October 17, 2017

The Honorable Jay Clayton
Chairman
United States Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

Re: Request for Information Concerning Standards of Conduct for Investment Advisers and Broker-Dealers

Dear Chairman Clayton:

The Financial Services Roundtable ("FSR" or "we")[1] appreciates the opportunity to submit comments concerning standards of conduct for brokers, dealers and investment advisers. FSR has long been in favor of the harmonization of regulations for broker-dealers and registered investment advisers when providing personalized investment advice to retail customers. In addition, we support strong consumer protections for retail customers.

FSR also supports the Commission's efforts to coordinate with the Department of Labor (the "Department") on standards of conduct for financial advisors. In view of the impact of the Department's investment-advice fiduciary rule (the "DoL Rule") on the marketplace, FSR believes the Commission should consider whether, and to what extent, the DoL Rule exacerbates retail customer confusion, reduces the product offerings available to retail customers, and increases the costs borne by retail customers.

[1] FSR represents the largest integrated financial services companies providing banking, insurance, payment, investment and finance products and services to the American consumer. FSR member companies provide fuel for America's economic engine, accounting for $54 trillion in managed assets, $1.1 trillion in revenue and 2.1 million jobs.

FSR members have noted several trends that adversely impact the customer experience and product and service availability related to the DoL Rule, including: (1) less guidance and support to IRA owners and small plans; (2) increases in minimum account size; (3) limited product shelf;[2] (4) shift to fee-based accounts; (5) moving clients with smaller accounts to self-service or robo-advice; (6) orphaning of smaller, less profitable accounts due to heightened risks; (7) reduced willingness to discuss or consider unmanaged assets with clients due to risks; (8) poor client service due to the time required to perform comparative analysis on the proposed account to the existing account; (9) disinclination to sell annuity products because of uncertainty surrounding the Rule and inability to launch new products because resources are tied up with Rule implementation; (10) additional disclosure documents and other changes to sales process make the sales process markedly longer in each client appointment; (11) less discretion on small accounts and compensation changes make working with small accounts more challenging and less cost-effective for financial advisors;[3] (12) higher manufacturing and distribution costs; and (13) new liability concerns.[4]

Moreover, a survey of a representative sample of all U.S. financial professionals conducted only one month after the June 9, 2017, initial compliance deadline shows significant disruption to the marketplace as a result of the DoL Rule:[5]

- Only 12% of survey respondents report the rule is helping them to serve their clients best interest and 33% report there has been no impact, yet those respondents still report more complicated paperwork and fewer small accounts. Fifty percent of respondents report the rule is restricting them from serving their clients best interests.
- Only 10% of Certified Financial Planners ("CFPs") report that the rule is helping them to serve their clients best interests, and 55% report the rule is restricting them from serving their clients' bests interests. This runs counter to the claim by the CFP Board of Standards that the rule is workable for their members.[6]

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2 In some instances, products with outlying commissions (both low and high) and/or non-standard commission structures are being eliminated from the product shelf, regardless of quality, benefits, or features of the product or its performance.

3 Ultimately, the financial advisor's legal risk is the same for a $2,000 account as for a $2 million account. Thus, financial advisors have less incentive to open small accounts in an effort to minimize the new risks and associated costs of the contractual provisions and warranties under the Best Interest Contract Exemption and the Principal Transactions Exemption.

4 See attached, FSR, *Fiduciary Rule Examination, Request for Information: General Questions* (Aug. 10, 2017) ("FSR Aug. 2017 Letter"), https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00601.pdf.

5 See attached, Harper Polling, *Department of Labor Fiduciary Rule: National Survey of Financial Professionals* (July 7-12, 2017) ("Harper Polling Slides") and Harper Polling, *Key Poll Findings—National Survey of Financial Professionals* (July 17, 2017) ("Harper Polling Memo").

6 Letter from Kevin R. Keller, Lauren Schadle, and Geoffrey Brown to Office of Regulations and Interpretations, Employee Benefit Security Administration, U.S. Department of Labor (April 24, 2017),

- The DoL Rule is significantly impacting the work methods of financial advisors: Seventy-three percent say the rule is impacting their work methods "a lot" or "some."[7]
- More than a third of financial advisors report that their "clients have expressed their displeasure to [them] about the impacts of the Department of Labor fiduciary rule on service or price."
- Seventy-five percent of respondents who report their typical clients have starting assets under $25,000 report that they will take on fewer small accounts due to increased compliance costs and legal risks.

The overly-complex DoL Rule has resulted in a significant reduction in access to professional financial advice and in products and services available to retail customers, as well as significant burdens on the industry. Without action by the Commission, we expect this data to go from bad to worse.

FSR strongly believes a single standard for broker-dealers servicing both retirement and non-retirement assets is in the best interest of retail customers, because it would reduce customer confusion and ultimately provide customers a higher-level of service. A single standard also would avoid the cost of developing and implementing compliance and supervisory programs around different standards of conduct. As we previously noted:[8]

> FSR believes . . . regulatory coordination between the Department and other authorities—including the [Commission], FINRA, and banking and insurance regulators—having jurisdiction over the products, services, and regulated institutions and individuals which are affected by the [DoL Rule] . . . could enable these regulators to craft a regulatory regime that is logical, coordinated and effective in promoting the interests of Retirement Investors. An improved regulatory regime would allow Retirement Investors access to a wide array of investment guidance, and products and services designed to help them meet their needs throughout their retirement. An improved regulatory regime also would afford Retirement Investors reasonable protections that can be administered efficiently and effectively by persons serving their needs.[9]

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available at https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/01324.pdf.

7 For example, one Harper Polling survey respondent noted: "Writing business is very time consuming and more complicated now, forcing me to abandon smaller accounts and clients who need my help the most." FSR Aug. 2017 Letter, *supra* n. 4 at 52.

8 82 Fed. Reg. 41,365 (Aug. 31, 2017).

9 See attached, FSR, *Fiduciary Rule Examination* (Sept. 15, 2017) (supporting the Department's proposed extension of the transition period from January 1, 2018 to July 1, 2019), https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA27/00116.pdf.

We urge the Commission to act swiftly to mitigate disruption in the market that stems from implementation of the DoL Rule, and thereby preserve access to advice and guidance, and choice of products and services that meet the particular needs of each retail customer, especially customers with modest-sized account balances.

This letter and our August 2017 and September 2017 comment letters on the DoL Rule (attached) provide FSR's response to selected issues raised in the request for information.

Executive Summary

- The DoL Rule has resulted in a reduction in access to professional guidance, more limited investment options and higher costs, particularly for retirement investors with modest-sized accounts.
- The Commission's regulatory approach should allow different and competing models and customer choice in how to pay for services, which will benefit retail customers.
- The Commission should develop a principles-based best-interest standard of conduct applicable to the broker-dealer's recommendations.
- Full and fair disclosure is an effective means for firms to provide information on how they mitigate, manage, or eliminate material conflicts of interest, and can address retail customer confusion about the roles of financial professionals.
- The Commission should coordinate with the Department, the States, and other regulators.
- The Commission and FINRA have the authority to enforce a best-interest standard of conduct for the benefit of retail customers.

A. The DoL Rule has resulted in a reduction in access to professional guidance, more limited investment options and higher costs, particularly for retirement investors with modest-sized accounts.

Since the promulgation of the DoL Rule, studies have shown significant disruption to both retail investors and the other market participants. Some firms have responded to the DoL Rule with changes to service models and product availability, including: (a) moving clients to fee-based accounts; (b) eliminating commission-based IRAs; (c) raising investment minimums for commission-based IRAs; (d) eliminating variable annuity products; and (e) excluding certain products from commission-based IRAs (*e.g.*, annuities, mutual funds, and exchange-traded funds).[10] The impact of the DoL Rule and associated prohibited transaction exemptions limits access to financial advice and guidance, reduces service models and product availability, and

[10] *See*, Wursthorn, *New Retirement Rule Is Delayed, but Not Its Impact*, Wall St. J. (Apr. 8, 2017); Wursthorn, *A Complete List of Brokers and Their Approach to "The Fiduciary Rule,"* Wall St. J. (Feb. 6, 2017).

raises the customers' overall cost of saving for retirement.[11] These adverse impacts are especially pronounced on those struggling to save for retirement.[12]

Another troubling outcome of the DoL Rule is a report that many retirement investors (especially those with a modest amount of assets to invest) could be left without access to professional advice.[13] Financial advisors help retirement investors save more, better customize their portfolios to individual risk tolerance, increase overall investor comfort with investment decisions, and improve financial literacy.[14] Studies indicate that households that have worked with a financial advisor over a 15-year period "have about 290% more financial assets than non-advised households,"[15] even though half of these households had less than $25,000 in savings when they initially began to work with a financial advisor.[16] Another study found advised individuals, segmented by age and income, have a minimum of 25 percent more assets than non-advised individuals, and advised individuals aged 35-54 years making less than $100,000 annually had 51 percent more assets than similar non-advised individuals.[17] "The discipline imposed by a financial advisor on households' financial behavior and increased savings of advised households are key to improving asset values of households relative to comparable

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11 FSR, *Fiduciary Rule Examination* at 5 (Apr. 17, 2017) ("FSR Apr. 2017 Letter"), https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/01309.pdf.

12 *Id.*

13 Milloy, *The Consequences of the Fiduciary Rule for Consumers,* American Action Forum at 11 (Apr. 10, 2017), https://www.americanactionforum.org/research/consequences-fiduciary-rule-consumers/. To the extent advisers move to fee-based accounts, "based on a minimum balance requirement of $30,000, the fiduciary rule could force 28 million Americans out of managed retirement accounts completely." *id.*

14 *See*, Bergstresser *et al*., *Assessing the Costs and Benefits of Brokers in the Mutual Fund Industry*, 22 REV. FIN. STUD. 4129 (2009), http://ssrn.com/abstract=1479110; Gennaioli *et al*., *Money Doctors* (Nat'l Bureau of Econ. Research, Working Paper No. w18174, 2012), http://ssrn.com/abstract=2089246.

15 Montmarquette and Viennot-Briot, *The Gamma Factor and the Value of Financial Advice*, CIRANO at 24 (Aug. 2016), https://cirano.qc.ca/files/publications/2016s-35.pdf.

16 Pollara, *Canadian Mutual Fund Investors' Perceptions of Mutual Funds and The Mutual Fund Industry* at 5 (2016), https://www.ific.ca/wp-content/uploads/2016/09/IFIC-Pollara-Investor-Survey-September-2016.pdf/15057/.

17 Oliver Wyman, *Role of Financial Advisors in the US Retirement Market* at 2 (2015), http://www.fsroundtable.org/wp-content/uploads/2015/07/The-role-of-financial-advisors-in-the-US-retirement-market-Oliver-Wyman.pdf.

households *without* an advisor."[18] Indeed, some studies find that "behavioral coaching can add 1% to 2% in net return."[19]

One report notes that 35 percent of advisers surveyed "will move away from low-balance accounts" (*i.e.*, less than $25,000 in assets).[20] Additionally, "nearly one in four advisers said that they will likely increase their current client minimums as a result of the fiduciary rule, focusing their attention on higher-net worth clients and more profitable relationships."[21] Another report indicates that the DoL Rule will result in additional charges to retirement investors of approximately $800 per account, or over $46 billion in the aggregate.[22]

Given our concerns about implementation of the DoL Rule, FSR believes the Commission's regulatory framework should not favor particular business models or products. Rather, the Commission's regulatory framework should afford retail customers access to advice and guidance from financial advisors, including choices among fee-based and transaction-based accounts; a broad array of products and services designed to meet the customer's unique financial goals; and appropriate regulatory safeguards to protect retail customers.

FSR believes the Commission should avoid adopting duplicative and/or competing standards, or a regulatory standard that is complex and unduly burdensome to implement.[23] The Commission should develop a principles-based regime for assuring compliance with a best-interest standard by broker-dealers and their financial advisors. Competing standards will result in customer confusion, putting broker-dealers and their financial advisors between a regulatory rock and a hard place, in having to comply with the Commission's rule and potentially having conflicting (or at least material additional) duties and obligations under whatever conditions are applicable under the Department's fiduciary regime.

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18 Montmarquette and Viennot-Briot, *supra* n. 15 at 40. *See also*, Kinniry Jr., Jaconetti, DiJoseph, and Zilbering, *Putting a value on your value: Quantifying Vanguard Advisor's Alpha*, The Vanguard Group at 16 (2016), http://www.vanguard.com/pdf/ISGQVAA.pdf (finding that based on "actual client behavior, . . . investors who deviated from their initial retirement fund investment trailed the target-date fund benchmark by 150 [basis points]. This suggests that the discipline and guidance that an advisor might provide through behavioral coaching could be the largest potential value-add of the tools available to advisors.").

19 *See* Kinniry *et al., supra* n. 18 at 16.

20 Investment News, The Economics of Change: How the DOL Fiduciary Rule Will Set Money in Motion and Alter Business Models Across the Advice Industry at 11 (2016), http://www.investmentnews.com/assets/docs/CI105297516.PDF.

21 *Id*. at 13.

22 Milloy, *supra* n. 13 at 11.

23 *See* FSR Aug. 2017 Letter, *supra* n. 4 at 7 (noting a "small group of FSR members have already incurred expenses exceeding $236 million (in aggregate) just to implement the [DoL] Rule through the June 9 Applicability Date").

Thus, broker-dealers and their financial advisors should be allowed to comply with the Commission's conditions and requirements and be deemed to be in compliance with the DoL Rule. Under this framework, the Department would afford a prohibited transaction exemption under ERISA and under the Internal Revenue Code for broker-dealers that would be based solely on the firm and its financial advisors being subject to the Commission's regime (including applicable rules by FINRA or other self-regulatory organizations subject to the Commission's oversight).

This regulatory framework would have the intended effect of protecting retail customers from conduct that would generally be perceived to be promoting the interests of the firm over the interests of its retail customers, but without adding unnecessary burdens, costs, and expense to a system of operation already subject to pervasive regulation under federal securities law.

B. The Commission's regulatory approach should allow different and competing models and customer choice in how to pay for services, which will benefit retail customers.

FSR has noticed a trend toward a fee-based model, which likely will continue as a result of the DoL Rule. This shift toward the fee-based model has arisen, in part, because of the additional litigation exposure brought about by the DoL Rule. Specifically, the Best Interest Contract Exemption (the "BIC Exemption")[24] imposes onerous compliance burdens and substantial litigation risk, making it impractical to employ the BIC Exemption in many cases.[25] Consequently, many institutions have responded by switching to fee-for-service compensation structures in place of traditional transaction-based compensation arrangements (which avoids utilizing the BIC Exemption).

This trend is harmful to retirement investors, particularly those with modest-sized and small-account balances, those taking retirement income, and those seeking lower-cost products. Indeed, the Harper Polling report finds financial advisors frequently reported that the consequences of the DoL Rule are fewer small accounts, increases in fees, and fewer investment options. Sample responses include: "The menu of products and services I offer, as well as to whom I offer them, will shrink significantly"; and "People with fewer assets will be hurt the most."[26]

We also note the United Kingdom's experience with the move to fee-based advice on retail investment products, which should serve as an instructive resource for the Commission's

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[24] Our concerns about the BIC Exemption also apply to the Principal Transactions Exemption, which requires the same contractual obligations and liabilities as the BIC Exemption.

[25] FSR Aug. 2017 Letter, *supra* n. 4 at 10.

[26] Harper Polling Slides, *supra* n. 5, at 55.

consideration. The Financial Conduct Authority's Retail Distribution Review[27] showed a prohibition on commission-based accounts has a negative impact on small investors. Specifically, the study found that "the proportion of firms who ask for a minimum portfolio of more than £100,000 has more than doubled, from around 13 percent in 2013 to 32 percent in 2015" and that "45 percent of firms very rarely advise customers on retirement income options, if those customers have small funds (*i.e.*, less than £30,000) to invest."[28]

Because fee-based programs can be more expensive and carry higher account minimums, it is often less expensive for longer-term retirement investors who pursue a "buy and hold" strategy to pay transaction-based commissions. FSR continues to support a regulatory approach that allows "different and competing models and fee structures," as this approach "can best preserve retail customers' choices, and facilitate availability of a wide range of affordable financial products and services" for retail customers.[29]

C. The Commission should develop a principles-based best-interest standard of conduct applicable to the broker-dealer's recommendations.

Section 913 of the Dodd-Frank Act authorizes the Commission to harmonize the regulatory structure without subjecting broker-dealers and registered investment advisers to identical regulatory regimes that may not acknowledge the different services and products offered to retail customers by these professionals and firms.[30] We believe the Commission should implement the "flexible provisions" in section 913(g) of the Dodd-Frank Act to shape new regulations "in an equitable manner that avoids duplicative burdens."[31]

Subjecting broker-dealers or investment advisers to a regulatory regime that was designed for a different sector of the financial services industry could negatively influence the pricing and availability of services, which would harm retail customers. We note Nevada has established its own fiduciary standard, and other states are contemplating action. The imposition of state-specific standards would intensify the complexity and confusion for retail customers. Therefore, any standard of conduct should preempt state laws to ensure a uniform standard of conduct, and minimize the possibility of customer confusion over applicable standards.

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27 The Retail Distribution Review "aimed to improve the level of professionalism within the intermediary sector, remove the potential for commission bias and enhance consumers' understanding of the services they were receiving." HM TREASURY, FINANCIAL ADVICE MARKET REVIEW: FINAL REPORT 3 (Mar. 2016).

28 *Id.* at 19.

29 *See* FSR, *Duties of Brokers, Dealers and Investment Advisers* at 10 (July 5, 2013).

30 *See* Section 913(g) of the Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. at 1828. *See also* Letter from Ranking Member Barney Frank of the House Financial Services Committee to Securities and Exchange Commission Chairman Mary Schapiro (May 31, 2011) (stating that "[the] new standard contemplated by Congress is intended to recognize and appropriately adapt to the differences between broker-dealers and registered investment advisers"), http://media.advisorone.com/advisorone/files/ckeditor/Barney%20Frank%20Letter.pdf.

31 See FSR, Study Regarding Obligations of Brokers, Dealers, and Investment Advisers at 6 (Aug. 30, 2010) ("FSR Aug. 2010 Letter").

FSR believes the Investment Advisers Act of 1940 appropriately regulates the conduct of registered investment advisers when dealing with retail customers, and affords strong protections for these customers. However, we urge the Commission to consider harmonizing, where possible, rules between broker-dealers and registered investment advisers, such as recordkeeping, registration, advertising, supervision and financial responsibility obligations, to ensure robust protections for all retail customers.

The current broker-dealer regulatory structure should be adapted to develop a best-interest standard of conduct for the provision of personalized investment advice about securities to retail customers. Broker-dealers are subject to a comprehensive regulatory regime under federal securities law and FINRA rules, which includes the exercise of active examination and enforcement authorities. As a result, broker-dealers and their registered representatives owe extensive duties to their retail customers, including the duty to make suitable recommendations, to observe just and equitable principles of trade, and comply with other FINRA rules governing the conduct of broker-dealers and their registered representatives.

We urge the Commission to move forward with a principles-based regulatory standard of conduct for broker-dealers under section 913 that incorporates the following framework:

- A requirement that a broker-dealer's recommendation to a retail customer "reflects the reasonable care, skill, prudence and diligence under the circumstances then prevailing that a prudent person would exercise based on the customer's investment profile (as the term *investment profile* is defined under FINRA Rule 2111)." Consistent with the direction of section 913 of the Dodd-Frank Act, and the long-standing distinction between investment advisers under the Investment Advisers Act and broker-dealers, broker-dealers would not have a continuing duty to customers after providing personalized investment advice.[32] As the Commission has previously held, "A broker's recommendations must be consistent with his customer's best interests, and he or she must abstain from making recommendations that are inconsistent with the customer's financial situation."[33]
- Clear and concise disclosures in "plain English" to customers of: (a) material conflicts of interest, (b) type and scope of services provided, and (c) the firm's (and registered representative's) compensation for services provided to the customer.
- A regulatory approach that does not favor particular business models or fee structures, but would permit broker-dealers to continue to receive commissions, to effect transactions with customers on a principal basis without being subject to trade-by-trade

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32 Section 913(g)(1) of the Dodd-Frank Act, 124 Stat. at 1828.

33 *See* In re Raghavan Sathianathan, Sec. Exch. Act Rel. No. 54722 (Nov. 8, 2006), "Section III. Unsuitability;" In re Dane S. Faber, Sec. Exch. Act Rel. No. 49216 (Feb. 10, 2004), "Section III.B. Suitability of Securities Recommendations."

disclosure and consent requirements, and to sell proprietary or other limited range of products.[34]

The creation of such a standard of conduct would benefit retirement *and* non-retirement retail customers by providing a uniform standard of conduct for personalized investment advice provided by broker-dealers without sacrificing or weakening investor protections. Further, this framework would have the enduring flexibility to promote and adapt to innovation in the market, and would be aligned with the standard of conduct for registered investment advisers.

D. Full and fair disclosure is an effective means for firms to provide information on how they mitigate, manage, or eliminate material conflicts of interest, and can address retail customer confusion about the roles of financial professionals.

Full and fair disclosure is an effective means for firms to provide information on how they mitigate, manage, or eliminate material conflicts of interest with their retail customers.[35] FSR believes regulators can address customer confusion by ensuring retail customers receive clear and concise disclosure in "plain English" of the services contracted for, the cost of those services, and any material conflicts of interest that could impact the relationship.[36]

We encourage the Commission to leverage existing disclosure requirements (*e.g.*, Form ADV, Part 2A) rather than create a new overlay of disclosure, which in our view would not advance customer education or protection. However, any overhaul of disclosure rules should be done "in the context of a wholesale review" and not on a "piecemeal" basis, which would increase efficiency and avoid overlaps and gaps in disclosure requirements.[37] FSR believes the Commission should allow broker-dealers to provide disclosures of material conflicts of interest through web-based and other electronic communication tools based on an "access equals

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34 *See* Section 913(g) of the Dodd-Frank Act, 124 Stat. at 1828.

35 Securities regulators have identified conflicts of interest as an examination priority. For example, OCIE noted a "focus on specific conflicts of interest, steps registrants have taken to mitigate conflicts, and the sufficiency of disclosures made to investors." *See* OCIE, Examination Priorities for 2013 (Feb. 21, 2013) at 2, https://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2013.pdf.

As part of its focus on conflicts of interest, FINRA initiated a review of firms' approaches to conflicts management and released a report noting conflicts in three critical areas: (1) enterprise-level frameworks to identify and manage conflicts of interest; (2) approaches to handling conflicts of interest in manufacturing and distributing new financial products; and (3) approaches to compensating their associated persons, particularly those acting as brokers for private clients. *See* FINRA, Report on Conflicts of Interest (Oct. 2013) at 1, https://www.finra.org/sites/default/files/Industry/p359971.pdf. *See also,* FINRA Regulatory Notice 13-45, Rollovers to Individual Retirement Accounts: FINRA Reminds Firms of Their Responsibilities Concerning IRA Rollovers (Dec. 2013), https://www.finra.org/sites/default/files/NoticeDocument/p418695.pdf.

36 See FSR, *Revised Definition of Investment Advice and Related Exemptions* at 57 (July 21, 2015), https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/00665.pdf.

37 See FSR Aug. 2010 Letter, *supra* n. 31, at 3.

delivery" model; however, customers who prefer to receive disclosures *via* the U.S. Mail would retain the option to do so.

E. The Commission should coordinate with the Department, the States, and other regulators.

We strongly encourage the Commission to engage with the Department, FINRA and banking and insurance authorities to ensure coordination among the regulators. The Commission also should coordinate with state regulators through the North American Securities Administrators Association, 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,"[38] which should include a harmonized standard of conduct for broker-dealers across the states.

FSR is concerned that regulators' failure to coordinate rules governing standards of conduct and related disclosures will only exacerbate investor confusion. A coordinated solution among all regulators and the states also would "empower Americans to make independent financial decisions and informed choices in the marketplace, save for retirement, and build individual wealth," and make the regulatory framework "efficient, effective and appropriately tailored," as required by the Presidential Executive Order on Core Principles for Regulating the United States Financial System.[39]

F. The Commission and FINRA have the authority to enforce a best-interest standard of conduct for the benefit of retail customers.

The Commission and FINRA have the authority to enforce a best-interest standard[40] for the benefit of retail customers holding retirement *and* non-retirement accounts at broker-dealers, as part of their respective comprehensive enforcement regimes.[41] Through their examinations and enforcement actions, the Commission and FINRA will be able to leverage their robust oversight of the provision of personalized investment advice to ensure financial services providers are acting in the best interests of retail customers. Thus, enforcement of the principles-based best-interest standard of conduct should reside with the Commission and FINRA, rather than the DoL Rule's reliance on private litigation.

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38 15 U.S.C. § 77(s)(d)(2)(B).

39 Executive Order 13,772, Section 1(a) and (f), 82 Federal Register 9,965 (Feb. 8, 2017).

40 Section 913(h) of the Dodd-Frank Act, 124 Stat. at 1829 (harmonization of enforcement) and section 15A(b)(2) of the Securities Exchange Act of 1934 [15 U.S.C. § 78o-3(b)(2)].

41 *See* Section 15(b)(4) – (6) [15 U.S.C. § 78o(b)(4) – (6)] (as to the Commission); Section 15A(b)(2), (7), and (15) [15 U.S.C. § 78o-3(b)(2), (7), and (15)] (as to FINRA).

FSR welcomes the opportunity to work with the Commission, the Department, and other regulators on standards of conduct for financial professionals. If it would be helpful to discuss FSR's views on this matter, please contact me at [redacted] or Felicia Smith, Vice President and Senior Counsel for Regulatory Affairs, at [redacted].

Sincerely yours,

Rich Foster

Richard Foster
Senior Vice President and Senior Counsel for
Regulatory and Legal Affairs
Financial Services Roundtable

With a copy to:

The Honorable Michael S. Piwowar, Commissioner
The Honorable Kara Stein, Commissioner

Attachments:

FSR, *Fiduciary Rule Examination, Concerning Proposed Extension of January 2018 Transition Period* (Sept. 15, 2017)

FSR, *Fiduciary Rule Examination, Request for Information: General Questions* (Aug. 10, 2017)

Appendix A: Department of Labor Fiduciary Rule: National Survey of Financial Professionals (July 7-12, 2017) [Harper Polling Slides]
Appendix B: Key Poll Findings—National Survey of Financial Professionals (July 17, 2017) [Harper Polling Memo]

VIA http://www.regulations.gov

September 15, 2017

Employee Benefits Security Administration
Suite 400
U.S. Department of Labor
200 Constitution Avenue
Washington, D.C. 20210

Attention: Fiduciary Rule Examination - RIN 1210-AB82

Gentlemen and Ladies:

The Financial Services Roundtable ("FSR")[1] supports the Department of Labor's (the "Department") proposed extension of the transition period from January 1, 2018 to July 1, 2019,[2] for the reasons set forth by the Department as well as other reasons discussed below.[3]

The proposed extension followed the Department's request for information (the "RFI"), which, among other things, solicited comments regarding the possibility of delaying the application of certain conditions (the "Additional Conditions") and regarding the "Impartial Conduct Standards" applicable under the administrative

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2 82 Federal Register 41,365 (Aug. 31, 2017).

3 *See also,* FSR Comment Letter (July 21, 2017), *available at* https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00271.pdf.

exemptions (the "Accompanying Exemptions") accompanying the promulgation of the final regulation (the "Rule")[4] defining who is a "fiduciary" under section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), and section 4975 of the Internal Revenue Code of 1975, as amended (the "Code").

The Department subsequently proposed to extend the transition period, primarily "to give the Department of Labor the time necessary to consider possible changes and alternatives to these exemptions. The Department is particularly concerned that, without a delay in the applicability dates, regulated parties may incur undue expense to comply with conditions or requirements that it ultimately determines to revise or repeal."[5]

FSR members include banks, broker-dealers, insurance companies, investment advisers, and other financial institutions providing products and services to employee benefit plans, individual retirement accounts, and other entities treated as plans for purposes of the Code (collectively, "Retirement Investors").[6] FSR and our members support retirement security and increased incentives and opportunities for Americans to plan, save, and invest to meet their needs in retirement. FSR also supports efforts to educate workers on the need for adequate savings targets and the availability of financial products designed to help them meet their unique needs throughout their retirement. FSR believes the broad availability of retirement savings opportunities is important because savings increase domestic investment, encourages economic growth, and results in higher wages, financial freedom, and a higher standard of living.[7]

FSR supports a best-interest standard being applicable to all persons providing personalized investment advice to retail customers (including non-retirement accounts), which is administered in a coordinated manner by agencies and self-regulatory organizations that serve as front-line regulators of the financial services industry. FSR opposes the Rule, which continues to be challenged in litigation, and some or all of the requirements that are included in the Additional Conditions could be rendered

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4 82 Federal Register 31,278 (July 6, 2017).

5 82 Federal Register 41,365 (Aug. 31, 2017).

6 FSR members also act as distributors, intermediaries, investment managers, product manufacturers, recordkeepers, trustees and custodians in the retirement services marketplace. FSR members provide a broad array of services to Retirement Investors, including (1) asset allocation (among funds or managers); (2) cash sweep; (3) estate planning; (4) financial planning; (5) interactive website tools; and (6) retirement planning.

7 *See also,* OXFORD ECONOMICS, *Another Penny Saved: The Economic Benefits of Higher US Household Saving* at vi (June 2014), *available at* http://www.oxfordeconomics.com/anotherpennysaved (noting that an increase in the nation's saving rate over the next 25 years "would add a discounted $7 trillion to America's economy, equal to about half of today's GDP;" a result that would "generate greater [U.S.] household wealth, [and] better insulate the [U.S.] economy from international capital shocks").

unnecessary by forthcoming court rulings. Although we will not repeat them at length here, we do respectfully submit that the Rule raises a host of serious legal problems.[8]

I. Executive Summary

- The current transition period is inadequate.
- Revisions to the Rule and Accompanying Exemptions are necessary.
- Extension of the Transition Period would facilitate the Department's coordination with the Securities and Exchange Commission (the "SEC"), FINRA, and Banking and Insurance Authorities.
- The Department and the Internal Revenue Service (the "Service") should extend their Good Faith Compliance Enforcement Policy.
- Tiering of the Transition Period should not be adopted.
- The Department should adopt a principled-based exemption framework instead of a streamlined exemption for particular products.
- Retirement Investors will be protected by the Impartial Conduct Standards during the extended Transition Period.

II. The Current Transition Period is Inadequate

President Trump directed the Department to re-examine the Rule to determine whether it may adversely affect the ability of Americans to gain access to retirement information and financial advice.[9] FSR believes that the current transition period does not provide the Department adequate time to consider possible additional exemption approaches or changes to the Rule in light of the Presidential Memorandum. The current transition period also does not provide adequate time for entities providing services to Retirement Investors to be able to make necessary or appropriate changes in practices arising as a result of the Department's review of the Rule and the Accompanying Exemptions.

Indeed, we believe the confusion and angst that exists among Retirement Investors is a direct result of the fact that the initial period to implement the material

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[8] Indeed, the Department itself acknowledged in its legal briefing that the PTEs' restrictions on class-litigation waivers, which are among the requirements set to take effect January 1, are improper and should be vacated. Brief for Appellee at 44, 45, 48, Chamber v. Department of Labor (5th Cir. 2017) (no. 17-10238).

[9] 82 Federal Register 9,675 (Feb. 7, 2017) (Presidential Memorandum on Fiduciary Duty Rule).

changes to business practices that were necessary to comply with the Rule was itself inadequate. Despite the Department's efforts to provide interim guidance throughout the implementation period, substantial compliance questions still abound regarding the Rule and the Accompanying Exemptions. Many in the industry have significant questions regarding how to comply with the requirements in the context of important matters, including, for example, rollovers and the treatment of cash held temporarily pending investment. The brief six- month transition period adopted by the Department to address the issues raised in the Presidential Memorandum exacerbated this uncertainty. With the possibility of changes to the Rule and the Accompanying Exemptions, institutions did not know what actions would be necessary to implement such changes, or what to tell Retirement Investors about what changes might be applicable regarding their accounts.

As noted in our letter of July 21, 2017, FSR recommended a delay of 24 months to avoid further confusion and disruption for Retirement Investors.[10] In reaching this conclusion, FSR determined that such a delay should allow sufficient time for the Department to complete the study mandated by the Presidential Memorandum, consider responses to the RFI, issue a notice of proposed rulemaking and consider comments on the rulemaking, finalize the rule, and allow at least one (1) year for financial institutions to implement any changes reflected in the Rule and the Accompanying Exemptions (or the conditions of any new exemptions promulgated).

While the proposed extension of the transition period is shorter than the period which FSR recommended, FSR believes the proposed extension provides the minimum period needed to allow the Department and other interested parties to review and improve the Rule and the Accompanying Exemptions to enhance the interests of Retirement Investors. However, the Department should solicit notice and comment on any new applicability and compliance dates, taking into account the necessity for financial institutions to have a reasonable period to implement any changes in an orderly and cost-effective manner.[11]

III. Revisions to the Rule and the Accompanying Exemptions Are Necessary

If the Rule and Accompanying Exemptions are retained following the Presidentially-mandated reexamination, FSR believes that, at a minimum, revisions to the Rule and significant revisions to the Additional Conditions are required to fulfill the

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[10] FSR Comment Letter (July 21, 2017), *available at* https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00271.pdf.

[11] For example, financial institutions must take steps to implement rule changes, including (i) evaluate system changes and implement system modifications; (ii) develop sound policies to comply with the applicable conditions of any exemptions; (iii) train personnel responsible for regular interaction with the Retirement Investors; and (iv) prepare effective communication to (and obtaining of any necessary consents from) Retirement Investors of the changes to the manner in which their accounts will be invested.

objectives that the Department sought to obtain in promulgating the Rule, while providing a path that allows Retirement Investors continued access to appropriate investment advice and a wide range of investment alternatives. FSR's August 10 comment letter presented our recommendations to improve the Rule and Accompanying Exemptions, including: (i) to expand the grandfather provision; (ii) to revise PTE 84-24 and the Best Interest Contract ("BIC") Exemption to eliminate restrictions that impair Retirement Investors' access to fixed-indexed annuities offered through independent marketing organizations; and (iii) to adopt a presumptive counterparty exception for communications between financial institutions.[12] FSR believes the proposed extension provides the Department adequate time to consider revisions to the Rule and Accompanying Exemptions.

IV. Extension of the Transition Period Would Facilitate the Department's Coordination with the SEC, FINRA, and Banking and Insurance Authorities

FSR believes an extension of the transition period would allow for regulatory coordination between the Department and other authorities—including the SEC, FINRA, and banking and insurance[13] regulators—having jurisdiction over the products, services, and regulated institutions and individuals which are affected by the Rule and the Accompanying Exemptions. FSR believes that such coordination could enable these regulators to craft a regulatory regime that is logical, coordinated and effective in promoting the interests of Retirement Investors. An improved regulatory regime would allow Retirement Investors access to a wide array of investment guidance, and products and services designed to help them meet their needs throughout their retirement. An improved regulatory regime also would afford Retirement Investors reasonable protections that can be administered efficiently and effectively by persons serving their needs.

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12 FSR Comment Letter (August 10, 2017) (recommending improvements to the Rule and Accompanying Exemption), available at https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00601.pdf ("FSR August 10 Comment Letter").

13 *See* National Association of Insurance Commissioners Comment Letter (August 7, 2017) (encouraging the Department to coordinate with state insurance authorities and discussing state regulatory authorities over life and annuity products), *available at* https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00452.pdf.

V. The Department and the Service Should Extend Their Good Faith Compliance Enforcement Policy

Having the Impartial Conduct Standards in place during the extended transition period should serve to afford Retirement Investors a material level of protection and comfort that their financial professionals will be acting first and foremost with their best interests in mind. However, the Impartial Conduct Standards are very broad concepts that could have many different interpretations and applications in the context of the complex world of financial products and services. Thus, institutions that are operating in this environment need to have comfort and certainty that they will not violate these principles when undertaking in good faith to comply with such principles during the proposed extension of the transition period.

Extending the good faith enforcement policies previously announced by the Department and the Service for the current transition period to apply during the extended transition period would facilitate the ability of institutions to provide appropriate products and services to Retirement Investors while at the same time still complying with the Impartial Conduct Standards in the provision of these products and services.

VI. Tiering of Transition Period Should Not Be Adopted

FSR appreciates the Department's recognition of the need to provide the industry adequate time to respond to developments following the Department's study of the issues and concerns presented. However, the Department should not adopt a tiered transition period, because the time needed to respond to a revised regulatory regime can only be gauged with reasonable accuracy after financial institutions have had an adequate period to review and assimilate the proposed revisions, and assess the action steps needed to comply.

The tiering concept may place the industry and Retirement Investors in a position where the pre-established period is inadequate to respond to the changes the Department ultimately proposes. FSR has concern that there could be reticence to provide additional time needed to comply, due to the presence of the tiering and the length of time that revisions to the fiduciary rule have been under consideration. Any minimum period established today would be set without any insight into what changes the Department is considering and may undertake to make. Indeed, the one-year implementation period that was provided for the final version of the current Rule was far from adequate to accomplish the myriad of changes required to implement that Rule.

It also seems highly unlikely that the transition period established by any tiering system would coincide with the implementation period that would be appropriate in the context of any across-the-board, integrated regime developed by securities, banking, and insurance regulators. We believe it is essential such an integrated regime become

effective concurrently with further changes adopted by the Department. Setting a time frame pursuant to the tiering approach could make that impossible.

Finally, the Department itself noted that the industry responded to the Rule in a manner that has led to innovation in product offerings, but in the heavily regulated financial services industry, such innovations cannot be developed and launched in a tight window. More innovations may develop, or need to be developed following the current review. Changes that are conceptually simple and beneficial may prove to require approvals from other agencies, or simply require material retooling of processes and procedures that are critical to the operation of banks, broker-dealers, insurance companies, independent marketing organizations and other intermediaries.

VII. The Department Should Adopt a Principled-Based Exemption Framework Instead of a Streamlined Exemption for Particular Products

While specific comment was not requested on this issue, FSR nonetheless deems it necessary to comment on the suggestion in the statement accompanying the proposal to extend the transition period that the Department is anticipating providing streamlined exemptions for certain new investment products. FSR believes that adopting such streamlined exemptions with regard to particular investment products would not further the interests of Retirement Investors, and could have the very detrimental effects that the Presidential Memorandum was concerned could derive from the current Rule and Accompanying Exemptions.

FSR strongly believes that the most efficient and effective method of promoting the interests of Retirement Investors, without reducing investment choices and access, is to revise the Rule and the Accompanying Exemptions in a manner that establishes a principled-based approach that would apply equally across a wide array of products.[14] FSR believes streamlined exemptions with respect to particular products could have the unintended consequence of the Department essentially favoring such a particular product over other products that may be more appropriate for a given Retirement Investor.

Adopting a streamlined exemption for particular products will encourage the use of such products, perhaps almost to the exclusion of others. This will, as a practical matter, reduce the investment choices made available to Retirement Investors. If the Department were to leave in effect much of the additional conditions of the BIC Exemption for the vast majority of investment products, and adopt a streamlined exemption for one or more particular products, the Department will create a scenario where institutions will be faced with the choice of assuming significant risks and burdens to design and offer alternative products. The costs of developing alternative products may be difficult to justify, especially when firms face a material risk that additional

[14] *See* FSR August 10 Comment Letter.

regulatory relief might not be granted. A more principles-based exemption framework would avoid such biases, and would not diminish the industry's capacity and incentives to develop products that would facilitate compliance with such principles.

VIII. Retirement Investors Will Be Protected by the Impartial Conduct Standards During the Extended Transition Period

Any concern that Retirement Investors will be harmed by an extended transition period should be allayed because the Impartial Conduct Standards will continue to protect them during the extended transition period. The Department has concluded that the application of the Impartial Conduct Standards, standing alone, "provides retirement investors with the protection of basic fiduciary norms and standards of fair dealing."[15]

Opponents of the proposed extension will likely assert that the extension is unnecessary because the Rule became effective June 9, 2017, and the industry was prepared for compliance with the Rule. However, under the regime that took effect on June 9, 2017, institutions can provide Retirement Investors investment advice in good faith subject only to compliance with the Impartial Conduct Standards. From a compliance perspective, this regime is predictably less burdensome than that which would necessarily follow from the Additional Conditions, as had been scheduled to take effect January 1, 2018.

Such Additional Conditions will frequently compel institutions to enter a contract with investors. This contract places on the institution the burden of proving compliance with these basic, but amorphous, Impartial Conduct Standards. It also places numerous burdens on the institutions that could readily operate as a pretext for challenging the institutions compliance with the Accompanying Exemptions. The industry as a whole has consistently and repeatedly stated that the compliance regime that would follow from the Additional Conditions is so unduly burdensome that it limits the investment choices that can be made available to investors. Moreover, this will continue to be true even if the Department rescinds its open invitation to attorneys motivated by the fees that can be received in a class action litigation to challenge the institution's good faith effort to assist Retirement Investors in achieving their investment objectives.

FSR further expects that some commenters will contend that the possibility of revisions to the Rule and the Accompanying Exemptions has caused uncertainty that has adversely affected both Retirement Investors and the industry. As discussed above, FSR believes that this uncertainty was triggered by the unreasonably short initial implementation period and the brevity of the six-month review period. With only a six-month delay in the application of the Additional Conditions, the market understood that

[15] 82 Federal Register 16902 at 16905 (Apr. 7, 2017).

there would be only a limited opportunity to respond to any changes that would be forthcoming, and virtually no time for Retirement Investors to become acquainted with the new business model before it applied to their investments.

* * * * *

FSR welcomes the opportunity to work with the Department on how to address the concerns raised by the Rule and Accompanying Exemptions. If it would be helpful to discuss FSR's specific comments or general views on this issue, please contact me at [redacted] or Felicia Smith, Vice President and Senior Counsel for Regulatory Affairs, at [redacted].

Sincerely yours,

Richard Foster
Senior Vice President and Senior Counsel
for Regulatory and Legal Affairs
Financial Services Roundtable

VIA http://www/regulations.gov

August 10, 2017

Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue
Washington, D.C. 20210

Attention: Fiduciary Rule Examination - RIN 1210-AB82

Gentlemen and Ladies:

On July 6, 2017, the Department of Labor (the "Department") published a request for information (the "RFI"), which, among other things, solicited comments with respect to certain questions regarding the possibility of delaying the application of certain conditions (the "Additional Conditions") in addition to the so-called "Impartial Conduct Standards" applicable under the administrative exemptions (the "Accompanying Exemptions") accompanying the promulgation of the final regulation (the "Rule") [1] defining who is a "fiduciary" under section 3(21)(A)(ii) Employee Retirement Income Security Act of 1974, as amended ("ERISA"), and section 4975 of the Internal Revenue Code of 1975, as amended (the "Code").

The Financial Services Roundtable ("FSR")[2] welcomes the opportunity to submit comments regarding possible additional exemption approaches or changes to the Rule in light of the Presidential Memorandum, wherein President Trump directed the Department to re-examine the Rule to determine whether it may adversely affect the ability of Americans to gain access to retirement information and financial services,[3] and for

1 82 Federal Register 31278 (July 6, 2017).

2 FSR represents the largest integrated financial services companies providing banking, insurance, payment, investment and finance products and services to the American consumer. FSR member companies provide fuel for America's economic engine, accounting for $54 trillion in managed assets, $1.1 trillion in revenue and 2.1 million jobs.

3 82 Federal Register 9675 (Feb. 7, 2017) (Presidential Memorandum on Fiduciary Duty Rule).

entities providing services to employee benefit plans, individual retirement accounts ("IRAs") and other entities treated as plans for purposes of the Code (collectively, "Retirement Investors") to be able to take the actions necessary or appropriate to address any changes in practices arising as a result of the Department's review of the Rule and the Accompanying Exemptions.

FSR opposes the Rule, which continues to be challenged in litigation, and some or all of the requirements currently set to take effect on January 1, 2018 could be rendered unnecessary by forthcoming court rulings. Although we will not repeat them at length here, we do respectfully submit that the Rule raises a host of serious legal problems.[4]

However, if the Rule and Accompanying Exemptions are retained following the Presidentially-mandated reexamination, FSR believes that, at a minimum, revisions to the Rule and significant revisions to the Additional Conditions are required to fulfill the objectives that the Department sought to obtain in promulgating the Rule, while providing a path that allows Retirement Investors continued access to appropriate investment services and a wide range of investment alternatives.

FSR notes that the Rule operates to create a fiduciary relationship in a substantial number of circumstances where such a relationship did not exist, either by statute or under the regulations that had been in effect for 40 years. And, in promulgating the Accompanying Exemptions, the Department created a standard for relief that requires the institution that seeks to rely on the relief to prove it has not acted to benefit itself due to the potential conflict created by the Rule. This purported relief therefore can prove to be illusory, particularly within the enforcement regime that the Department has created, empowering private litigants to challenge each and every action that an institution may take to support the objectives of Retirement Investors.

As noted in our letter of July 21, FSR believes a delay of 24 months[5] is required to avoid further confusion and disruption for Retirement Investors. A delay also would allow all regulatory agencies having jurisdiction over the products, services and institutions which are affected by the Rule and the Accompanying Exemptions appropriate opportunity to help craft a regulatory regime that is logical, coordinated and effective in promoting the interests of Retirement Investors in having access to a wide array of investment guidance and investment opportunities, within a framework that

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[4] Indeed, the Department itself has recently acknowledged in its legal briefing that the PTEs' restrictions on class-litigation waivers, which are among the requirements set to take effect January 1, are improper and should be vacated. Brief for Appellee at 44, 45, 48, Chamber v. Department of Labor (5th Cir. 2017) (no. 17-10238).

[5] This 24-month period is necessary to allow for the Department to complete the study mandated by the Presidential Memorandum, consider responses to the RFI, issue a notice of proposed rulemaking and consider comments on the rulemaking, finalize the rule, and allow at least one (1) year for financial institutions to implement. This time frame also would allow for regulatory coordination between the Department and other authorities, including the Securities and Exchange Commission, FINRA, and banking and insurance regulators.

affords them reasonable protections that can be administered efficiently and effectively by persons serving the needs of such Retirement Investors.

FSR members include banks, broker-dealers, insurance companies, investment advisers, and other financial institutions providing products and services to Retirement Investors.[6] FSR and our members support retirement security and increased incentives and opportunities for Americans to plan, save, and invest to meet their needs in retirement. FSR also supports efforts to educate workers on the need for adequate savings targets and the availability of financial products designed to help them meet their unique needs throughout their retirement. FSR believes the broad availability of retirement savings opportunities is important because savings increase domestic investment, encourages economic growth, and results in higher wages, financial freedom, and a higher standard of living.[7]

Our members have noted several trends that adversely impact the customer experience and product and service availability related to the Rule, including: (1) less guidance and support to IRA owners and small plans; (2) increases in minimum account size; (3) limited product shelf;[8] (4) shift to fee-based accounts; (5) moving clients with smaller accounts to self-service or robo-advice; (6) orphaning of smaller, less profitable accounts due to heightened risks; (7) reduced willingness to discuss or consider unmanaged assets with clients due to risks; (8) poor client service due to the time required to perform comparative analysis on the proposed account to the existing account; (9) disinclination to sell annuity products because of uncertainty surrounding the Rule and inability to launch new products because resources are tied up with Rule implementation; (10) additional disclosure documents and other changes to sales process make the sales process markedly longer in each client appointment; (11) less discretion on small accounts and compensation changes make working with small accounts more challenging and less cost-effective for financial professionals;[9] (12) higher manufacturing and distribution costs; and (13) new liability concerns.

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6 FSR members also act as distributors, intermediaries, investment managers, product manufacturers, recordkeepers, trustees and custodians in the retirement services marketplace. FSR members provide a broad array of services to Retirement Investors, including (1) asset allocation (among funds or managers); (2) cash sweep; (3) estate planning; (4) financial planning; (5) interactive website tools; and (6) retirement planning.

7 *See also,* OXFORD ECONOMICS, *Another Penny Saved: The Economic Benefits of Higher US Household Saving* at vi (June 2014), *available at* http://www.oxfordeconomics.com/anotherpennysaved (noting that an increase in the nation's saving rate over the next 25 years "would add a discounted $7 trillion to America's economy, equal to about half of today's GDP;" a result that would "generate greater [U.S.] household wealth, [and] better insulate the [U.S.] economy from international capital shocks").

8 In some instances, products with outlying commissions (both low and high) and/or non-standard commission structures are being eliminated from the product shelf, regardless of quality, benefits, or features of the product or its performance.

9 Ultimately, the financial professional's legal risk is the same for a $2,000 account as for a $2 million account.

Properly taking into account the market reaction that followed the adoption of the Rule, FSR believes that the Department will necessarily conclude that appropriate revisions to the Rule and the Accompanying Exemptions would create a more efficient, effective, and appropriately tailored regulation that will preserve access to advice and choice of products and services that meet the particular needs of each Retirement Investor, especially investors with modest-sized account balances.

In particular, the Accompanying Exemptions can be revised to (i) reduce unnecessary burdens, including with regard to disclosure, (ii) eliminate the substantial litigation risks that would be applicable under the Accompanying Exemptions as currently proposed, and (iii) create safe harbors for integrating such exemptions with other regulatory schemes. A delay of an appropriate period would allow the Department sufficient time to determine whether to develop streamlined conditions for compliance with regard to products and services that are developed to minimize conflicts of interests, and to determine whether such alternative exemptions would serve the best interests of Retirement Investors, or have the practical effect of directing Retirement Investors solely to particular types of products that may or may not best serve their long-term investment needs. FSR believes that these improvements to the Rule and the Accompanying Exemptions can be adopted without impairing the protection intended to be afforded to Retirement Investors thereunder.

These improvements will facilitate efficient and cost-effective compliance by institutions and financial professionals, which will encourage them to continue to provide a full array of services and investment choices for such Retirement Investors, rather than to limit access and choice as has already occurred in advance of the restrictive conditions now proposed to take effect on January 1, 2018.

These improvements also will advance the Trump Administration's policy to "empower Americans to make independent financial decisions and informed choices in the marketplace, save for retirement, and build individual wealth; [and] make regulation efficient, effective, and appropriately tailored."[10]

This letter outlines FSR's proposals for specific improvements to the Rule and Accompanying Exemptions and our responses to the questions posed by the Department in the RFI, which we offer to assist the Department in its review of the Rule and the Accompanying Exemptions, as directed by the Presidential Memorandum.

[10] Exec. Order No. 13,772, 82 Federal Register 9965 (Feb. 8, 2017) (Core Principles for Regulating the United States Financial System).

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I. Executive Summary.

- A **survey of a representative sample of all U.S. financial professionals** conducted only one month after the Rule's June 9 initial compliance deadline shows significant disruption to the marketplace.[11] We expect this data to go from bad to worse without changes to the Rule and Accompanying Exemptions.

    - Only 12% of respondents report the Rule is helping them to serve their clients best interest and 33% report there has been no impact, yet those respondents still report more complicated paperwork and fewer small accounts. A majority of respondents (50%) report the Rule is restricting them from serving their clients best interests.

    - Only 10% of Certified Financial Planners (CFP) report that the Rule is helping them to serve their clients best interests, and 55% report the Rule is restricting them from serving their clients bests interests. This runs counter to the claim by the CFP Board of Standards that the Rule is workable for their members.

    - The Rule is significantly impacting the work methods of financial professionals: 73% say the Rule is impacting their work methods "a lot" or "some" (CFP: 76% a lot/some; CFA: 77%, CLU 71%, JD 76%).

    - More than a third of financial professionals report that their "clients have expressed their displeasure to [them] about the impacts of the Department of Labor fiduciary rule on service or price."

    - Seventy-five percent of respondents who report their typical clients have starting assets under $25,000 report that they will take on fewer small accounts due to increased compliance costs and legal risks.

- **Access to investment services** for investors with modest-sized and small-account balances has been and will continue to be severely curtailed, **and investment choices** for a wide array of Retirement Investors has been and will continue to be substantially diminished as a result of the Rule and the Best Interest Contract Exemption's ("BIC Exemption") onerous compliance burdens and litigation risks.

- For Retirement Investors—particularly those with modest-sized account balances—the **result has been a reduction in access to professional assistance, more limited investment options and higher costs**. These limitations will eventually lead to lower returns for Retirement Investors.

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[11] Harper Polling, Key Poll Findings—National Survey of Financial Professionals (July 17, 2017), attached hereto as Exhibit B.

- The Rule and Accompanying Exemptions have been costly and burdensome to implement,[12] and the limitations of the Accompanying Exemptions have, in many cases, **made it impractical to continue to utilize existing transaction-based compensation models and to offer certain investment products**.

- The Department **should eliminate the contract requirement in the BIC Exemption**. In lieu of the contract, an institution would provide a simple statement in "plain English" to the Retirement Investor to identify and disclose the institution's material conflicts. The Impartial Conduct Standards, which are broad, principles-based conditions, are more consistent with both the Department's historical practices with regard to the issuance of class exemptions and Congress' general statutory approach to ERISA.

- In lieu of the BIC Exemption's current requirements, the Department **should develop simple disclosures** that would alert the Retirement Investors appropriately to the fiduciary nature of the relationship, broadly describe the compensation structure and describe any potential conflicts of interests. This form of model disclosure would likely be a substantial improvement in the conditions of the BIC Exemption that would enhance compliance if it does not require excessive detail that is unnecessary or not helpful to the Retirement Investor.

- The Department **should adopt a principles-based approach to the Accompanying Exemptions** instead of the time-consuming process of tailoring of rules and exemptions that favors particular classes of existing investments and stifles product innovation. Streamlined exemptions for particular products or classes of investments could have the unintended consequence of compelling institutions to focus the investment options made available to Retirement Investors solely or excessively on such "favored" investments, which may not always be in the best interests of Retirement Investors.

- If the **Securities and Exchange Commission (the "SEC") were to develop its own principles-based regime** for assuring compliance with a best interest standard, the Department should deem compliance with such a regime to satisfy the requirements of Rule. For institutions that are subject to regulation by a primary regulator other than the SEC, a similar rule should apply if their primary regulator (*e.g.*, banking or insurance agencies) adopts a "best interest" requirement. To avoid some institutions having a competitive advantage over others, those institutions not subject to mandatory SEC regulation should have the option to comply with the SEC requirements as to the best interest standard and also be deemed to comply with the Rule by doing so.

- The Department **should allow PTE 84-24 to continue to apply** with respect to all annuity investments **and expand** the exemption **to cover the conduct of all**

[12] A small group of FSR members have already incurred expenses exceeding $236 million (in aggregate) just to implement the Rule through the June 9 Applicability Date.

parties, including IMOs and other intermediaries, who are integral to the marketing and sale of fixed-indexed annuities and other insurance products in the ordinary course of their business.

- The Department **should expand the BIC Exemption to include all parties who operate as agents or intermediaries in the marketing of products (including independent marketing organizations or "IMOs")** to Retirement Investors. The BIC Exemption should not be restricted to "financial institutions" if the Impartial Conduct Standards are satisfied.

- The Rule should be **revised to exclude as a fiduciary any person or entity that prepares marketing materials or provides research** concerning an investment vehicle and does not have direct contact with the Retirement Investor, to avoid discouraging the provision of information and further limiting Retirement Investors' access to guidance and investment choices that may be valuable to them. Unfortunately, the expansive definition of investment advice has created concern that these entities may become fiduciaries if a Retirement Investor receives the marketing materials or research.

- The **"hire me" exemption in the preamble to the Rule** should be extended to cover "hire me" proposals relating to the rollover of plan assets, whether from a qualified plan or an IRA.

- The Department **should exempt recommendations to contribute to an IRA from the definition of "investment advice"**. Financial professionals serve an important and valuable role in encouraging savings for retirement, and an exemption limiting the possible adverse impact of the Rule on providing such encouragement would benefit Retirement Investors. Further, it would be appropriate to segregate, where reasonably practicable, the act of encouraging additional contributions from the investment of such contributions.

- The Department **should provide an exemption for bank deposit products and similar products** (such as the use of sweep services and other permissible methods of addressing cash held temporarily for investment by broker-dealers), which would afford institutions substantial flexibility without creating the risk of material concerns for Retirement Investors.[13] The administrative burdens of conforming the investment of relatively small percentages of a Retirement Investor's account with the otherwise applicable terms of the Accompanying Exemptions can be particularly burdensome for institutions providing these services to Retirement Investors.

- The Department should provide a full exemption from the Rule to enable institutions to provide assistance and guidance to Retirement Investors concerning all investments in accounts entered into prior to and after June 9, 2017, and prior

[13] *See*, *e.g.*, section 408(b)(4) of ERISA.

to January 1, 2018, or any delayed applicability date **(the "grandfather" provision),** without becoming subject to fiduciary status with respect to such investments. This expanded grandfather provision should also allow investors to make ongoing contributions of new money into the account and institutions to provide ongoing assistance and guidance for the life of the account.

- The Rule should be **revised to exclude certain communications from the definition of a "recommendation"** where both the context in which the communication arises and the dealings between the parties are clear that the person making the communication is not undertaking to provide fiduciary advice, and has identified itself to the Retirement Investor as representing the interests of the counterparty to the transaction with a Retirement Investor.

- The Department **should adopt a presumptive counterparty exemption** to the Rule, pursuant to which the financial professional counterparty exemption to the Rule would apply automatically, or at least be subject to a rebuttable presumption that the counterparty exemption applies with respect to communications between financial institutions. This would avoid increased costs, delays, and burdensome exchanges of forms between institutions the Rule was clearly not designed to protect.

II. Introduction

It has become apparent in the period since the promulgation of the Rule and the Accompanying Exemptions that access to investment services for investors with modest-sized and small account balances has been and will continue to be severely curtailed and investment choice for a wide array of Retirement Investors has been and will continue to be substantially diminished.

The combination of the breadth of the definition of investment advice under the Rule and the prescriptive requirements of the Accompanying Exemptions operate in combination to cause institutions that have long supported the objectives of Retirement Investors either to withdraw from servicing smaller and modest-sized accounts or to significantly restrict the investment opportunities that are made available to Retirement Investors.

The Department's goal in promulgating the Rule was to prescribe a regime that would discourage those parties providing investment services to Retirement Investors from acting in their own interests in situations in which such institutions might have conflicts of interest in connection with the provision of investment advice. In creating this regime, the Department cast aside a series of reasonable limitations on the scope of investment activities that could be perceived as fiduciary investment advice, and mandated certain conduct and behaviors that it determined were necessary to avoid damage to Retirement Investors that could potentially arise from conflicts of interests.

Moreover, as part of this regime, the Department unilaterally determined that the enforcement regime developed by Congress for dealing with circumstances where

persons rendering services as fiduciaries to IRAs was inadequate, and constructed an expansive path to allow a contractual cause of action to every IRA investor that Congress intentionally chose not to afford to such investors in the enactment of ERISA.

Part of this self-constructed enforcement regime included a prohibition of mandatory arbitration of actions that could be pursued as class actions that the "government is no longer defending;"[14] but even with the elimination of this element, the Department's current construct leaves in place a system that increases litigation costs and exposures for the institutions that provide support to such Retirement Investors.

Thus, rather than advancing the interests of Retirement Investors by encouraging improved assistance by introducing reasonable safeguards intended to minimize the adverse impact of potential conflicts of interests, the actual consequence of the regime that the Department has constructed is to diminish the ability of Retirement Investors to plan, save, and invest to meet their needs in retirement through access to the investment professionals of their choosing and the investment products that the Retirement Investors select after consultation with such professionals.

The Rule's Impact on Retirement Investors. For Retirement Investors—particularly those with accounts of modest size—the result has been a reduction in access to professional guidance, more limited investment options and higher costs. The Rule has been costly and burdensome to the regulated community, and the limitations of the Accompanying Exemptions have, in many cases, made it impractical to continue to utilize existing compensation models and to offer certain investment products. It follows that these limitations will eventually lead to lower returns for Retirement Investors.

The Accompanying Exemptions, intended to provide pathways to allow the continued use of commission-based compensation structures in compliance with the Rule, provide inadequate relief and have already led to unintended negative consequences for Retirement Investors. The "Best Interest Contract Exemption" ("BIC Exemption")[15] imposes onerous compliance burdens and substantial litigation risk, making it impractical to employ in many cases. Consequently, many institutions have responded by switching to fee-for-service compensation structures in place of traditional transaction-based compensation arrangements, but such model is often not in the best interests of a Retirement Investor with a modest-sized account.

Elimination of the Contract Requirement in the BIC Exemption. While a requirement that institutions identify and disclose their Material Conflicts of Interests to Retirement Investors will benefit such investors by alerting them to the circumstances in which there could be an economic incentive for an institution not to act in the best interests of Retirement Investors, the contractual requirement of the BIC Exemption is a burdensome, overbroad means of achieving this end. Aside from the conflicts disclosure,

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[14] Brief for Appellee at 17, Chamber v. Department of Labor (5th Cir. 2017) (No. 17-10238).

[15] Our comments on the BIC Exemption also apply to the Principal Transactions Exemption, which requires the same contractual obligations and liabilities as the BIC Exemption.

the remaining warranties essentially serve only as avenues for challenges against the institution in litigation, and do not further the interests of the Retirement Investors.

Moreover, considering the general requirements of the Impartial Conduct Standards, the neutral factors incorporated in the BIC Exemption are unnecessary. The Best Interest Standard incorporates the fiduciary responsibilities provisions of ERISA. The Impartial Conduct Standards, which are broad, principles-based conditions, are more consistent with both the Department's historical practices regarding the issuance of class exemptions and Congress' general statutory approach to ERISA.

Except for the conduct that was prescribed in the prohibited transaction provisions of ERISA and the Code, Congress adopted broad principles to guide and regulate fiduciary conduct, including those related to a fiduciary engaging in conduct that might raise conflicts of interest that could lead the fiduciary to act in its own interest over that of Retirement Investors. Congress did not attempt to dictate particular acts that had to be performed, or a list of investments that would be permitted for those investing plan assets.

Model BIC Exemption Disclosures. A model BIC Exemption disclosure would facilitate compliance for institutions if the model disclosure does not require the inclusion of excessive detail that is unnecessary or not helpful to the Retirement Investor. The model disclosures should replace the warranties and disclosure currently mandated by the BIC Exemption. In lieu of the BIC Exemption's current requirements, the Department should develop simple, "plain English" disclosures that would alert the Retirement Investors appropriately to the fiduciary nature of the relationship, broadly describe the compensation structure, and describe any potential conflicts of interests. This form of model disclosure would likely be a substantial improvement in the conditions of the BIC Exemption that would enhance compliance. Such model disclosure should also facilitate the Retirement Investors' understanding of these issues as compared to what would derive from the deluge of information that would currently be required under the BIC Exemption.

A Principles-Based Framework for Exemptions. Rather than creating specific exemptions that provide relief for particular investment classes, the better path would be for the Department to make the Accompanying Exemptions principles-based and not prescriptive of the business and operations of institutions attempting to service the needs of Retirement Investors. Streamlined exemptions for particular products or classes of investments could have the unintended consequence of compelling institutions to focus the investment options made available to Retirement Investors solely or excessively on such "favored" investments, which may not always be in the best interests of Retirement Investors. A more principles-based BIC Exemption and other exemptions would avoid such biases, and would not diminish the industry's capacity and incentives to develop products that would facilitate compliance with such principles.

In addition to potential unintended consequences leading to portfolio allocations that are not in the best interests of Retirement Investors and the practical consequence of

limiting investment choice and potential investment returns for Retirement Investors by focusing on exemptions that favor a particular investment design, the Department could also be deemed to be regulating conduct that is in the proper domain of the institution's primary regulator. In the context of providing preferential treatment for one type of insurance product over another, the Department could be indirectly imposing federal regulation of insurance that is properly in the domain of the states.

Further, the time-intensive process for crafting and adopting exemptions makes choosing additional categories of streamlined exemptions impractical considering the industry's immediate need for mechanisms to comply with the Rule. A flexible, principles-based framework for exemptions would eliminate the need for the onerous process of developing an ever-expanding set of product-specific exemptions as innovations occur in the marketplace.

Exemption for Compliance with Standards of Primary Regulators. If the Securities and Exchange Commission (the "SEC") were to develop its own principles-based regime for assuring compliance with a best interest standard, compliance with such a regime should be deemed to satisfy the requirements of Rule. For institutions that are subject to regulation by a primary regulator other than the SEC, a similar rule should apply if their primary regulator (*e.g.*, banking or insurance agencies) adopts a "best interest" requirement. To avoid some institutions having a competitive advantage over others, those institutions not subject to mandatory SEC regulation should have the option to comply with the SEC requirements as to the best interest standard and be deemed to comply with the Rule by doing so.

PTE 84-24. Allowing PTE 84-24 to continue to apply with respect to all annuity products would avoid confusion for Retirement Investors, and facilitate the ability of insurers and their representatives to comply with the Rule and PTE 82-24 without costs and burdens that are excessive in relation to the perceived benefit to Retirement Investors of these additional conditions. With the Impartial Conduct Standards applied to PTE 84-24, Retirement Investors would have an added level of protection that would be more than sufficient to assure the guidance they receive with respect to the investment of their retirement assets in any annuity contract would be provided with the primary purpose of enhancing the value of their retirement assets, especially in light of the safeguards and oversight that are applied by the primary regulators of the institutions involved in the sale of such products.

The exemption available under PTE 84-24 also should be made available to cover the conduct of all parties, including independent marketing organizations ("IMOs") and other intermediaries, who are integral to the marketing and sale of fixed-indexed annuities and other insurance products in the ordinary course of their business.

Expansion of the BIC Exemption to Non-Financial Institutions. The BIC Exemption is unnecessarily restrictive as to the entities to which it applies, because its availability is limited to specified financial institutions. The Department has itself recognized that the BIC Exemption was not sufficiently broad enough to encompass all

parties who operate as agents or intermediaries in the marketing of products to Retirement Investors by proposing an additional exemption to cover the operation of certain independent marketing organizations ("IMOs"), a proposal that was itself unnecessarily restrictive because it would be available only to an IMO that can meet the restrictive conditions associated with the BIC Exemption and "[h]as transacted sales of Fixed Annuity Contracts averaging at least $1.5 billion in premiums per fiscal year over its prior three fiscal years." [16] Where the Impartial Conduct Standards are satisfied, there is no reason that the BIC Exemption should be limited only to financial institutions.

Fiduciary Status Should Not Apply Absent Direct Contact with the Retirement Investor. The expansive definition of investment advice has created concern that entities that have never had direct contact with a Retirement Investor may become fiduciaries by means of preparing marketing materials or providing research with respect to an investment vehicle if a Retirement Investor receives such information. This expansive application of fiduciary status will discourage provision of information and further limit Retirement Investors' access to assistance and investment choices that may be valuable to them. Accordingly, the Department should revise the Rule such that any person or entity that does not have direct contact with the Retirement Investor will not be deemed a fiduciary under the Rule. If the Department is unwilling to provide an exclusion from fiduciary status in these circumstances, it should, at a minimum, create a rebuttable presumption that such a person or entity is not providing investment advice unless a Retirement Investor can demonstrate by clear and convincing evidence that such person was actively engaged, whether alone or in combination with the person(s) having direct contact with the Retirement Investor in conduct intended to influence the investment decision of the Retirement Investor.

Expansion of the Hire Me Exemption. The "hire me" exemption in the preamble to the Rule should be extended to cover "hire me" proposals relating to the rollover of plan assets, whether from a qualified plan or an IRA. FSR believes that Retirement Investors should make fully informed decisions regarding whether to initiate a rollover. However, the Rule in its current form essentially requires a guarantee of investment performance for a financial professional proposing a rollover of plan assets, as the implied presumption of the Rule is that, unless the returns to the Retirement Investor following a rollover decision are enhanced net of fees, the manager or financial professional somehow breached a fiduciary duty to the Retirement Investor. This result is not consistent with ERISA or the Code. Congress specifically enacted Section 404(c) of ERISA to permit participants to make their own investment decisions, and gave the settlor of an IRA unfettered discretion over his or her own account.

Exempt Contribution Recommendations from the Definition of "Investment Advice". An exemption from the definition of "investment advice" regarding contributions to an IRA would be an improvement to the existing exemptions that would benefit Retirement Investors. Financial professionals serve an important and valuable role in encouraging savings for retirement, and an exemption limiting the possible

[16] 82 Federal Register at 7,372.

adverse impact of the Rule on providing such encouragement would benefit Retirement Investors. Further, it would be appropriate to segregate, where reasonably practicable, the act of encouraging additional contributions from the investment of such contributions.

Exemption for Bank Deposits and Similar Investments. An exemption for bank deposit products and similar products (such as the use of sweep services and other permissible methods of addressing cash held temporarily for investment by broker-dealers) would provide institutions substantial flexibility without creating the risk of material concerns for Retirement Investors. Given the relatively small percentages of a Retirement Investor's account that would generally be held in such short-term cash or the relatively short periods during which such cash would be held in such investments, these amounts will have at most an immaterial impact on the overall return on investments in a Retirement Investor's accounts. Yet, collectively, the administrative burdens of conforming the investment of such amounts with the otherwise applicable terms of the Accompanying Exemptions can be particularly burdensome for institutions providing these services to Retirement Investors. Such an exemption would parallel the relief that Congress afforded bank deposits generally under Section 408(b)(4) of ERISA, and would properly balance the burdens associated with the oversight and management of such assets for the institutions with the interests of Retirement Investors of having appropriate liquidity to accommodate their overall investment strategies, or simply making investments in safe and secure bank deposits.

Revisions to the Grandfather Provision. The Department should provide a full exemption from the Rule to enable institutions to provide assistance and guidance to Retirement Investors regarding all investments in accounts entered into prior to and after June 9, 2017, and prior to January 1, 2018, or any delayed applicability date ("pre-existing investments") without the institutions becoming subject to fiduciary status. The grandfather provision should also be expanded to allow investors to make ongoing contributions of new money into the account and to permit institutions to provide ongoing assistance and guidance for the life of the account, including providing guidance to Retirement Investors with regard to decisions pertaining to exchanging mutual funds.

The current grandfather provision is unduly restrictive and impairs a financial institution's ability to address the needs of Retirement Investors with pre-existing investments. Institutions do not know whether and to what extent they can provide information to "grandfathered" accounts without losing such status and inadvertently becoming a fiduciary over an account not structured to comply in full with the Rule.

A more effective grandfathering provision would enhance the institution's ability to provide beneficial and necessary services to Retirement Investors. Affording a full exemption from the Rule for pre-existing investments would allow the institution to fulfill the expectations of these investors at the time the investment was initially made, without having the institution seek to undo commercial arrangements with third parties that were acceptable under the law prevailing at the time guidance was given.

Communications Excluded from the Definition of a "Recommendation". The Rule should be revised to exclude from the definition of a "recommendation" any communication where the person making the communication (1) is not undertaking to provide fiduciary advice, and (2) has identified itself to the Retirement Investor as representing the interests of the counterparty to the transaction with a Retirement Investor. This exception should apply regardless of whether the Retirement Investor is represented by an independent qualified fiduciary. Without an exception of this nature, a number of investment opportunities have been (and more will be) denied to Retirement Investors because persons who might inadvertently get caught in the wide net of being an investment-advice fiduciary have chosen (and others will choose) not to offer the opportunity to Retirement Investors rather than be compelled to undertake to comply with the prescriptive rules of the BIC Exemption.

Presumptive Counterparty Exception for Communications Between Institutions. While the Rule provides an exemption to fiduciary obligations when communicating recommendations to a fiduciary that is independent of the financial professional, reliance on the exemption requires that the financial professional reasonably believe that the counterparty is capable of evaluating investment risks independently. In practice, the requirement has resulted in excessive disclosures and exchanges of forms between institutions that the Rule was clearly not designed to protect, as institutions seek to minimize the risk of noncompliance with the Rule. The result has been increased costs, delays and burdensome exchanges of forms. FSR proposes that the financial professional counterparty exemption to the Rule apply automatically, or at least be subject to a rebuttable presumption that the counterparty exemption applies with respect to communications between financial institutions.

III. Actions and Developments in the Regulated Community in Response to the Rule.

1. What has the regulated community done to comply with the Rule and Accompanying Exemptions to date, particularly including the period since the June 9, 2017, applicability date?

2. Are there market innovations that the Department should be aware of beyond those discussed herein that should be considered in making changes to the Rule?

The Regulated Community's Actions. In our view, the most important consideration is the effect of the Rule and the Accompanying Exemptions (including the Additional Conditions) on Retirement Investors' access to investment assistance and choice of investment products. Retirement Investors already are experiencing a higher bar to access assistance and restrictions on product choice, effects that are especially pronounced for investors with modest-sized accounts. We believe these adverse impacts on Retirement Investors will only increase if the provisions of the Rule remain as

currently in effect and institutions servicing such Retirement Investors will need to comply with the Accompanying Exemptions and the Additional Conditions in their current forms. What is apparent from the extensive work that financial institutions have done to prepare for compliance with the Rule and Accompanying Exemptions is that, left in their current form without significant changes, these developments will not enhance the investment experience and results of Retirement Investors.

While the objective of the Rule was to reduce the circumstances in which potential conflicts of interests could impair the investment guidance and returns that Retirement Investors receive, the consequence of the Rule, coupled with the prescriptive nature of the Accompanying Exemptions, is to significantly reduce access to professional assistance for modest-sized account investors, and to limit the investment choices that are available to Retirement Investors who are still able to access such assistance. It is reasonable to assume that more limited choices will eventually lead to less retirement savings for Retirement Investors.

The regulated community has expended significant resources regarding the interpretation of the Rule and compliance with its provisions, including redesigning fee structures and compensation plans and establishing policies and procedures reasonably designed to ensure compliance with the Rule and applicability of the Accompanying Exemptions. FSR's members and other institutions in the regulated community have spent considerable time and resources determining whether the Accompanying Exemptions offer a viable opportunity to continue to provide services to Retirement Investors under a transaction-based compensation model.[17]

While the BIC Exemption theoretically provides an administrative class exemption from the prohibited transaction provisions of ERISA[18] and the Code,[19] the disclosure and compliance burdens and additional litigation risk associated with this exemption make a transaction-based compensation model impracticable in many cases. According to a poll of a representative sample of all financial professionals across the United States, conducted July 7-12 by Harper Polling and commissioned by FSR (the "Financial Professionals Poll"),[20] only 12% of respondents said that the Rule is helping them to serve their clients' best interests. A majority of financial professionals surveyed (50%) reported the rule is restricting them from serving their clients best interests. For those who reported the Rule is helping or has had no impact on their ability to serve their clients best interests, many reported negative changes to client services by (i) servicing fewer small accounts, (ii) offering fewer investment options, (iii) including fewer mutual

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17 For example, a small group of FSR members have incurred expenses in excess of $236 million (in aggregate) to implement the Rule through the June 9 Applicability Date; and estimate expenses in excess of $71 million (in aggregate) for post-June 9 implementation.

18 29 U.S.C. § 1106.

19 26 U.S.C. § 4975(c)(1).

20 *See* Harper Polling, Department of Labor Fiduciary Rule: National Survey of Financial Professionals (July 7-12, 2017), attached hereto as Exhibit A.

fund options, and (iv) higher compliance costs, including additional fees for Retirement Investors.[21]

One of the consequences that has already occurred from the promulgation of the Rule and the industry's efforts to comply with its terms is numerous institutions have restricted client accounts to a fee-for-service model, where doing so would serve the best interests of Retirement Investors. This change in structure allows the institution to avail itself of the benefit (if needed) of the streamlined exemption for "level-fee" fiduciaries contained in the BIC Exemption with respect to such accounts. Through this mechanism, where the account size and activity justify the change, Retirement Investors can continue to access needed investment assistance and an appropriate array of investment choices. However, for many accounts of modest size, a fee-for-service model does not promote the best interests of the Retirement Investor, as it would generally result in higher fees overall which would not be suitable for the level of activity generally associated with such accounts.

Institutions have spent considerable time and expense redesigning the compensation payable to the individuals who will be dealing directly with Retirement Investors to minimize any potential conflicts of interests for such individuals that could lead to a violation of the best interest standard applicable in the context of the BIC Exemption and the other Accompanying Exemptions. This has required a complete overhaul of the previously common commissioned-based compensation structure that had been permitted at law and by each such institution's primary regulators.

Institutions have also incurred substantial expense in developing new policies and procedures reasonably designed to comply with the best interest standard and the other conditions applicable under the BIC Exemption for those accounts that could not be reasonably restructured to a level-fee arrangement and still promote the best interest of the Retirement Investor. As institutions have tried to fit the square peg of the needs of Retirement Investors into the round hole that the BIC Exemption provides, those that have concluded that they can provide some continuing level of service to Retirement Investors have been compelled to limit the investment choices made available to such investors. Institutions that have developed systems that conform to the restrictive path of the BIC Exemption have found it a virtual impossibility to comply with these restrictions without narrowing product choices available to Retirement Investors. And worse for Retirement Investors (particularly those with modest-sized account balances), a number of institutions have determined that the risk and expense associated with BIC Exemption compliance do not permit an avenue to continue to provide services to Retirement Investors for whom a level fee arrangement is not viable.

Market Innovations. As the Department itself notes, the industry has also responded by developing new products responsive to the limitations that the BIC Exemption imposes, in an attempt to make available a wider array of investment options

[21] Harper Polling, Key Poll Findings—National Survey of Financial Professionals, Table 1 (July 17, 2017), attached hereto as Exhibit B.

to Retirement Investors within the parameters of such limitations. Each of these institutions operates in highly regulated regime. The Rule and Accompanying Exemptions do nothing to relieve the regulatory burdens associated with trying to make operational changes to comply with their requirements. Moreover, the timeframes the Department established for compliance did not allow sufficient time for institutions to work with their regulators in the development, review and, where required, approval of new products or new procedures to comply with the constraints of the Rule and Accompanying Exemptions to minimize the unintended, but unavoidable, adverse effects on Retirement Investors' access to assistance and investment choices.

Despite these obstacles, FSR members report developing other new products or services for their retail retirement accounts or small plans in response to the Rule, including (1) self-directed offerings; (2) increased pricing flexibility in existing products; (3) adding registered investment adviser services (such as wrap accounts); (4) multiple employer plans; (5) fee-based products; and (6) converting small plans to fee-for-service. The industry's initiative to develop new products is illustrative of the desire of those that have long served Retirement Investors effectively to continue to be able to provide investment services that will promote the best interest of these investors.

The simplest way to promote such investors' best interest is to provide incentives and opportunities for them to achieve their ultimate objective, which is to enhance the amount of assets that they will have in retirement and ensure the availability of financial products designed to help them meet their unique needs throughout their retirement. Limiting access to assistance and choice does not serve these interests. But there is only so much that such institutions can do within the parameters of the regulatory regimes in which they function, and they will need the aid of their primary regulators to make changes to afford added investment choices to Retirement Investors. However, the Department can reduce the need to limit investment choices by making judicious changes to the Rule and the Accompanying Exemptions and still achieve its objective of reducing the risk that potential conflicts of interests would impair the advice received.

IV. Balancing Consumer Protection and Access to Advice and Products.

1. Do the Rule and Accompanying Exemptions appropriately balance the interests of consumers in receiving broad-based investment advice while protecting them from conflicts of interest?

2. Do they effectively allow Advisors to provide a wide range of products that can meet each investor's particular needs?

Balance of Consumer Interests. Simply stated, the Rule and the Accompanying Exemptions do not appropriately balance such interests for those Retirement Investors whose accounts cannot effectively be migrated to a level fee arrangement.

First, the excessive disclosure requirements associated with the BIC Exemption introduce elements of cost and risk for institutions that are disproportionate to the limited benefit that the disclosure will provide to investors.

Second, the litigation risks associated with BIC Exemption compliance create further expense for highly-regulated institutions. Even as the Department has conceded that its BIC Exemption's condition restricting class-litigation waivers is not consistent with federal law,[22] for institutions that are subject to the rules and regulations of FINRA, this risk continues to be present and a substantial burden in providing investment choices to Retirement Investors under the Rule.

The Rule increases litigation risk in other ways as well. In addition to the risks related to the private right of action and class-waiver restrictions, FSR members note risks arising out of (1) unintended fiduciary status; (2) litigation related to agents that do not have a financial institution; (3) difficulty quantifying risk in the absence of case law; (4) Monday-morning quarterbacking by the plaintiffs' bar; (5) new ERISA claims; (6) recommendations of proprietary products; (7) use of the commission-based business model; (8) the neutral factors requirement; (9) small client accounts; (10) interpretation of independent fiduciary exception; (11) bad precedent; (12) definition of "reasonable compensation"; and (13) new fiduciary duty state-law claims.

FSR members' concerns about the Rule's impact on doing business and increased costs related to litigation risks are borne out by recent trends showing record increases in securities class litigation filings and settlement amounts. For example, 226 federal class action securities fraud class action filings in the first half of 2017 (which were the most on record) represented a "49 percent increase from the second half of 2016."[23] In 2016, courts approved settlement amounts aggregating $6 billion, which was almost double the amount in 2015.[24]

Ultimately, the cost of additional litigation risk created by the Rule, along with costs borne by institutions arising from the need for compliance and supervisory systems, new or enhanced systems, new data collection and management requirements, new and expanded document retention requirements, outside legal counsel costs and consultant expenses, will result in increased costs for many Retirement Investors.

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22 Brief for Appellee at 44, 45, 48, Chamber v. Department of Labor (5th Cir. 2017) (No. 17-10238) (stating "that DOL may not interpret its *broad but general* exemption authority as conferring upon it the specific power to *discriminate against arbitration* by withholding the BIC Exemption unless fiduciaries consent to class litigation, where Title II of ERISA itself provides no countervailing substantive right to litigate rather than arbitrate here.").

23 Cornerstone Research, *Securities Class Action Filings: 2017 Midyear Assessment* (2017) at 5, *available at* https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2017-Midyear-Assessment.

24 Cornerstone Research, *Securities Class Action Settlements: 2016 Review and Analysis* (2017) (noting the 2016 settlement amounts were the "second highest in the past 10 years"), *available at* https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Settlements-2016-Review-and-Analysis.

Third, the limited exception under the Rule for arrangements that clearly do not involve the provision of fiduciary investment advice—where institutions in the ordinary course conduct of their businesses are unequivocally offering to investors products for sale, and have not undertaken any relationship that would imply in any manner the assumption of a common law fiduciary role—has created vast confusion and concern regarding compliance with the Rule.

Persons who are clearly acting as the agent of an institution in marketing a product to investors for their consideration can readily be deemed fiduciaries under the scope of the Rule, and do not benefit from the counterparty exception provided, if the Retirement Investor is a sophisticated individual investor who has concluded that he or she does not need or want to incur the expense of a financial professional. Even mutual fund companies whose business (which is subject to pervasive regulation by the SEC) is offering a product to investors for purchase have become concerned that they might be drawn into a fiduciary role in the ordinary course marketing of their shares.

A broader counterparty exemption would be appropriate and simplify compliance with the Rule, which in turn should enhance access to assistance and investment choices for Retirement Investors.

Fourth, the neutral factors that the Department has incorporated into the BIC Exemption are unnecessary in light of the general requirements of the Impartial Conduct Standards, add little additional protection for Retirement Investors beyond these Impartial Conduct Standards, and create substantial ambiguity in regard to compliance with the BIC Exemption As a result, these neutral factors have been exceedingly difficult for institutions to interpret and apply, causing institutions to add extensive policies and procedures limiting the operation of their businesses. Establishing neutral factors requires institutions to retain and bear the expense of third party consultants. Once established, these neutral factors require such institutions to incur substantial, ongoing expense for continued training, oversight and compliance with these conditions, which add little or no additional protections for the Retirement Investors beyond the Impartial Conduct Standards.

The Best Interest Standard incorporates the fiduciary responsibilities provisions of ERISA that Congress established to define the conduct required of ERISA fiduciaries, which have protected effectively the interests of employee benefit plans for over 40 years. Layering specific additional requirements over and above such principles has had the effect of limiting investor choice, as institutions strive to comply with these unclear and prescriptive rules, against a regime that invites litigation challenges.

Consumer Access to a Wide Range of Investment Products. The compliance and disclosure burdens and additional litigation risk created by the Rule have resulted in diminished access to financial assistance and a narrowing of the range of products available to consumers. When asked about the impact of the Rule, 63% of respondents to the Financial Professionals Poll reported that the fiduciary standard will

definitely/probably/or has already limited investment options/products they can provide to clients. Fifty-six percent said that their firms would offer fewer mutual fund products to consumers. Moreover, 68% reported that they or their institutions will take on fewer small accounts. It is clear the Rule and the Accompanying Exemptions have an adverse effect because they limit access and investment choice for Retirement Investors.[25]

These findings are particularly troubling given that the survey was conducted only one month after the initial compliance deadline for the Rule, and the results show significant disruption to the marketplace. Without changes to the Rule, we expect further deterioration in consumer access to investment products. Similarly, only 10% of certified financial planners report that the Rule is helping them to serve their clients best interests; and 55% report the Rule is restricting them from serving their clients best interests (contrary to the claim by the Financial Planning Coalition that the Rule is not unworkable for its members[26]).

V. Costs and Benefits of the Rule and Alternative Approaches.

1. To what extent do the incremental costs of the additional exemption conditions exceed the associated benefits and what are those costs and benefits?

2. Are there better alternative approaches?

3. What are the additional costs and benefits associated with such alternative approaches?

Costs and Benefits of the Rule and Accompanying Exemptions. As described in Section IV above, the costs and risks created by the BIC Exemption's excessive disclosure requirements and additional litigation risk for institutions are disproportionate to the limited benefits they create for investors. The neutral factors incorporated into the BIC Exemption are unnecessary in light of the general requirements of the Impartial Conduct Standards, result in costly compliance efforts, and add little additional protection for Retirement Investors. The inevitable result of these additional costs and risks will be greater costs, diminished access to financial assistance and fewer investment options for Retirement Investors. The Department previously expressed its belief that "[b]ecause of Firms' anticipated efforts to satisfy the Impartial Conduct Standards . . . most . . . of the investor gains predicted in the 2016 [Regulatory Impact Analysis] for the transition period will remain intact."[27] The Impartial Conduct Standards serve the Department's purpose of protecting investors without imposing the additional burdensome and complex

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[25] Harper Polling, Key Poll Findings—National Survey of Financial Professionals, Table 1 (July 17, 2017).

[26] Letter from Kevin R. Keller, Lauren Schadle, and Geoffrey Brown to Office of Regulations and Interpretations, Employee Benefit Security Administration, U.S. Department of Labor (April 24, 2017), *available at* http://financialplanningcoalition.com/wp-content/uploads/2017/04/Financial-Planning-Coalition-Supplemental-Comment-Letter-RIN-1210-AB79....pdf.

[27] 82 Federal Register 16,902 at 16,907 (Apr. 7, 2017).

requirements mandated by the Additional Conditions or by the contract requirement for IRAs.

Alternative Approaches. FSR recommends several alternative approaches that maintain essential protections for Retirement Investors while reducing compliance costs and burdens.

1. Fiduciary Status Should Not Apply Absent Direct Contact with the Retirement Investor. FSR urges the Department to remove the concept of fiduciary conduct for a person or entity that does not have direct contact with the Retirement Investor from the Rule. At a minimum, the Rule should be revised to create a rebuttable presumption that such a person or entity is not providing investment advice unless a Retirement Investor can demonstrate by clear and convincing evidence that such person was actively engaged, whether alone or in combination with the person(s) having direct contact with the Retirement Investor in conduct intended to influence the investment decision of the Retirement Investor.

In expanding the definition of what constitutes investment advice, the Department cast an inappropriately broad net. Because the Department found elements of the prior rule to frustrate its perception of what should constitute fiduciary conduct—namely the requirements that (1) there be a mutual understanding between the parties that the person providing the advice was acting in a fiduciary capacity, (2) the advice had to form the primary basis for the investment decision, and (3) the advice had to be individualized—the concept of recommendation under the Rule struck all such conditions from the final Rule. But in so doing, the Department created an environment where persons who do not directly interface with a Retirement Investor could be deemed to be investment-advice fiduciaries.

Entities that establish an investment vehicle or provide investment research and which receive fees or other compensation in connection with that vehicle or research could be deemed to be fiduciaries if a Retirement Investor receives information prepared by such fund or from such researcher from a person whom the Retirement Investor consults about acting on its behalf, but does not retain. This information may be required to be disclosed by applicable law, or may consist of materials prepared generally to explain the virtues of the investment vehicle or the skill and experience of the person responsible for management, but which could form, at least in part, the basis for the Retirement Investor's decision to invest. Or it could be information listing the pros and cons of a particular security that the Retirement Investor reviews and concludes the pros outweigh the cons, based on his or her own judgment.

This could make the entity that prepared the materials a fiduciary to the Retirement Investor, and, if the compensation received does not constitute a level fee arrangement, the fund or researcher could find itself in violation of the Rule if it has not also had the forethought to build into its communications its statement of Material Conflicts of Interests, provided web-based fee disclosure, expressly undertaken the requisite BIC Exemption warranties and, if the Retirement Investor is not an ERISA plan, somehow managed to enter into a contract with a person that it may not even know existed. We believe this possibility is an unintended consequence.

It is reasonable for the Department to conclude that no person who is truly acting in a fiduciary capacity should be able to circumvent that status by asserting it is not a fiduciary or otherwise manipulating its guidance to circumvent the intent of the law. However, it is not consistent with the guiding principles of ERISA that a person can inadvertently or accidentally become a fiduciary because its ordinary course business activities influence in some immaterial way a Retirement Investor's decision to make an investment decision.

2. *Codification and Expansion of Hire Me Exemption*. The hire me exception described in the preamble to the Rule should be formally incorporated into the Rule itself, rather than having such an important concept addressed solely in the preamble to the adoption of the Rule. Having this critical exception solely in the preamble to the Rule, rather than in the Rule itself, creates the possibility for the application of this exception to be challenged and limits the industry's ability to rely on it, which is especially problematic in light of the significant litigation risk created by the Rule in general. Additionally, this exception should be expanded to cover a Retirement Investor's decision to retain the services of a manager or professional through the mechanism of a rollover, subject to the prophylactic disclosure described below.

The Rule deviates from traditional analysis under ERISA as to the decision by a plan fiduciary to retain the services of an investment manager or other financial professional. When a plan fiduciary hires the services of an investment manager or financial professional, such manager or professional does not become a fiduciary by marketing its services to the plan fiduciary. The manager or professional is clearly acting in its own best interests, hoping to have the plan fiduciary select it to provide services. One could contend that it is providing advice regarding the investment of plan assets, in that it is seeking to have the plan fiduciary change the manner in which its existing assets are invested by having that fiduciary engage it to manage the assets in a different way. Yet, the manager or professional does not become a fiduciary to the plan prior to being engaged and commencing services on behalf of the plan under that engagement. However, this is precisely what the Rule purports to do with regard to a manager or professional which seeks to be retained to manage the assets of a particular Retirement Investor.

The preamble to the Rule contains a traditional "hire me" exception to the act of providing investment advice, but the Rule does not extend the benefit of this exception when the "hire me" proposal relates to the rollover of plan assets, whether from a qualified plan or an IRA. The Department imposes fiduciary duties on the manager or professional seeking to be retained in the context of seeking to be retained to manage assets that would be rolled over.

Moreover, there is an implicit assumption in the Department's pronouncements that the manager or financial professional would implicitly be acting contrary to the best interests of the Retirement Investor by recommending a rollover that would increase the costs borne by that Retirement Investor. This assumption ignores the situation of a Retirement Investor who is a participant in a 401(k) plan but receives no professional investment assistance. While such a Retirement Investor may have access to low-cost investment options, it may be contrary to his or her best interest to forego professional guidance as to the investment of his or her retirement accounts. An investment manager

or professional offering to provide this incremental service at an incremental cost to the Retirement Investor would not have the benefit of the "hire me" exception. The Department would not contend that the "hire me" exception should not apply if a participant in a 401(k) retained a manager to guide him or her in investing his or her account balances among the investment choices within the plan. The result should be the same if the manager or financial professional is offering its services through arrangements that offer alternative investments necessitating a rollover.

Notwithstanding this incongruity in the current Rule and Accompanying Exemptions, FSR believes that Retirement Investors should make fully informed decisions regarding whether to initiate a rollover. But not all Retirement Investors may, standing alone, be in a position to make such a decision. It would therefore be appropriate to require that the manager or professional marketing its services in the context of a rollover disclose the fact that, in light of the incremental services, the Retirement Investor is likely to incur higher fees than simply investing at his or her volition in the investment options made available under the applicable plan.

Similarly, it would be reasonable to require disclosure of the fees and other compensation that the manager or professional could receive in connection with the decision to retain its services. However, the Rule and Accompanying Exemptions require that such a manager or professional be able to demonstrate that the decision to retain its services is clearly the preferential choice for the Retirement Investor, including taking into account the fees that the manager or professional will charge for its services. Indeed, it essentially requires a guarantee of investment performance, as the implied presumption of the Rule is that, unless the net returns to the Retirement Investor following a rollover decision are enhanced, the manager or professional somehow breached a fiduciary duty to the Retirement Investor. That result is simply not consistent with ERISA or the Code. Congress specifically enacted Section 404(c) of ERISA to permit participants to make their own investment decisions, and gave the settlor of an IRA unfettered discretion over his or her own account. There is no reason to suggest that there should be a limitation on that discretion such that it does not extend to the selection of the professional that the Retirement Investor would select to assist such investor in managing his or her retirement assets.

3. *Expansion of the Institutions Able to Rely on the BIC Exemption.* The availability of the BIC Exemption should not be restricted to "financial institutions" if the Impartial Conduct Standards are satisfied.[28]

Indeed, the Department has itself recognized that the BIC Exemption was not sufficiently broad enough to encompass all parties who operate as agents or intermediaries in the marketing of products to Retirement Investors by proposing an additional exemption to cover the operation of certain independent marketing

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[28] *See* Greg Iacurci, *DOL fiduciary rule causing DC-plan record keepers to change business with insurance agents* (July 24, 2017) (noting impact on independent agents who cannot use the BIC Exemption because they are not affiliated with a financial institution), *available at* http://www.investmentnews.com/article/20170724/FREE/170729972/dol-fiduciary-rule-causing-dc-plan-record-keepers-to-change-business?NLID=daily&NL_issueDate=20170728&utm_source=Daily-20170728&utm_medium=email&utm_campaign=investmentnews&utm_visit=584677&itx[email]=e9e42747f19fbb959a9c24c987c39163443a14edadd8266ca31330410eaaeac5@investmentnews.

organizations ("IMOs").[29] That particular proposal was also unnecessarily restrictive with regard to the IMOs to which it would apply, because the exemption would be available only to an IMO that can meet the restrictive conditions associated with the BIC Exemption and "[h]as transacted sales of Fixed Annuity Contracts averaging at least $1.5 billion in premiums per fiscal year over its prior three fiscal years."[30] However, even if that proposed exemption were appropriately expanded to cover those IMOs that act as intermediaries in marketing fixed-indexed annuity insurance products to Retirement Investors, the exemption would still not cover all parties that could have direct contact with Retirement Investors in connection with offering various investment products.

We believe the scope of the exemption should not be restricted to financial institutions and IMOs. So long as the applicable conditions and safeguards are satisfied, the BIC Exemption (even as modified as recommended in this comment letter) will operate to protect the interests of Retirement Investors, regardless of the nature of the entity that is acting as an investment-advice fiduciary.

4. Education Exception Should Allow References to Specific Investments. The Department should reinstate the ability to provide education information that includes references to specific investments, as was permitted under the principles set forth in Interpretive Bulletin 96-1. These principles, which were developed and adopted by the Department, served both plan sponsors and participants well for 20 years. While the principles of Interpretive Bulletin 96-1 were generally incorporated into the Rule, the elimination of the ability to reference specific investment alternatives without undertaking fiduciary status severely limits the utility of the exception for educational information. The Department should however retain the Rule's expansion of the education guidance permitted to encompass retirement planning-related information and materials.[31]

VI. BIC Exemption Contract Requirement for IRAs.

1. What is the likely impact on Advisors' and firms' compliance incentives if the Department eliminated or substantially altered the contract requirement for IRAs?

2. What should be changed?

3. Does compliance with the Impartial Conduct Standards need to be otherwise incentivized in the absence of the contract requirement and, if so, how?

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29 Proposed Best Interest Contract Exemption for Insurance Intermediaries, 82 Federal Register 7,336 (Jan. 19, 2017).

30 82 Federal Register at 7,372.

31 We note that the Obama Administration abandoned IB 96-1, without any empirical support for the change; accordingly, this recommendation could be adopted without impacting any of the benefits projected by the Obama Administration. See § 2510.3-21(b)(2)(iv)(C)(4) and (D)(5).

Effect on Compliance Incentives. As described above in Section IV, the litigation risks associated with BIC Exemption's contract requirement are predicated on an assumption by the Department that highly regulated institutions will not comply with a new regulatory regime. Eliminating the contract requirement for IRAs would not diminish these institutions' compliance incentives.

The Department imposed the contract condition, and created a series of Additional Conditions that created an enforcement mechanism to encourage judicial challenges regarding the conduct of financial institutions. Congress imposed the penalties that it deemed appropriate to ensure compliance with the prohibited transaction provisions of the Code and vested enforcement authority in the Internal Revenue Service. These penalties impose substantial economic liabilities on disqualified persons who engage in such prohibited transactions, especially if not corrected promptly.

Institutions that are heavily regulated comply with their duties and obligations, and must address the impact of any potential liabilities associated with any prohibited transactions on their financial statements, which are subject to heavy scrutiny by their primary regulators, and to an elaborate reporting regime if the institution has publicly traded securities. Considering these factors, there is no other incentive required to compel the institutions' compliance with the Impartial Conduct Standards and any other conditions that are included in the Accompany Exemptions following the current review.

If the Department is concerned that monetary penalties imposed by the Code are not sufficient to ensure compliance, it could coordinate with the institutions' primary regulators to build compliance with the Rule into their ordinary and regular oversight.

Proposed Changes and Incentives for Compliance with Impartial Conduct Standards. While a requirement that institutions identify and disclose their Material Conflicts of Interests to Retirement Investors will benefit such investors by alerting them to the circumstances in which there could be an economic incentive for an institution not to act in the best interests of Retirement Investors, the contractual requirement of the BIC Exemption is a burdensome, overbroad means of achieving this end. Aside from the conflicts disclosure, the remaining warranties essentially serve only as avenues for challenges against the institution in litigation, and do not further the interests of the Retirement Investors.

Moreover, as discussed above, the neutral factors that the Department has incorporated into the BIC Exemption are unnecessary in light of the general requirements of the Impartial Conduct Standards. They add little additional protection for Retirement Investors, yet they create significant burdens for institutions. The Best Interest Standard incorporates the fiduciary responsibilities provisions of ERISA. Heavily regulated institutions are already subject to substantial scrutiny by their primary regulators, and the rules established by such regulators already provide investors generally with substantial protections. The combination of the Best Interest Standard and these existing protections will operate to protect Retirement Investors from being disadvantaged by institutions

acting improperly due to conflicts of interests. With these protections in place, the contract requirement for IRAs should be eliminated.

The remaining warranties under the contract requirement pertain to the institutions' business operations in a manner that is unprecedented in the administration of ERISA and the exercise of the Department's discretionary authority to grant administrative exemptions. The Impartial Conduct Standards, which are broad, principles-based conditions that afford material protections to the interests of Retirement Investors, are more consistent with both the Department's historical practices regarding the issuance of class exemptions and Congress' general statutory approach to ERISA.

Except for the particular conduct that was prescribed in the prohibited transaction provisions of ERISA and the Code, Congress adopted broad principles to guide and regulate fiduciary conduct, including those related to a fiduciary engaging in conduct that might raise conflicts of interest that could lead the fiduciary to act in its own interest over that of Retirement Investors. Congress did not attempt to dictate particular acts that had to be performed, or a list of investments that would be permitted for those investing plan assets.

VII. Alternative Streamlined Exemptions.

1. Would mutual fund clean shares allow distributing Financial Institutions to develop policies and procedures that avoid compensation incentives to recommend one mutual fund over another? If not, why?

2. What legal or practical impediments do Financial Institutions face in adding clean shares to their product offerings?

3. How long is it anticipated to take for mutual fund providers to develop clean shares and for distributing Financial Institutions to offer them, including the time required to develop policies and procedures that take clean shares into account?

4. What are the costs associated with developing and distributing clean shares?

5. Have Financial Institutions encountered any operational difficulties with respect to the distribution of clean shares to the extent they are available?

6. Do commenters anticipate that some mutual fund providers will proceed with T-share offerings instead of, or in addition to, clean shares? If so, why?

A Principles-Based Framework for Exemptions. While any incremental relief would be beneficial to the regulated community, were the Department to adhere strictly to the existing conditions of the Accompanying Exemptions, the better path for the Department would be to make the Accompanying Exemptions principles-based and not prescriptive of the business and operations of institutions attempting to service the needs of Retirement Investors.

Streamlined exemptions for particular products or classes of investments could have the unintended consequence of compelling institutions to focus the investment options made available to Retirement Investors solely or excessively on such "favored" investments, which may not always be in the best interests of Retirement Investors. It is likely that such streamlined exemptions would have the practical consequences of herding a substantial portion of Retirement Investors' accounts toward these particular investments. Creating such a "favored" category of investments would have the practical effect of limiting choice and potentially affecting returns on investments, by narrowing the class of preferred investments. But a more principles-based BIC Exemption and other exemptions would not create such a bias, and would not diminish the industry's capacity and incentives to develop products that would facilitate compliance with such principles.

With a principles-based generally applicable BIC Exemption, institutions that can effectively and efficiently use clean shares will still have proper motivation to employ such product, but institutions that desire to make available other investment choices to Retirement Investors will not be placed at a competitive disadvantage when choosing to do so. This will afford Retirement Investors the greatest choice among investment alternatives, while a focus on product-specific streamlined exemptions creates a risk of stifling the development of future innovations in the marketplace.

Further, the time-intensive process for crafting and adopting exemptions makes choosing additional categories of streamlined exemptions impractical considering the industry's immediate need for mechanisms to comply with the Rule. A flexible, principles-based framework for exemptions would eliminate the need for the onerous process of developing an ever-expanding set of product-specific exemptions as innovations occur in the marketplace.

Thus, a restructuring of the Accompanying Exemptions away from prescriptive one-size-fits-all rules and toward guiding principles such as those associated with the Impartial Conduct Standards would best serve the interests of Retirement Investors. This approach would not artificially limit choice or favor one product class over another, and yet would afford such investors substantial protections against improper conduct by persons providing services with regard to their investments. A principles-based approach also would result in an exemption that is "efficient, effective and appropriately tailored," as required by the Presidential Executive Order on Core Principles for Regulating the United States Financial System.

VIII. Treatment of Fee-Based Annuities.

1. How would advisors be compensated for selling fee-based annuities?

2. Would all of the compensation come directly from the customer or would there also be payments from the insurance company?

3. What regulatory filings are necessary for such annuities?

4. Would payments vary depending on the characteristics of the annuity? How long is it anticipated to take for an insurance company to develop and offer a fee-based annuity?

5. How would payments be structured?

6. Would fee-based annuities differ from commission-based annuities in any way other than the compensation structure?

7. How would the fees charged on these products compare to the fees charged on existing annuity products?

8. Are there any other recent developments in the design, marketing, or distribution of annuities that could facilitate compliance with the Impartial Conduct Standards?

As discussed in Section VII above, while incremental relief would be welcome, FSR believes a principles-based approach to the Accompanying Exemptions that is not prescriptive of the business and operations of institutions providing services to Retirement Investors and provides flexibility that fosters product innovation would be preferable to the tailoring of rules and exemptions to particular classes of investments.

In addition to potential unintended consequences leading to portfolio allocations that are not in the best interests of Retirement Investors and the practical consequence of limiting investment choice and returns for Retirement Investors by focusing on exemptions that favor a particular investment design, the Department could also be deemed to be regulating conduct that is in the proper domain of the institution's primary regulator. Further, in the context of providing preferential treatment for one type of insurance product over another, the Department could be indirectly imposing federal regulation of insurance that is properly in the domain of the states.

Moreover, as is discussed in greater detail in Section XVII below, the Department presented no evidence to indicate that there was need to modify PTE 84-24 to distinguish between various types of annuity or other insurance products. This class exemption had been used effectively by the insurance industry for over 30 years. In the materials accompanying the Rule and the Accompanying Exemptions, the Department did not describe any abuses that it had observed in the context of plans relying on such exemption, and apparently undertook no studies to evaluate the need for additional protections with regard to insurance products, or any particular type of annuity products. Without such studies or other evidence supporting a need to draw a distinction between different types of insurance or annuity products, it seems inappropriate to adopt an exemption that would favor annuities marketed under one type of fee structure over another.

IX. Other Opportunities for Streamlined Exemptions.

In the RFI, the Department requested input with regard to the following questions:

1. Clean shares, T-shares, and fee-based annuities are all examples of market innovations that may mitigate or even eliminate some kinds of potential advisory conflicts otherwise associated with recommendations of affected financial products. These innovations might also increase transparency of advisory and other fees to retirement investors. Are there other innovations that hold similar potential to mitigate conflicts and increase transparency for consumers?

2. Do these or other innovations create an opportunity for a more streamlined exemption?

3. To what extent would the innovations address the same conflicts of interest as the Department's original rulemaking?

As discussed more fully in Sections VII and VIII above, FSR believes a principles-based approach to the Accompanying Exemptions would be preferable to the time-consuming process of tailoring of rules and exemptions that favors particular classes of existing investments and stifles product innovation. Aside from the potential for unintended consequences of such exemptions that are not in the best interests of Retirement Investors, the Department encroaches on the authority of the states and the responsibilities of the institutions' primary regulators by essentially dictating what kinds of investments are appropriate for Retirement Investors (in a manner Congress affirmatively decided not to do in the enactment of ERISA).

A focus on innovative products that help institutions offer a wider array of investments to Retirement Investors within the parameters of a principles-based approach to the Accompanying Exemptions should be encouraged and supported. Such products would enhance the availability of assistance and the breadth of products available to Retirement Investors. The conditions associated with, and the timing of the applicability of, such exemptions should encourage the development of new products that enhance compliance, without favoring any product over another. However, the Department must recognize that development of new products in a highly-regulated environment takes time and requires coordination with institutions' primary regulators.

X. Streamlined Exemptions Based on Model Policies and Procedures.

1. Could the Department base a streamlined exemption on a model set of policies and procedures, including policies and procedures suggested by firms to the Department?

2. Are there ways to structure such a streamlined exemption that would encourage firms to provide input regarding the design of such a model set of policies and procedures?

3. How likely would individual firms be to submit model policies and procedures suggestions to the Department?

4. How could the Department ensure compliance with approved model policies and procedures?

The set of questions posed in this section simply describe what the law already provides; institutions that have particular needs and concerns may seek individual administrative exemptions from the Department that would address their concerns. In the context of the development of appropriate class exemptions, there is likely to be an aversion in the regulated community to present individualized and proprietary data that relates to policies that have been developed to allow the institution to market products and services to Retirement Investors with the intent of providing offerings that are superior to those of their competitors, as these data represent a competitive advantage resulting from costly and time-intensive efforts on the part of individual institutions.

Moreover, in developing an appropriate class exemption that would focus on individual business models, the Department would need to develop multiple exemptions to reflect the differences in the regulatory regimes that apply across industries. There would be need for a banking exemption, a broker-dealer exemption, an insurance exemption, and so on. Such an approach also fails to account for differences among institutions and regulation within these industries.

As discussed above in Sections VII, VIII and IX, FSR believes that the Department should focus on a less prescriptive and more principles-based set of exemptions based primarily on the Impartial Conduct Standards. FSR further believes that it is inappropriate for the Department to add substantial conditions to any exemption predicated on a view that companies operating within these regulated industries would not attempt to comply in good faith with such principles-based requirements.

XI. Incorporation of Securities Regulation of Fiduciary Investment Advice

1. If the Securities and Exchange Commission or other regulators were to adopt updated standards of conduct applicable to the provision of investment advice to retail investors, could a streamlined exemption or other change be developed for advisors that comply with or are subject to those standards?

2. To what extent does the existing regulatory regime for IRAs by the Securities and Exchange Commission, self-regulatory bodies (SROs) or other regulators provide consumer protections that could be incorporated into the Department's exemptions or that could serve as a basis for additional relief from the prohibited transaction rules?

In the event that the SEC were to develop its own principles-based regime for assuring compliance with a best interest standard, it would be appropriate and in the best interest of Retirement Investors for the Department to offer as an alternative to the otherwise applicable principles-based exemptions a streamlined exemption that would be based solely on compliance with such SEC-mandated regime (including applicable rules by FINRA or other self-regulatory organizations subject to SEC oversight).

For institutions subject to regulation by the SEC, such institutions would be required to comply with the SEC-mandated policies and procedures. Such institutions should not be caught between a regulatory rock and a hard place, in having to comply with the SEC rule and potentially having conflicting (or at least material additional) duties and obligations under whatever conditions are applicable under the Department's regime. Thus, these institutions should be allowed to comply with the SEC conditions and requirements and be deemed to be in compliance with the Rule should they do so.

Moreover, for other institutions that are subject to regulation by a primary regulator other than the SEC, a similar rule should apply if their primary regulator (*e.g.*, banking or insurance agencies) adopts a "best interest" requirement. Additionally, to avoid some institutions having a competitive advantage over others, those institutions not subject to mandatory SEC regulation should have the option to comply with the SEC requirements as to the best interest standard and also be deemed to comply with the Rule by doing so.

Such an approach would have the intended effect of protecting Retirement Investors from conduct that would generally be perceived to be promoting the interests of the institution over the interests of the Retirement Investors, but without adding unnecessary burdens, costs and expense to a system of operation already subject to pervasive regulation.

XII. Disclosure requirements.

1. Are there ways to simplify the BIC Exemption disclosures or to focus the investor's attention on a few key issues, subject to more complete disclosure upon request?

2. For example, would it be helpful for the Department to develop a simple up-front model disclosure that alerts the retirement investor to the fiduciary nature of the relationship, compensation structure, and potential sources of conflicts of interest, and invites the investor to obtain additional information from a designated source at the firm? The Department would welcome the submission of any model disclosures that could serve this purpose.

A model disclosure would facilitate compliance for institutions, so long as the model does not require the inclusion of excessive detail that is unnecessary or not helpful to the Retirement Investor. The model disclosures should replace the warranties and

disclosure currently mandated by the BIC Exemption. In lieu of the BIC Exemption's current requirements, the Department should develop simple, "plain English" disclosures that would alert the Retirement Investors appropriately to the fiduciary nature of the relationship, broadly describe the compensation structure and describe any potential conflicts of interests. This form of model disclosure would likely be a substantial improvement in the conditions of the BIC Exemption that would enhance compliance. Such model disclosure should also facilitate the Retirement Investors' understanding of these issues as compared to what would derive from the deluge of information that would currently be required under the BIC Exemption.

What is important is that Retirement Investors be aware that there could be instances where the institutions with which they are working to enhance their retirement assets and meet their unique needs throughout their retirement might have interests that conflict with their own. These considerations can be presented clearly and simply without undue burden. And with the protections afforded by the Impartial Conduct Standards, the institutions will be compelled not to act improperly due to these conflicts.

FSR would welcome the opportunity to work with the Department in developing such model disclosure. While the industry would also be willing to propose a model for consideration, it would beneficial in the development of any such model to have a dialogue with the Department regarding the scope of the disclosure it would consider appropriate, the level of detail that it would envision to be required, and the elements that it would deem beneficial to disclose.

XIII. Contributions to Plans or IRAs

1. Should recommendations to make or increase contributions to a plan or IRA be expressly excluded from the definition of investment advice?

2. Should there be an amendment to the Rule or streamlined exemption devoted to communications regarding contributions? If so, what conditions should apply to such an amendment or exemption?

In its recently released FAQs on the Rule, the Department has taken positive steps toward clarifying that encouraging the Retirement Investor to make or increase contributions to a plan or IRA is not investment advice under the Rule and does not otherwise cause a person to be deemed to be a fiduciary. This guidance reaffirms that it has never been considered a fiduciary act merely to encourage one to save for retirement.

However, as the guidance would suggest, there may be circumstances where, as a factual matter it is not readily possible to distinguish the encouragement of contributions from a recommendation to make an investment. In such circumstances, an exemption from the definition of investment advice with regard to contributions to an IRA would be a beneficial improvement to the existing exemptions that would benefit Retirement Investors. Studies indicate that investment professionals serve an important and valuable

role in encouraging savings for retirement.[32] Such a blanket exemption would limit the possible adverse impact of the Rule on providing such encouragement, which should be deemed beneficial to Retirement Investors.

It would be appropriate to segregate, where reasonably practicable, the act of encouraging additional contributions from the investment of such contributions. Where not practicable, such as where the encouragement is made by a bank employee and the Retirement Investor is desirous of investing the assets in bank deposits, or the encouragement is made by an insurance agent and the likely investment of such additional contributions would be in an insurance product, it would be appropriate for the Impartial Conduct Standard to apply to that recommendation. Where the contribution and the actual investment of the contributed assets can be readily separated, no condition should apply to a suggestion to contribute more toward one's retirement.

XIV. Bank Deposits and Similar Investments

1. Should there be an amendment to the Rule or streamlined exemption for particular classes of investment transactions involving bank deposit products and HSAs? If so, what conditions should apply, and should the conditions differ from the BIC Exemption?

An exemption for bank deposit products and similar products (such as the use of sweep services and other permissible methods of addressing cash held temporarily for investment by broker-dealers) would provide institutions substantial flexibility without creating the risk of material concerns for Retirement Investors. Such an exemption could provide that it is only applicable with respect to cash held in bank deposits or otherwise held temporarily pending investment (such as following payments of dividends, sales of securities or following contributions to the Retirement Investor's account). The sole condition for this finite exemption would be the requirement that the Retirement Investor's account be credited with interest or a similar economic return that affords the Retirement Investor a rate of return that is at least equal to a market-based rate for similar investments (such as referencing the FDIC report of interest payable on interest bearing checking accounts). The use of such a program would be conditioned upon the Retirement Investor's express consent to the use of such program, and appropriate disclosure of the underlying rate of return.

Given the relatively small percentages of a Retirement Investor's account that would generally be held in such short-term cash or the relatively short periods during which such cash would be held in such investments, these amounts will have at most an

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[32] *See* Montmarquette and Viennot-Briot, *The Gamma Factor and the Value of Financial Advice*, CIRANO at 24 (Aug. 2016) (finding advised households over a 15-year period "have about 290% more financial assets than non-advised households"), *available at* https://cirano.qc.ca/files/publications/2016s-35.pdf; Pollara, *Canadian Mutual Fund Investors' Perceptions of Mutual Funds and The Mutual Fund Industry* at 5 (2016) (noting that half of households in Montmarquette study had less than $25,000 in savings when they initially began to work with an adviser).

immaterial impact on the overall return on investments in a Retirement Investor's accounts. Yet, collectively, the administrative burdens of conforming the investment of such amounts with the otherwise applicable terms of the Accompanying Exemptions can be particularly burdensome for institutions providing these services to Retirement Investors. But this burden would have to be incurred by the institution, as short-term cash is an integral component to servicing any investment account.

Such an exemption would parallel the relief that Congress afforded bank deposits generally under Section 408(b)(4) of ERISA, and would properly balance the burdens associated with the oversight and management of such assets for the institutions with the interests of Retirement Investors of having appropriate liquidity to accommodate their overall investment strategies, or simply making investments in safe and secure bank deposits.

XV. Grandfathering.

In the RFI, the Department requested input with regard to the following questions:

1. To what extent are firms and advisors relying on the existing grandfather provision?

2. How has the provision affected the availability of advice to investors?

3. Are there changes to the provision that would enhance its ability to minimize undue disruption and facilitate valuable advice?

Reliance on Grandfathering. To the extent that institutions have concluded that they cannot comply with the requirements of the Accompanying Exemptions without undue risks and expense with regard to all of their accounts, such institutions are indeed relying on the grandfather provision. Yet many questions and concerns about the scope of the provision remain.

Effects on the Availability of Assistance to Investors, and Proposed Changes to the Provision. Institutions relying on the grandfathering provision will often have duties and obligations—contractually, at law or under best practices—to provide investors with information and reports about their investments that, under the Rule's broad definition of a "recommendation", could be deemed to constitute a recommendation that would cause the loss of the ability to rely on the grandfather provision. At a minimum, the Department should clarify that such information may be provided. However, we believe further revisions to the unduly restrictive grandfather provision currently in effect would enhance the ability of financial institutions to provide beneficial and necessary services to Retirement Investors.

The Department should provide a full exemption from the Rule to enable institutions to provide assistance and guidance to Retirement Investors regarding all investments in accounts entered into prior to and after June 9, 2017, and prior to January

1, 2018, or any delayed applicability date ("pre-existing investments") without the institutions becoming subject to fiduciary status. The grandfathering provision should also be expanded to allow investors to make ongoing contributions of new money into the account and to permit institutions to provide ongoing assistance and guidance for the life of the account, including providing guidance to Retirement Investors with regard to decisions pertaining to exchanging mutual funds.

Affording a full exemption from the Rule for pre-existing investments would allow the institution to fulfill the expectations of these investors at the time the investment was initially made, without having the institution seek to undo commercial arrangements with third parties that were acceptable under the law prevailing at the time guidance was given.

XVI. PTE 84-24.

1. If the Department provided an exemption for insurance intermediaries to serve as Financial Institutions under the BIC Exemption, would this facilitate advice regarding all types of annuities?

2. Would it facilitate advice to expand the scope of PTE 84-24 to cover all types of annuities after the end of the transition period on January 1, 2018?

3. What are the relative advantages and disadvantages of these two exemption approaches (i.e., expanding the definition of Financial Institution or expanding the types of annuities covered under PTE 84-24)?

4. To what extent would the ongoing availability of PTE 84-24 for specified annuity products, such as fixed indexed annuities, give these products a competitive advantage vis-à-vis other products covered only by the BIC Exemption, such as mutual fund shares?

PTE 84-24 had been in effect for over 30 years when the Department adopted the Rule. The Department did not present any evidence that such exemption had led to investments that were not in the best interests of Retirement Investors. Insurance regulators in the states in which the issuers of such annuities do business review the sales practices of these insurers and their representatives.

Allowing this exemption to continue to apply with respect to all annuity products would avoid confusion for Retirement Investors, and facilitate the ability of insurers and their representatives to comply with the Rule and PTE 82-24 without costs and burdens that are excessive in relation to the perceived benefit to Retirement Investors of these additional conditions. With the Impartial Conduct Standards applied to PTE 84-24, Retirement Investors would have an added level of protection that would be more than sufficient to assure the guidance they receive with respect to the investment of their retirement assets in any annuity contract would be provided with the primary purpose of enhancing the value of their retirement assets, especially in light of the safeguards and

oversight that are applied by the primary regulators of the institutions involved in the sale of such products.

Annuity products and mutual fund products provide different benefits, and their fees and structures reflect the differences in these products. Mutual funds are a pure investment alternative; an annuity product (even one that offers investment options that are comparable to, or that includes investment products that are, mutual funds) offers additional benefits at an added cost that are designed to provide Retirement Investors certain levels of guarantees with regard to the protection of principal and mortality risks.

These added benefits are important to certain Retirement Investors and these additional benefits influence their investment decisions in a manner that differs significantly from investing in products that do not offer such alternatives. The primary regulators of insurance companies and their representatives are much better positioned to regulate the issues that are raised by investments in annuity contracts than the Department. Having the Impartial Conduct Standards apply should be sufficient to assure that financial institutions and their representatives provide guidance to Retirement Investors that is consistent with fiduciary standards under ERISA and the Code.

The exemption available under 84-24 also should be made available to cover the conduct of all parties, including IMOs and other intermediaries, who are integral to the marketing and sale of fixed-indexed annuities and other insurance products in the ordinary course of their business.

Moreover, as described above, we believe the BIC Exemption should be reviewed and revised to eliminate the incremental conditions that are applicable to investments that would made in reliance upon such exemption. FSR believes the Impartial Conduct Standards should be the basis for the added protection that would made available to Retirement Investors through the Rule and the Accompanying Exemptions.

XVII. Communications with Independent Fiduciaries with Financial Expertise.

1. To the extent changes would be helpful, what are the changes and what are the issues best addressed by changes to the Rule or by providing additional relief through a prohibited transaction exemption?

Communications Excluded from the Definition of a "Recommendation." The Rule should be revised to exclude from the definition of a "recommendation" any communication where the person making the communication (1) is not undertaking to provide fiduciary advice, and (2) has identified itself to the Retirement Investor as representing the interests of the counterparty to the transaction with a Retirement Investor. This exception should apply regardless of whether the Retirement Investor is represented by an independent qualified fiduciary.

The Department has crafted the Rule so that persons with an ongoing relationship with a Retirement Investor, to whom the investor looks for investment guidance, would

be deemed to be fiduciaries. The Accompanying Exemptions impose numerous and material conditions to disallow such a person from benefiting directly or indirectly from any recommendation made to a Retirement Investor. But the Rule is written so broadly that a person who is clearly and unequivocally representing a third party in marketing an investment product is compelled to assume fiduciary duties merely by describing the benefits of the investment. Thus, a fund sponsor that provides an offering memorandum to a Retirement Investor, an administrative agent who describes the advantages of an investment, or a person engaging in a principal transaction could be assuming fiduciary duties, and be compelled to assume all of the costs, expenses and burdens of the BIC Exemption or one of the other Accompanying Exemptions to effect single, isolated transactions where no reasonable person expected such financial institution or professional to become a fiduciary.

The reason for the breadth of the Rule is apparent. The Department determined that persons who assumed a position of trust, or purported to provide investment advice to a Retirement Investor, should not be permitted to abuse that trust or mislead an investor for its own benefit. But an individual or institution marketing an investment opportunity that unambiguously discloses whose interests such person is representing should not be burdened with the obligations imposed under Section 404 of ERISA merely because in representing the interests of itself or others it honestly describes the perceived merits of the investment opportunity it is presenting for consideration. As described below, reasonable and bright line conditions can be made applicable to such exception.

Without an exception of this nature, a number of investment opportunities have been (and more will be) denied to Retirement Investors because persons who might inadvertently get caught in the wide net of being an investment-advice fiduciary have chosen (and others will choose) not to offer the opportunity to Retirement Investors rather than be compelled to undertake to comply with the prescriptive rules of the BIC Exemption. Investment vehicles which had a modest number of IRA investors can not rationalize the expense of and risks associated with BIC Exemption compliance to accept a modest amount of investment from IRA investors.

Indeed, the scope of the definition of recommendation is so broad that mutual fund sponsors have begun to inquire whether they need to incorporate "deemed investor representations" into the purchase of their shares—that any Retirement Investor acquiring shares is deemed to have engaged the services of a professional independent fiduciary—to preclude the assertion that their existence and disclosure documents would make them investment-advice fiduciaries under the Rule, to the extent a Retirement Investor directed funds into their shares. This concern illustrates perfectly the unintended and perhaps unlimited scope of the definition of recommendation.

This exception to the definition of "recommendation" could include the requirement of the Impartial Conduct Standards prohibiting the person asserting the exception from making misleading statements. It could require such a person to make an affirmative statement that the person was acting in the interest of the counterparty to the transaction and not the Retirement Investor. The person relying on the exception could

also be required to disclose any financial or other material interest it has in the transaction, as well as any other conflicts of interest that it might have with regard to the transaction. This exception would be expressly unavailable to any person receiving a fee or other compensation directly from the Retirement Investor for the provision of investment advice to the Retirement Investor.

If the Department is concerned that such an exception to the scope of the term recommendation in the Rule would be abused, such exception could be effected through a prohibited transaction exemption. Such an exemption could include any or all of the above-stated requirements that would have applied to an exception incorporated into the Rule. But, unlike the BIC Exemption, this exemption would not (i) require that the person act in the transaction in the Retirement Investor's best interest, (ii) require that the disclosed compensation be subject to any standard of reasonableness, or (iii) impose any additional disclosure or other conditions on the availability of the exemption.

Presumptive Counterparty Exception for Communications Between Institutions. While the Rule provides an exemption to fiduciary obligations when communicating advice to a fiduciary that is independent of the investment professional, reliance on the exemption requires that the professional reasonably believe that the counterparty is capable of evaluating investment risks independently. While such a belief may theoretically be assumed between institutions, in practice the requirement has resulted in excessive disclosures and exchanges of forms between institutions that the Rule was clearly not designed to protect, as institutions seek to minimize the risk of noncompliance with the Rule. The result has been increased costs, delays and burdensome exchanges of forms.

FSR proposes that the investment professional counterparty exemption to the Rule apply automatically, or at least be subject to a rebuttable presumption that the counterparty exemption applies with respect to communications between financial institutions.

* * * *

FSR welcomes the opportunity to work with the Department on how to address the concerns raised by the Final Rule and Accompanying Exemptions. If it would be helpful to discuss FSR's specific comments or general views on this issue, please contact me at [redacted] or Felicia Smith, Vice President and Senior Counsel for Regulatory Affairs, at [redacted].

Sincerely yours,

Rich Foster

Richard Foster
Senior Vice President and Senior Counsel
for Regulatory and Legal Affairs
Financial Services Roundtable

Attachments:

Appendix A: Department of Labor Fiduciary Rule: National Survey of Financial Professionals (July 7-12, 2017) [Harper Polling Slides]

Appendix B: Key Poll Findings—National Survey of Financial Professionals (July 17, 2017) [Harper Polling Memo]

Appendix A

Department of Labor Fiduciary Rule: National Survey of Financial Professionals
(July 7-12, 2017)
[Harper Polling Slides]

FINANCIAL SERVICES ROUNDTABLE

Department of Labor Fiduciary Rule

National Survey of Financial Professionals

July 7-12, 2017

Sample: 600 financial advisors

Harper Polling

Methodology

- *The sample size for the survey is 600 financial advisors across the United States and the margin of error is +/-4.0%. Reponses were gathered via live operator telephone and online interviews. The survey was conducted July 7-12, 2017 by Harper Polling. Total percentages for responses may not equal 100% due to rounding.*

Harper Polling

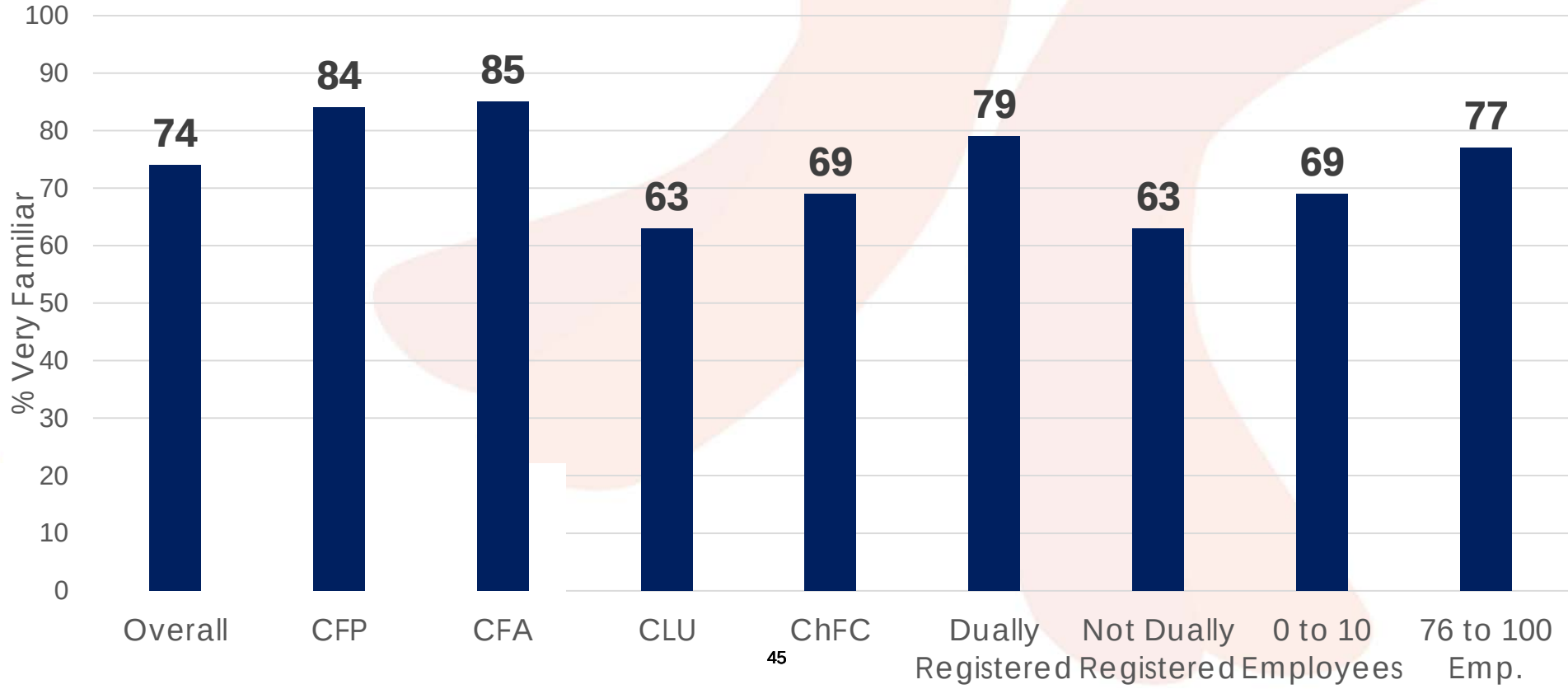
FIDUCIARY RULE OVERVIEW

Harper Polling

Awareness of Rule

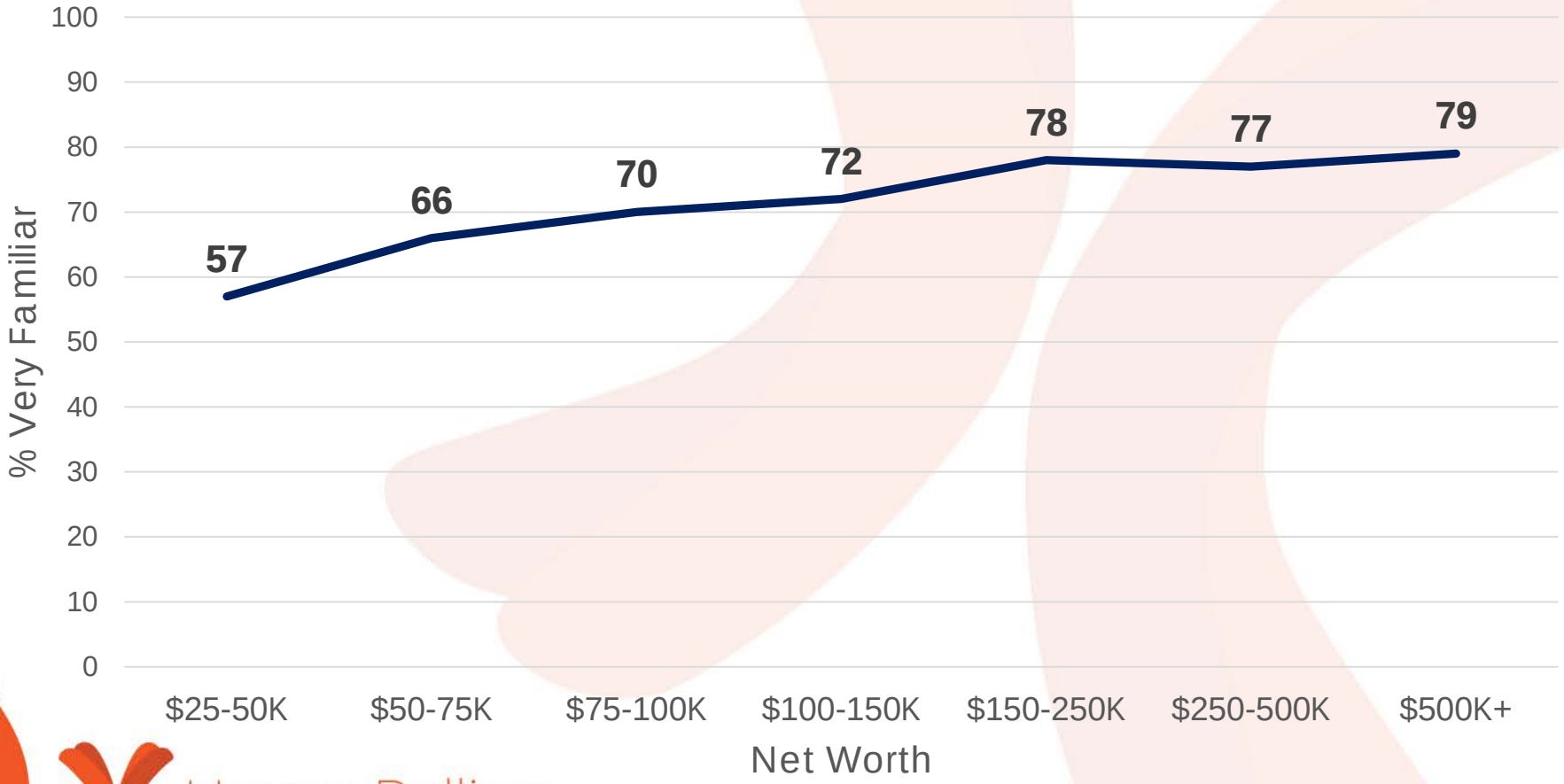
Q: Are you familiar with the Department of Labor's new fiduciary rule, which partially went into effect in early June?

Effectively *all* financial advisors surveyed have some level of familiarity with the rule (98% very/somewhat familiar). Awareness is high across all demographic cohorts. However, there are some notable variations when looking at those who are *very* familiar with the rule:



Awareness Increases with Average Client Household Net Worth

Advisors servicing higher-wealth individuals are generally more aware of the rule.



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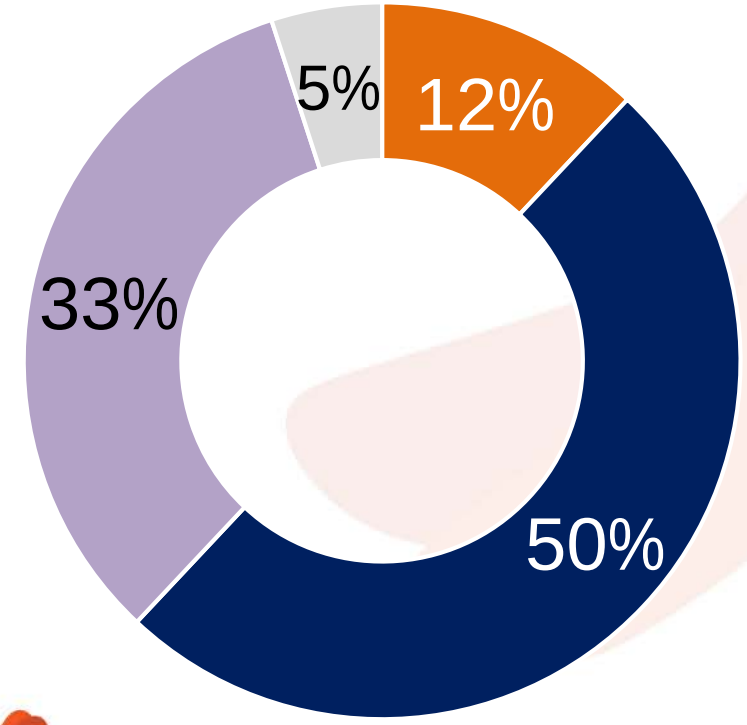
Impact of Rule

Q: As you may know, the Department of Labor's new fiduciary rule partially went into effect in early June and takes full effect on January 1, 2018. The new rule requires financial advisors to adhere to an updated fiduciary standard for retirement accounts meaning that they must act solely in their clients' best interests.
Which of the following statements comes closest to your opinion?



- The fiduciary rule is helping me to serve my clients' best interests
- The fiduciary rule is restricting me from serving my clients' best interests
- The fiduciary rule has had no impact on my ability to serve my clients' best interests
- Not sure

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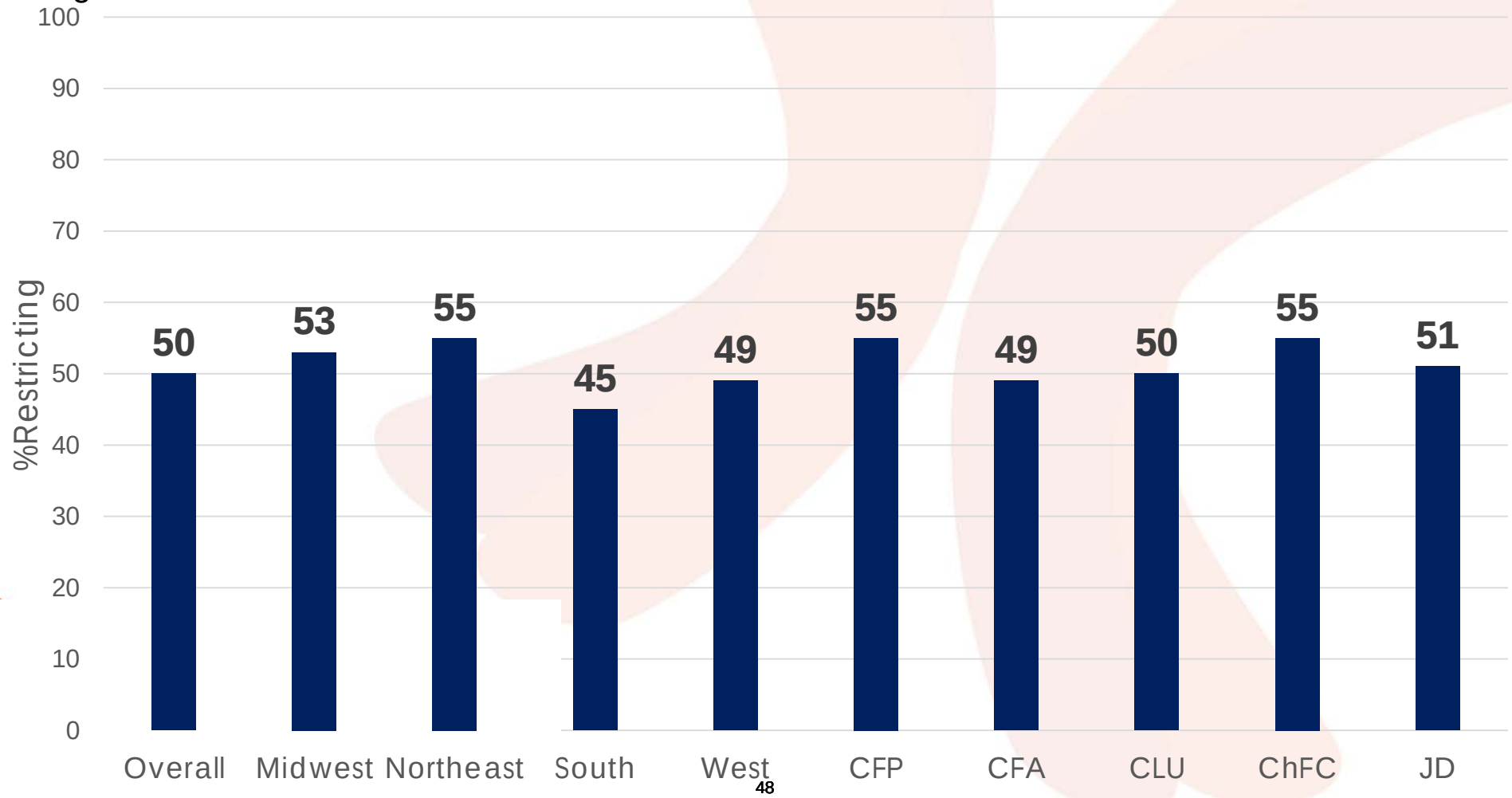
Impact of Rule

Key Demographics

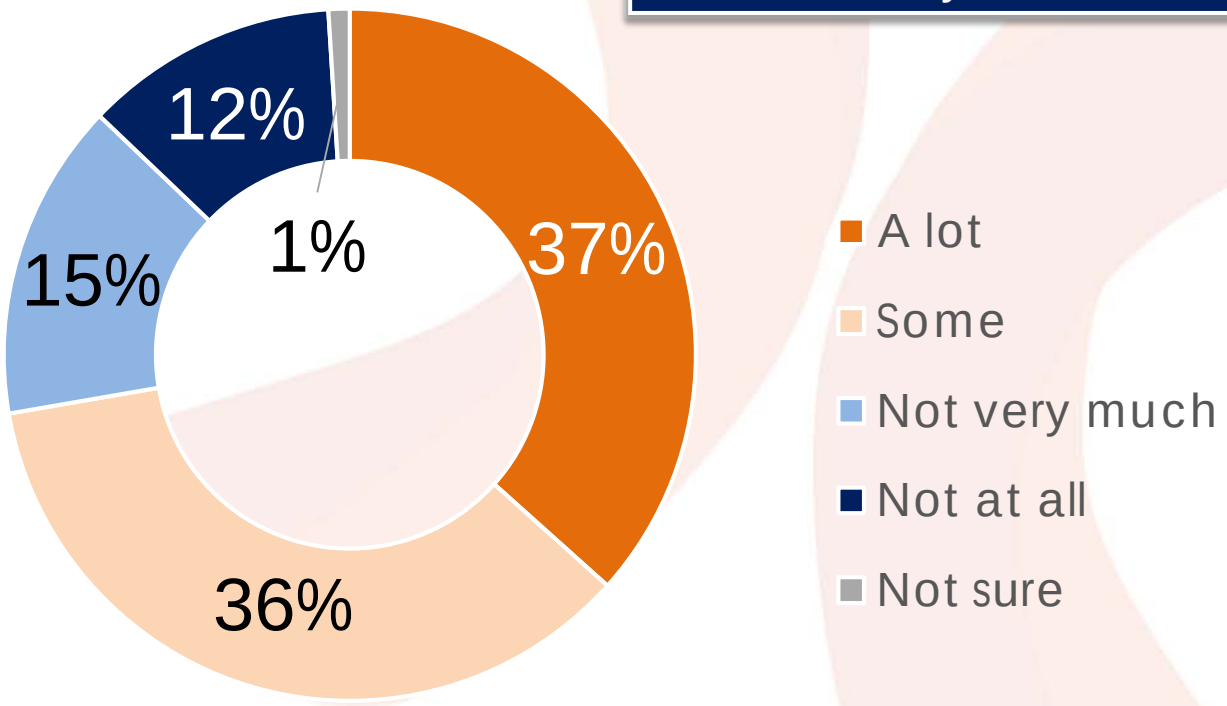
Advisors across the geographic regions of the country say that the rule is restricting them from serving their clients. Respondents with a variety of professional designations agree.



Impact on Work Methods

Q: Is the new fiduciary rule currently impacting your work methods a lot, some, not very much, or not at all?

Total A lot/Some: 73%
Total Not very much/Not at all: 27%



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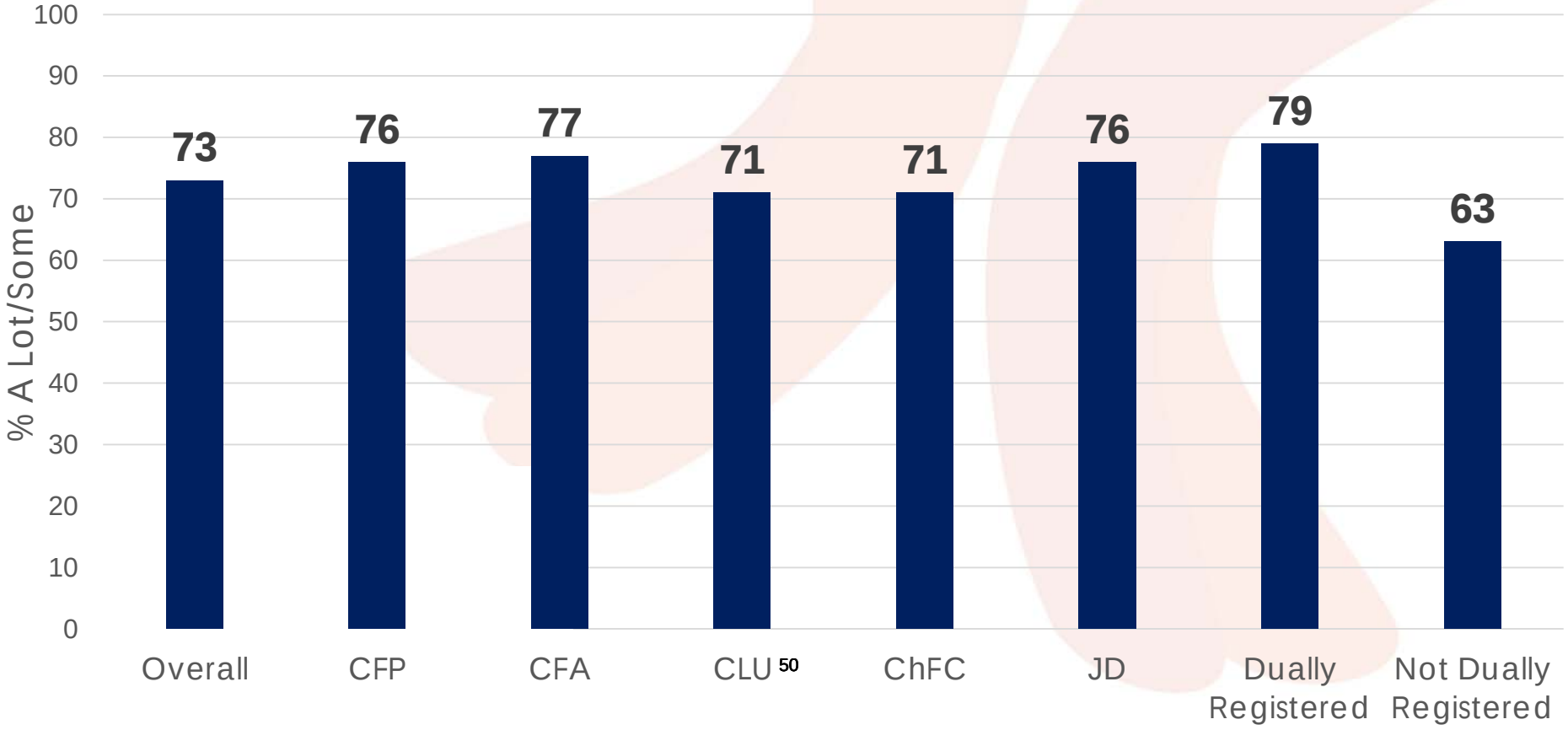
Impact on Work Methods

Key Demographics

Q: Is the new fiduciary rule currently impacting your work methods a lot, some, not very much, or not at all?

Respondents with a variety of different professional designations report that the new rule is impacting their work methods "a lot" or "some." Dually registered advisors are somewhat more likely to be seeing an impact on their work methods than those who are not dually registered.



Current Changes

Word Cloud

Q: [OPEN-END] What specific changes in your work methods have you already made in response to the rule?

The word cloud below provides a visualization of the categorized open-end responses. Larger phrases appeared more frequently.

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Impact on Consumer Service

Many advisors were focused on the **impact increased paperwork has on their ability to serve clients.** The following are verbatim responses to the question *What specific changes in your work methods have you already made in response to the rule?*

> Writing business is very time consuming and more complicated now, forcing me to abandon smaller accounts and clients who need my help the most.

> More paperwork and time spent on regulations put in place by the DoL actually allow me to provide LESS service to my clients.

> Serving smaller investors may become a thing of the past.

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Impact on Consumer Service

> It's tripled our workload...It is costing my clients more money with less choices.

> It now takes 2 to 3 times as much time to do the work--I will be helping half as many people in the future.

> This rule limits our ability to help young and new investors saving for retirement. Many of my co-workers are not handling retirement accounts under $200,000. Where does this leave the new investor?

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Future Changes

Word Cloud

Q: [OPEN-END] What specific, additional changes, if any, do you anticipate making in the next six months to 1 year in response to the rule?

Note that fewer small accounts, additional fees, and fewer investment options are more frequently cited as likely changes in the next 6 months to 1 year.

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Future Impact on Consumer Service

The following are verbatim responses to the question *What specific, additional changes, if any, do you anticipate making in the next six months to 1 year in response to the rule?*

> Will take on fewer small accounts. People with fewer assets will be hurt the most.

> Downsizing and getting rid of 75% of my book. No longer can work for the little guy.

> I will have a more "McDonalized" practice where similar clients have the same investments.

> The menu of products and services I offer, as well as to whom I offer them, will shrink significantly.

Future Impact on Consumer Service

> The end result of this is less choice of investments and moving more assets to fee based accounts, which will increase the cost for clients.

> I will have to turn away investors who wish to open an IRA with less than $5K. I practice in a very rural area and this will discourage young investors just starting their work life, at the very time in their lives when they should be starting to save for retirement.

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Respondents were read a series of potential changes that they or their company might make in response to the Department of Labor's new fiduciary rule, and asked to report how likely they believe it is that each change will occur: definitely, probably, possibly, probably not, definitely not, or has already happened.

POTENTIAL SPECIFIC CHANGES

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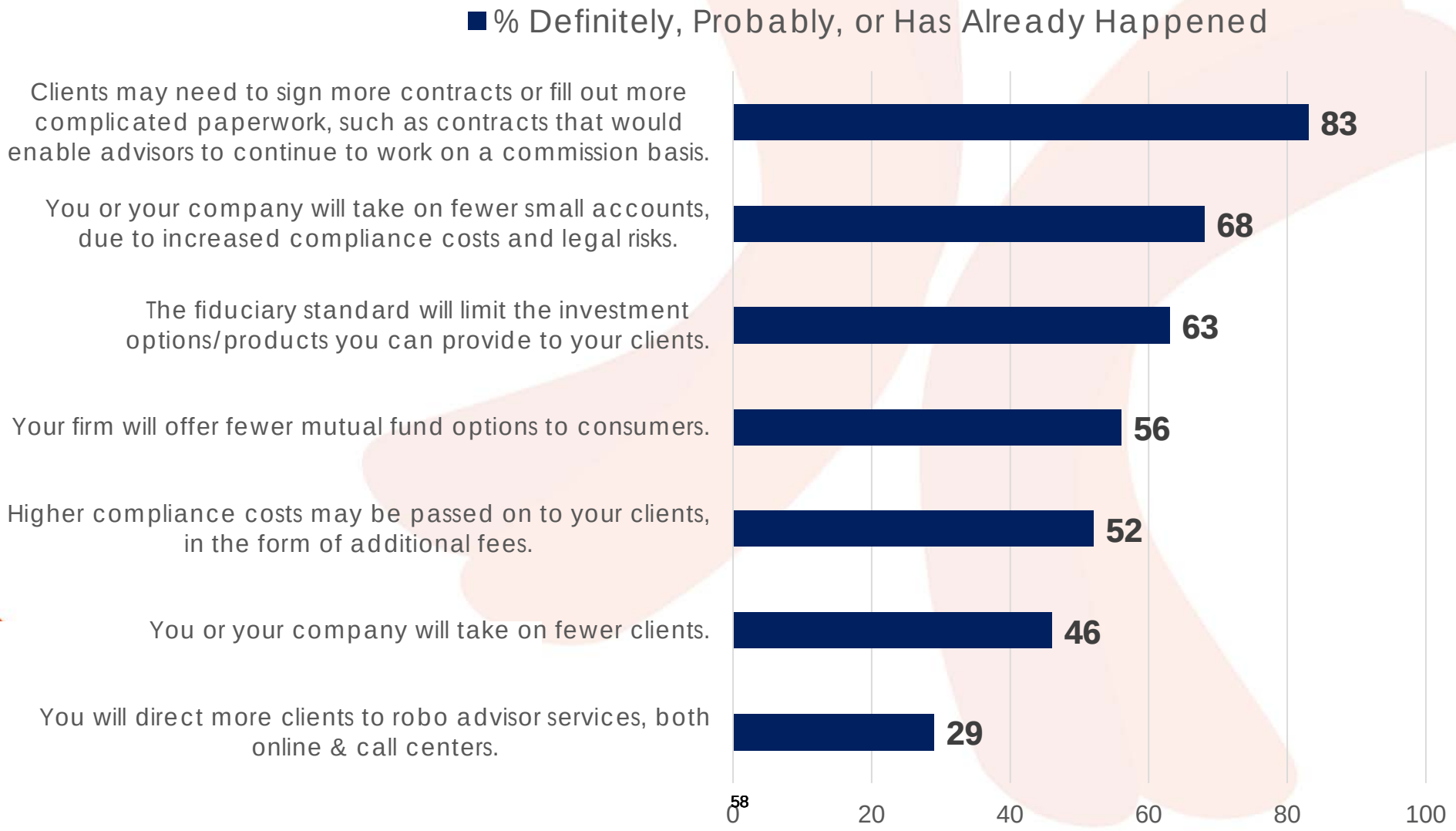
Advisors Anticipate Various Changes

Q: Now I am going to read you a series of potential changes that you or your company might make in response to the fiduciary rule. Please tell me how likely you believe it is that each change will occur: definitely, probably, possibly, probably not, or definitely not.



Potential Changes: Overall Findings

- About 1 in 10 respondents say they have already seen fewer investment options for clients, more complicated paperwork/ contracts for clients to fill out, and fewer mutual fund options.

- Fewer small accounts and more complicated paperwork/contracts for clients are the changes that are most likely to *definitely* happen, according to respondents (paperwork: 53% definitely, fewer small accounts: 45% definitely).

- Even advisors who say that the rule is "helping me to serve my clients' best interests" or has had "no impact on my ability" say that there will be more complicated paperwork/contracts for clients (73% def/prob/already; 75%) and fewer small accounts (51%, 46%).

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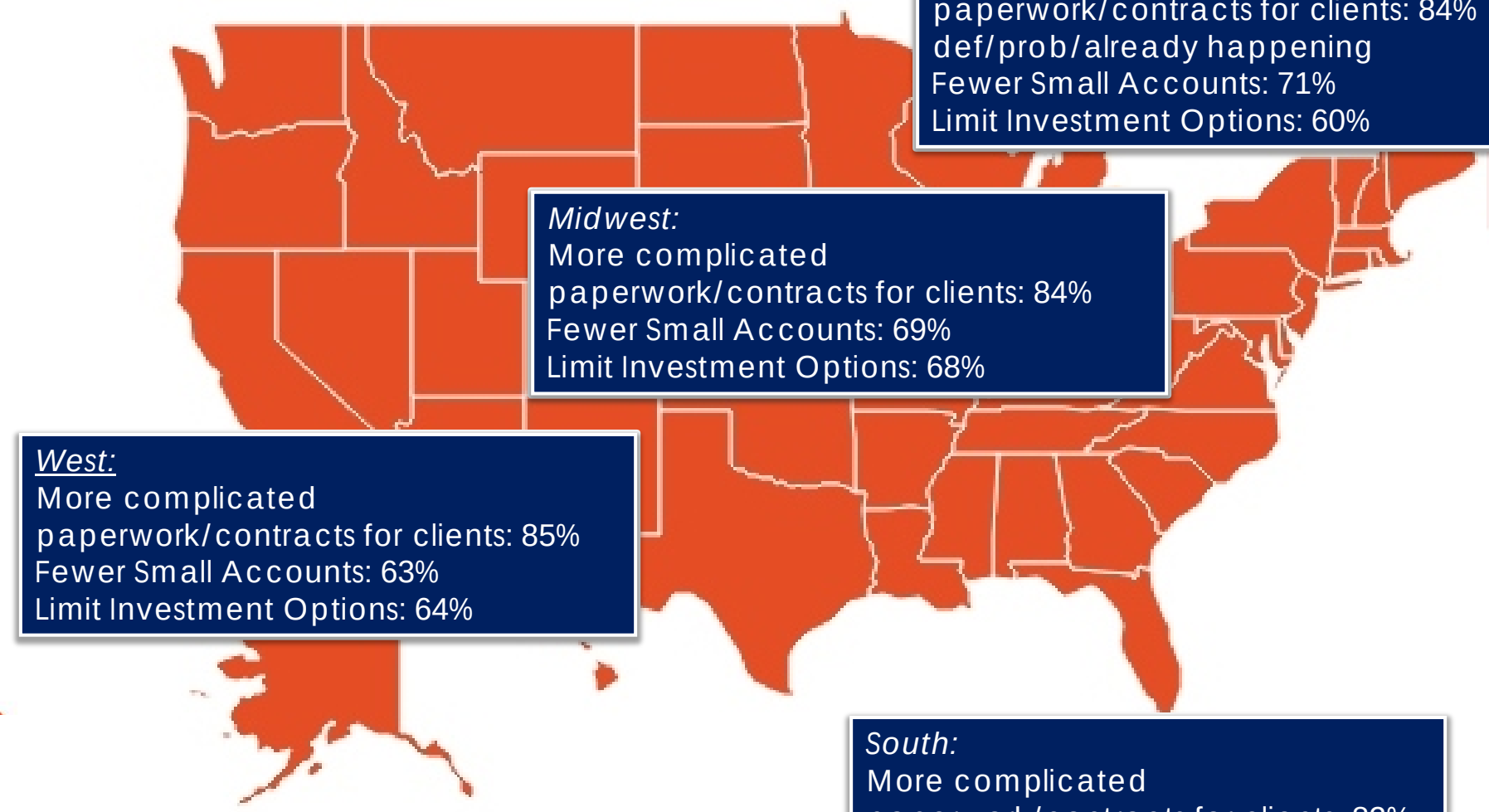
Potential Changes by Region



Northeast:
More complicated paperwork/contracts for clients: 84%
def/prob/already happening
Fewer Small Accounts: 71%
Limit Investment Options: 60%

Midwest:
More complicated paperwork/contracts for clients: 84%
Fewer Small Accounts: 69%
Limit Investment Options: 68%

West:
More complicated paperwork/contracts for clients: 85%
Fewer Small Accounts: 63%
Limit Investment Options: 64%

South:
More complicated paperwork/contracts for clients: 82%
Fewer Small Accounts: 70%
Limit Investment Options: 61%

Potential Changes: Size of Firm

- Interesting conclusions arise from comparing advisors working at small firms (10 or fewer employees, 50% of sample) to advisors working at larger firms (76 to 100 employees, 31% of sample)
  - **Both advisors at small and large firms believe fewer small accounts and more complicated paperwork/contracts for clients are inevitable impacts of the rule.**
  - Advisors working for larger firms are more likely to say that the fiduciary standard will limit the investment options/products they can provide.
  - The larger firm advisors are also more likely to anticipate that higher compliance costs may be passed on to clients in the form of additional fees.

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Potential Changes: Professional Degree/Designation

- Strong majorities of respondents with a variety of professional designations, including CFP, CFA, CLU, ChFC and JD, report that fewer small accounts, limited investment options, and more complicated paperwork/contracts for clients will definitely happen, probably happen, or have already happened in response to the rule.

- **CFPs are more likely than the overall results to say that each of the following will definitely, probably or has already happened:**
  - more complicated paperwork/contracts for clients (88%)
  - fewer small accounts (74%)
  - limited investment options (66%)
  - fewer mutual fund options (67%)
  - higher compliance costs passed on to consumer as additional fees (60%)

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Potential Changes:

Average Starting Household Net Worth of Individual Clients

- Fewer small accounts and more complicated paperwork/contracts for clients are seen as inevitable results of the rule across average client net worth levels.

- Advisors who say the average net worth of their clients is under $25,000 are far more likely to say they will definitely, probably, or have already directed more clients to robo advisor services, both online and at call centers (43% vs. 29% overall).

- Advisors servicing the lowest (under $25K) and highest ($250-500K, more than $500K) net worth clients are most likely to say they will take on fewer small accounts.

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Potential Changes: Race and Gender

- Most African-American and Hispanic advisors say more complicated paperwork/contracts for clients (72%, 91%) and fewer small accounts (49%, 57%) will definitely, probably, or have already happened.

- A majority of both women and men believe more complicated paperwork/contracts for clients (84% women, 84% men), fewer small accounts (63%, 70%), limited investment options (58%, 66%), fewer mutual fund options (52%, 57%), and higher compliance costs passed on to consumers in the form of fees (50%, 52%) will definitely, probably, or have already happened.

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CLIENT COMPLAINTS & TRANSPARENCY

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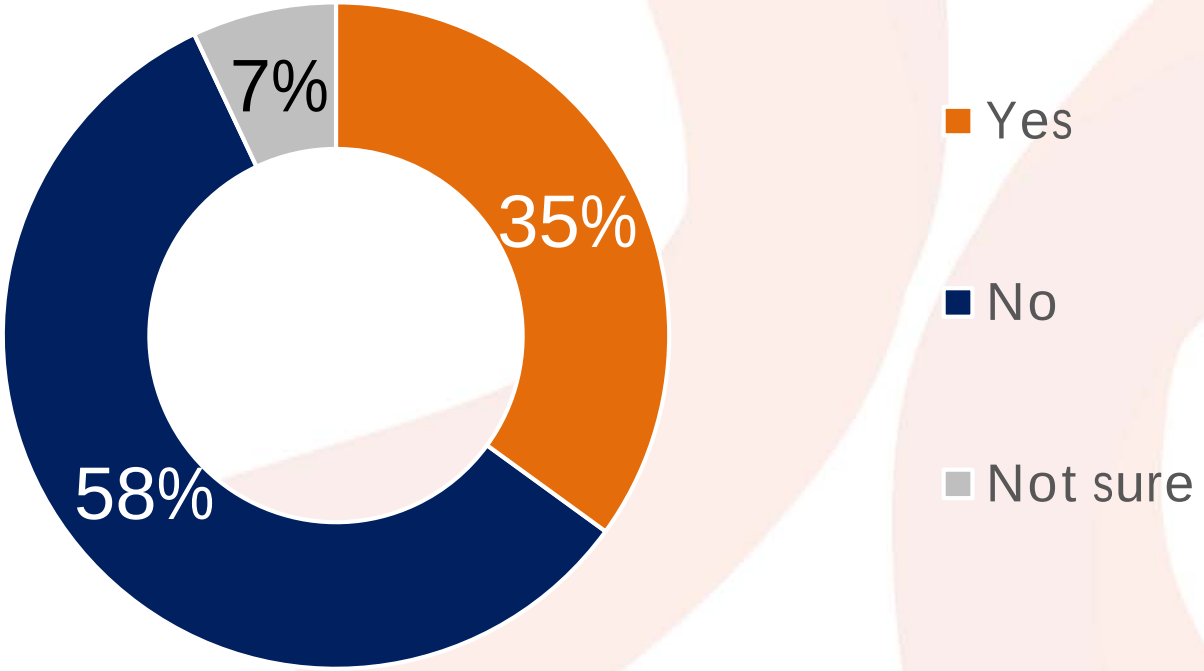
Client Complaints

Q: Have clients expressed their displeasure to you about the impacts of the Department of Labor fiduciary rule on service or price?



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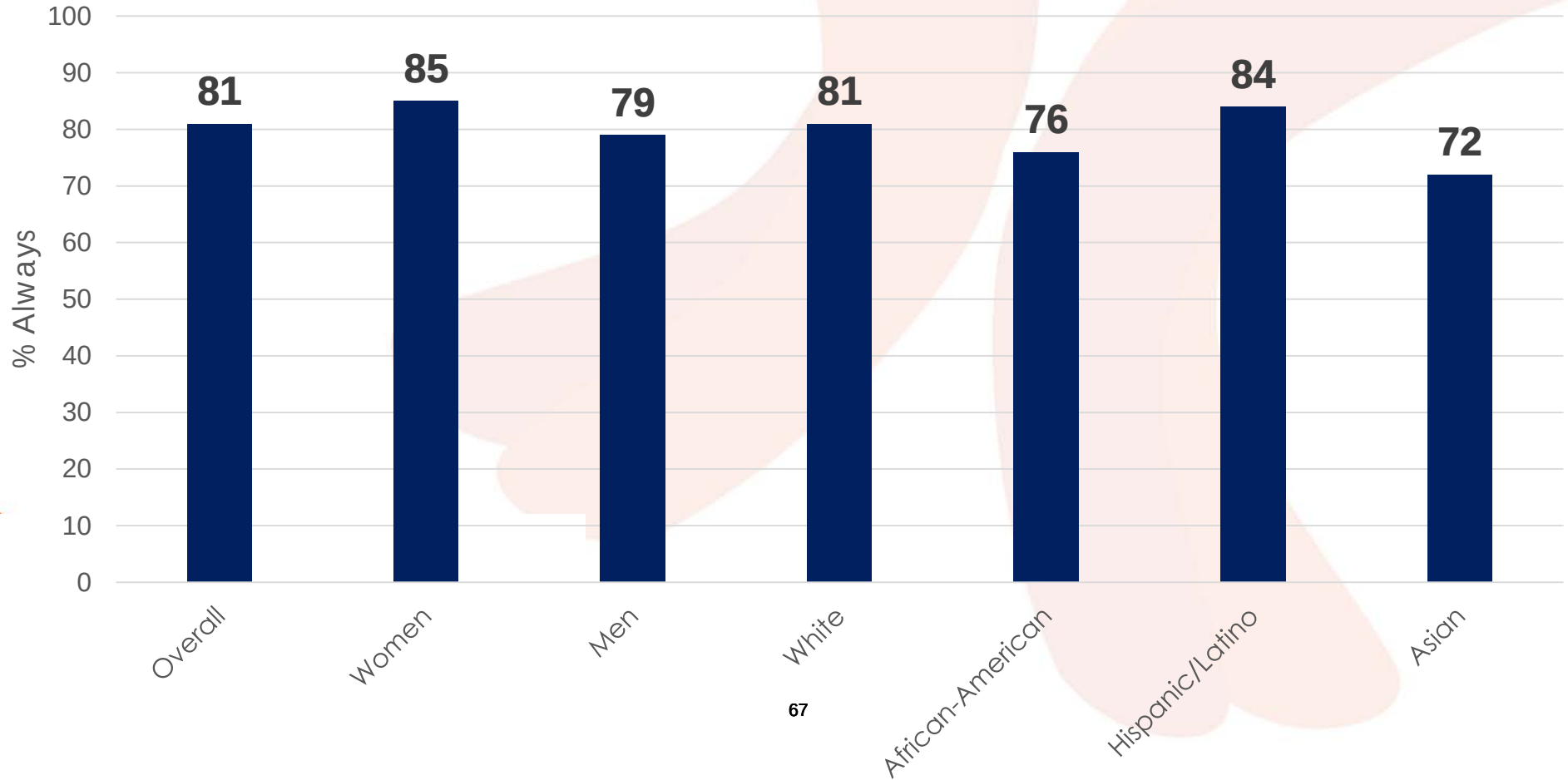
Restricting my ability to serve clients: 52% yes
Larger firm: 47% yes
Smaller firm: 30% yes

How to Pay

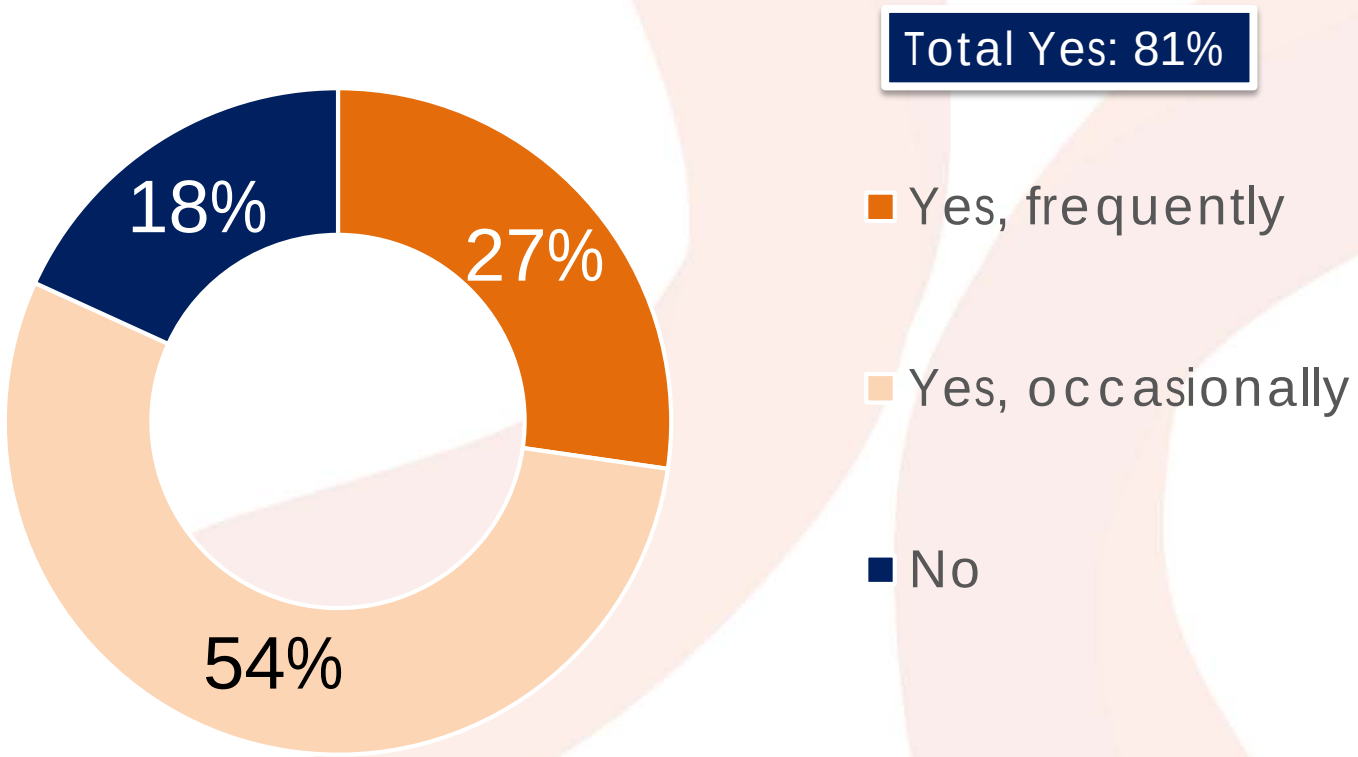
Q: Do you ever discuss with a client how to pay for the products or services being considered?

The overwhelming majority of advisors say that they "always" *"discuss with a client how to pay for the products or services being considered."* This substantial majority holds across demographics, including advisors of all races and genders.



Commissions and Fees

Q: Do clients ever ask you about the commissions or fees you earn on different products you recommend?



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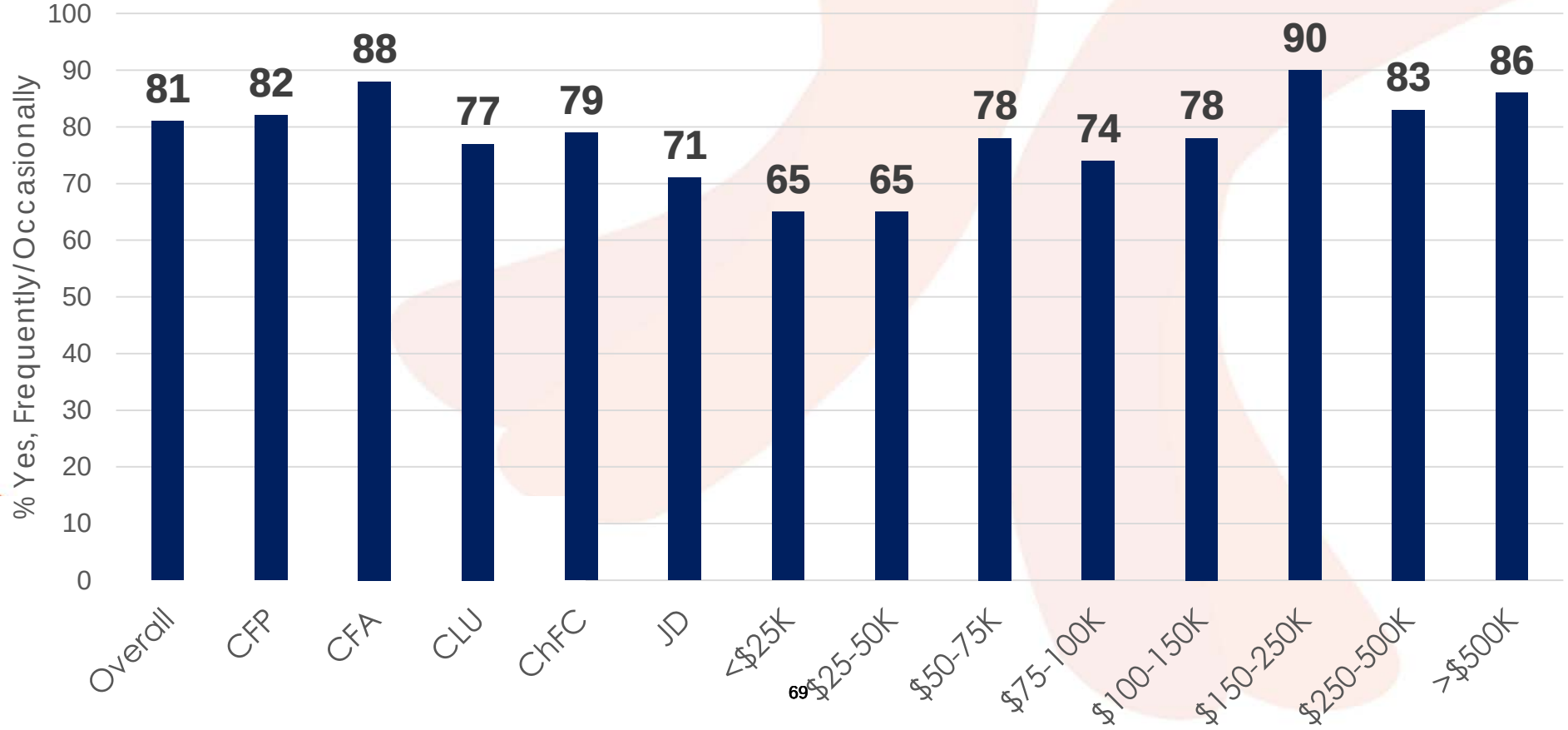
Commissions and Fees

Key Demographics

Q: Do clients ever ask you about the commissions or fees you earn on different products you recommend?

Respondents with all professional designations and degrees say that their clients ask them about the commissions or fees they earn. Substantial majorities of advisors servicing clients of all levels of net worth also say that their clients ask them about commissions or fees.



Contact Harper Polling

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Harper Polling

Appendix B

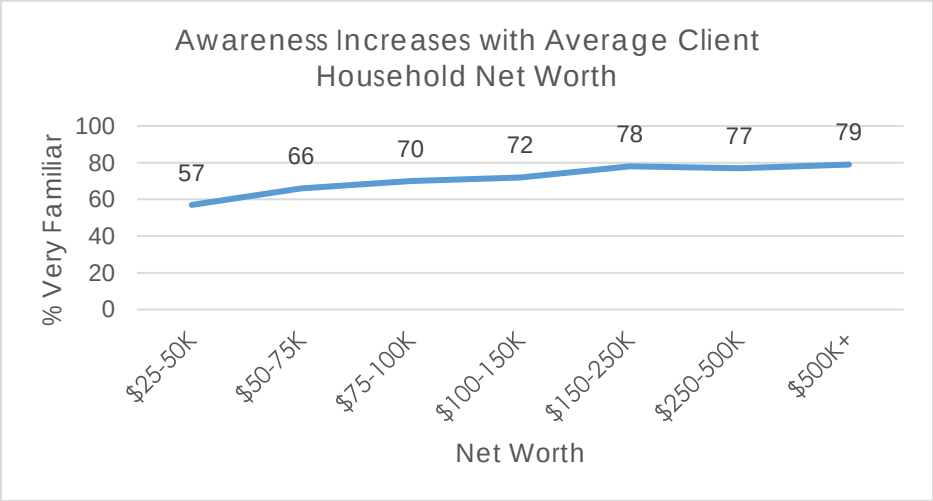
Key Poll Findings—National Survey of Financial Professionals (July 17, 2017)
[Harper Polling Memorandum]

TO: Financial Services Roundtable
FROM: Brock McCleary
Date: July 17, 2017
RE: Key Poll Findings—National Survey of Financial Professionals

Department of Labor Fiduciary Rule

Awareness: Effectively *all* financial advisors surveyed have some level of familiarity with *"the Department of Labor's new fiduciary rule, which partially went into effect in early June."* Three-in-four advisors describe themselves as "*very* familiar" with the new rule. Awareness is high across demographic cohorts. However, there are some notable variations when looking at those who are "*very* familiar" with the rule.

- Respondents with a CFP (84% very familiar) or CFA (85%) professional designation are more aware of the rule than CLU (63%) or ChFC (69%).
- Advisors who are dually registered are substantially more likely to be *very* familiar with the rule (79%) than those who are not (63%).
- Individuals who work for larger firms (76 to 100 people: 77% very familiar) are somewhat more aware of the rule than those working for smaller firms (0 to 10 people: 69%).
- Lastly, awareness generally increases as the average starting household net worth of an advisor's clients increases, meaning that those servicing higher-wealth individuals are more aware of the rule:



Impact: When asked "*As you may know, the Department of Labor's new fiduciary rule partially went into effect in early June and takes full effect on January 1, 2018. The new rule requires financial advisors to adhere to an updated fiduciary standard for retirement accounts meaning that they must act solely in their clients' best interests. Which of the following statements comes closest to your opinion?"* **A majority of financial advisors say that the new fiduciary rule "is restricting me from serving my clients' best interests" (50%).** A third of respondents said that the rule *"has had no impact on my ability to serve my clients' best interests"* (33%) while just 12% say the rule *"is helping me to serve my clients' best interests."*

- Advisors across geographic regions of the country say that the rule is restricting them from serving their clients' best interests (Midwest: 53%, Northeast: 55%, South: 45%, West: 49%).
- Advisors across all levels of individual client net worth say that the rule is restricting them. The "restricting" number peaks among those whose average individual client net worth is between $50,000-75,000 (54%) or between $100,000-150,000 (55%).

- Majorities of more experienced advisors (16+ years) say that the rule is restricting their ability to serve their clients' best interests (16-20: 55%, 21-30: 54%, 31-40: 57%, 41+: 51%) while those with 15 years or less experience are less likely to view the rule as restrictive (0 to 5: 39% restrict, 30% no impact; 6-10: 50%, 36%, 11-15: 44%, 36%).
- 55% of Certified Financial Planners say that the rule is restricting their ability to serve their clients' best interests (10% helping, 33% no impact). Respondents with a CFA (49%), CLU (50%), ChFC (55%) and JD (51%) agree.

The new fiduciary rule is impacting the work methods of financial advisors. Seventy-three percent of respondents say that the rule is either impacting their methods "a lot" (37%) or "some" (36%).

- Respondents with a variety of professional designations report that the new rule is impacting their work methods "a lot" or "some" (CFP: 76% a lot/some, CFA: 77%, CLU: 71%, ChFC: 71%, JD: 76%).
- Dually registered advisors are more likely to be seeing an impact on their work methods (79%) than those who are not dually registered (63%).

Respondents were asked *"What specific changes in your work methods have you already made in response to the rule?"* More than a third of financial professionals reported an increase in the amount of burdensome paperwork (35%). Increased fees (10%), fewer smaller clients (8%) and fewer investment options for clients (7%) were also cited frequently as current changes. A few specific quotes are shown below:

> It's tripled our workload.

> Paperwork and suffocating documents.

> I have limited products and investments I can now offer. All recommendations must go through rigorous screening with compliance. What took a day or two to put in place can take up to a month.

Potential Changes

Respondents were read a series of potential changes that they or their company might make in response to the Department of Labor's new fiduciary rule, and asked to report how likely they believe it is that each change will occur. *Please see Tables 1-4 below for a further breakdown of the potential changes by key demographic groups. Key Findings from each table are outlined below.*

Table 1- Potential Changes by Rule Impact:

- A majority of all advisors surveyed report that each of the following changes will definitely, probably, or have already happened: increased paperwork, fewer small accounts, fewer investment options for clients, fewer mutual fund options, and higher compliance costs/additional fees.
- About 1 in 10 respondents say they already see more paperwork, fewer investment options for clients, and fewer mutual fund options.
- More complicated paperwork and fewer small accounts are the most likely to definitely happen, according to respondents.
- **Even advisors who say that the rule is "helping me to serve my clients' best interests" or has had "no impact on my ability" say that there will be more complicated paperwork and fewer small accounts.**
- Overwhelming majorities of respondents who say the rule is "restricting" them say complicated paperwork, fewer small accounts, and limited investment options will definitely, probably, or are already happening.

Table 2- Potential Changes by Region and Size of Firm

- Advisors across the geographic regions of the country anticipate substantial changes in response to the rule.
- Interesting conclusions also arise from comparing advisors working at small firms (0 to 10 employees), which constitute 50% of the sample, to advisors working at larger firms (76 to 100 employees), which comprise 31% of the sample.
    - Both small and large firms believe increased paperwork and fewer small accounts are inevitable impacts of the rule.
    - Advisors working for larger firms are more likely to say that the fiduciary standard will limit the investment options/products they can provide.
    - The larger firm advisors are also more likely to anticipate that higher compliance costs may be passed on to clients in the form of additional fees.

Table 3- Potential Changes by Professional Designation/Degree and Dually Registered

- Strong majorities of respondents with a variety of professional designations, including CFP, CFA, CLU, ChFC and JD, report that increased paperwork, fewer small accounts, and limited investment options will definitely happen, probably happen, or have already happened in response to the rule.
- CFPs are more likely than the overall results to say that each of the following will definitely, probably or has already happened: increased paperwork, fewer small accounts, limited investment options, fewer mutual fund options, and higher compliance costs/fees.
- A majority of dually registered respondents anticipate each of the following changes: increased paperwork, fewer small accounts, limited investment options, fewer mutual fund options, higher compliance costs/fees.

Table 4- Potential Changes by Average Starting Household Net Worth of Individual Clients

- Increased paperwork and fewer small accounts are seen as inevitable results of the rule across average client net worth levels.
- Advisors servicing the lowest (under $25K) and highest ($250-500K, more than $500K) net worth clients are most likely to say they will take on fewer small accounts.
- Advisors who say the average net worth of their clients is under $25,000 are far more likely to say they will definitely, probably, or have already directed more clients to robo advisor services, both online and at call centers (43%).

Potential Changes by Race and Gender

- A majority of both women and men believe increased paperwork (84% women, 84% men), fewer small accounts (63%, 70%), limited investment options (58%, 66%), fewer mutual fund options (52%, 57%), and higher compliance costs passed on to consumers in the form of fees (50%, 52%) will definitely, probably, or have already happened.
- Most African-American and Hispanic advisors say increased paperwork (72%, 91%) and fewer small accounts (49%, 57%) will definitely, probably, or have already happened.

Please see the infographic at the end of this document (Pg. 10) which includes the percentage of respondents who say each change will definitely, probably, or has already happened.

Client Products

Strong majorities of all respondents provide each of the following products to their clients: securities and investment products (89%), 401(k) and other qualified pension plans (68%), IRAs (94%), Life insurance and/or fixed annuities (91%), variable annuities and/or variable life insurance (80%), and long-term care insurance (77%). Although about three-in-four respondents say they still provide all of these products to their clients (77%), substantial minorities have already stopped selling certain products. These include 401(k) and other qualified pension plans (10%), variable annuities and/or variable life insurance (9%) and securities and investment products (8%). All three of these numbers increase among respondents who say that the fiduciary rule is restricting their ability to serve their clients' best interest (401(k): 15%, variable annuities: 11%, securities and investment: 10%). Almost 1 in 10 of these respondents also say they have stopped selling IRAs (9%).

Client Complaints and Transparency

Complaints: More than a third of financial advisors report that their *"clients have expressed their displeasure to [them] about the impacts of the Department of Labor fiduciary rule on service or price" (35% yes, 58% no).*

- This number increases to 52% among respondents who say the fiduciary rule is restricting their ability to serve their clients.
- **Advisors working for larger firms (76-100 employees) are substantially more likely to have received complaints from clients (47% yes) than those at small firms (0-10: 30%).**

How to Pay: The overwhelming majority of advisors say that they "always" *"discuss with a client how to pay for the products or services being considered" (81%).* This substantial majority holds across demographics, including advisors of all races (White: 81% always, African-American: 76%, Hispanic/Latino: 84%, Asian: 72%, other: 86%) and genders (women: 85%, men: 79%).

Commissions: Advisors say that their clients do ask them *"about the commissions or fees you earn on different products you recommend."* Twenty-seven percent say that this occurs frequently, while 54% say it happens occasionally. Respondents with all professional designations and degrees say that their clients ask them about the commissions or fees they earn (CFP: 82% frequently/occasionally, CFA: 88%, CLU: 77%, ChFC: 79%, JD: 71%). Substantial majorities of advisors servicing clients of all levels of net worth say that their clients ask them about commissions or fees (under $25,000: 65%, $25-50K: 65%, $50-75K: 78%, $75-100K: 74%, $100-150K: 78%, $150-250K: 90%, $250-500K: 83%, More than $500K: 86%).

METHODOLOGY: The sample size for the survey is 600 Financial Advisors across the United States and the margin of error is +/-4.0%. Reponses were gathered via live operator telephone and online interviews. The survey was conducted July 7-12, 2017 by Harper Polling. Total percentages for responses may not equal 100% due to rounding.

TABLE 1- Potential Changes by Rule Impact

Q: Now I am going to read you a series of potential changes that you or your company might make in response to the fiduciary rule. Please tell me how likely you believe it is that each change will occur: definitely, probably, possibly, probably not, or definitely not.

The following tables compare the combined percentage of respondents who say a change will "definitely" occur, "probably" occur or has already happened, overall and among several key demographics. For example, the first row in the "Restricting" column tells us that 92% of respondents who say the rule is restricting their ability to serve their client's best interests say there will definitely be, probably be, or already is more complicated paperwork.

	% Def/Prob/Has Already Happened Overall	% Definitely Overall	% Has Already Happened	Helping	Restricting	No Impact
Clients may need to sign more contracts or fill out more complicated paperwork, such as contracts that would enable financial advisors to continue to work on a commission basis.	83	53	11	73	92	75
You or your company will take on fewer small accounts, due to increased compliance costs and legal risks.	68	45	6	51	87	46
The fiduciary standard will limit the investment options/products you can provide to your clients.	63	39	9	35	86	39
Your firm will offer fewer mutual fund options to consumers.	56	30	10	26	72	44
Higher compliance costs may be passed on to your clients, in the form of additional fees.	52	27	5	25	68	39
You or your company will take on fewer clients.	46	23	4	25	66	25
You will direct more clients to robo advisor services, both online and at call centers.	29	12	5	14	37	23

KEY:

Helping=Responded the rule is "helping" me serve my clients' best interests
Restricting=Responded that the rule is "restricting" ability
No Impact= Responded that the rule is having "no impact" on ability
Dual Reg=Dually Registered
MW= Midwest, NE=Northeast
0 to 10 emp= Firm has 0 to 10 employees
76 to 100 emp= Firm has 76 to 100 employees

TABLE 2- Potential Changes by Region and Size of Firm

	% Def/Prob/ Has Already Happened Overall	MW	NE	South	West	0 to 10 emp	76 to 100 emp
Clients may need to sign more contracts or fill out more complicated paperwork, such as contracts that would enable financial advisors to continue to work on a commission basis.	83	84	84	82	85	83	84
You or your company will take on fewer small accounts, due to increased compliance costs and legal risks.	68	69	71	70	63	68	78
The fiduciary standard will limit the investment options/products you can provide to your clients.	63	68	60	61	64	61	75
Your firm will offer fewer mutual fund options to consumers.	56	58	60	52	52	58	60
Higher compliance costs may be passed on to your clients, in the form of additional fees.	52	55	54	51	47	49	58
You or your company will take on fewer clients.	46	48	52	46	40	48	55
You will direct more clients to robo advisor services, both online and at call centers.	29	26	32	31	30	30	32

TABLE 3- Potential Changes by Professional Designation/Degree and Dually Registered

	% Def/Prob/Has Already Happened Overall	CFP	CFA	CLU	ChFC	JD	Dually Registered
Clients may need to sign more contracts or fill out more complicated paperwork, such as contracts that would enable financial advisors to continue to work on a commission basis.	83	88	80	80	88	86	85
You or your company will take on fewer small accounts, due to increased compliance costs and legal risks.	68	74	66	74	76	70	73
The fiduciary standard will limit the investment options/products you can provide to your clients.	63	66	76	65	71	72	66
Your firm will offer fewer mutual fund options to consumers.	56	67	51	59	67	46	57
Higher compliance costs may be passed on to your clients, in the form of additional fees.	52	60	27	53	57	50	53
You or your company will take on fewer clients.	46	50	33	51	50	46	49
You will direct more clients to robo advisor services, both online and at call centers.	29	33	19	27	29	13	32

TABLE 4- Potential Changes by Average Starting Household Net Worth of Individual Clients

	% Def/Prob/Has Already Happened Overall	Under $25K	$25 50K	$50 75K	$75 100K	$100 150K	$150 250K	$250 500K	More than $500K
Clients may need to sign more contracts or fill out more complicated paperwork, such as contracts that would enable financial advisors to continue to work on a commission basis.	83	69	83	82	76	85	82	88	85
You or your company will take on fewer small accounts, due to increased compliance costs and legal risks.	68	75	61	60	58	68	66	75	72
The fiduciary standard will limit the investment options/products you can provide to your clients.	63	42	63	67	56	62	60	70	64
Your firm will offer fewer mutual fund options to consumers.	56	53	47	58	39	60	56	64	54
Higher compliance costs may be passed on to your clients, in the form of additional fees.	52	55	57	47	44	60	43	54	54
You or your company will take on fewer clients.	46	32	33	44	45	55	42	50	48
You will direct more clients to robo advisor services, both online and at call centers.	29	43	27	28	20	31	27	30	34

Potential Changes in Response to DoL Fiduciary Rule

83%

Clients may need to sign more contracts or fill out more complicated paperwork, such as contracts that would enable financial advisors to continue to work on a commission basis.

68%

You or your company will take on fewer small accounts, due to increased compliance costs and legal risks.

63%

The fiduciary standard will limit the investment options/products you can provide to your clients.

56%

Your firm will offer fewer mutual fund options to consumers.

52%

Higher compliance costs may be passed on to your clients, in the form of additional fees.

46%

You or your company will take on fewer clients.