suitability obligations attach when the transaction occurs, but the suitability of the recommendation is evaluated based on the circumstances that existed at the time the recommendation was made.").

[44] *See* Wells Fargo to SEC 2013 Letter, at 7-9.

[45] *See*, *e.g.*, FINRA, Regulatory Notice 12-25, *Suitability* (May 2012), at 7 (FAQ 8).

[46] *See*, *e.g.*, Dep't of Labor, Pension and Welfare Benefits Admin., *Interpretive Bulletin 96-1; Participant Investment Education; Final Rule*, 61 Fed. Reg. 29586 (June 11, 1996) (codified at 29 C.F.R. pt. 2509) *available at:* http://www.gpo.gov/fdsys/pkg/FR-1996-06-11/pdf/96-14093.pdf.