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Office of Regulations and Interpretations
Office of Exemption Determinations
Employee Benefits Security Administration
Room N-5655
US Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: *RIN 1210-AC02: Definition of an Investment Advice Fiduciary*
Application No. D-12057: Proposed Amendment to PTE 2020-02
Application No. D-12060: Proposed Amendment to PTE 84-24
Application No. D-12094: Proposed Amendments to PTE 75-1, 77-4, 80-83, 83-1, 86-128

To Whom it May Concern:

The Investment Company Institute[1] appreciates the opportunity to comment on the Department of Labor's (the "Department") proposed regulation defining who is a "fiduciary" of an employee benefit plan under the Employee Retirement Income Security Act of 1974 (ERISA), or an individual retirement account (IRA) under section 4975 of the Internal Revenue Code of 1986 ("Code"), as a result of giving investment advice to a plan or its participants or beneficiaries, or

[1] The Investment Company Institute (ICI) is the leading association representing regulated investment funds. ICI's mission is to strengthen the foundation of the asset management industry for the ultimate benefit of the long-term individual investor. ICI's members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in other jurisdictions. Its members manage $31.9 trillion invested in funds registered under the US Investment Company Act of 1940, serving more than 100 million investors. Members manage an additional $8.5 trillion in regulated fund assets managed outside the United States. ICI also represents its members in their capacity as investment advisers to certain collective investment trusts (CITs) and retail separately managed accounts (SMAs). ICI has offices in Washington DC, Brussels, and London and carries out its international work through ICI Global.

an IRA or IRA owner (the "Proposed Fiduciary Rule").[2] In addition to the Proposed Fiduciary Rule, the Department is proposing amendments to several prohibited transaction exemptions (PTEs) currently available for use by advice fiduciaries.[3] These include PTEs 2020-02, 84-24, 75-1, 77-4, 80-83, 83-1, and 86-128 (the Proposed Fiduciary Rule and the proposed amendments to the PTEs are referred to collectively as the "Proposal").

We understand and appreciate the Department's interest in ensuring that American workers receive the advice and guidance they need to save for a secure retirement. ICI is deeply concerned, however, that the Proposal will have significant unintended consequences and will harm the very retirement savers it is intended to protect. If the Proposal is adopted without significant revisions, retirement savers and plan sponsors will have access to less investment information at many critical points—when considering, for example, establishing a plan or retirement account, how to invest retirement assets among available investment products or strategies, whether or not to roll account balances to an IRA or keep assets invested in a current plan, and what type of lifetime payment option or distribution strategy may be appropriate. Retirement savers also will have fewer choices for the type of investment professional they want to work with. Such an outcome will not serve the needs of the millions of Americans saving for their future.

This letter highlights our concerns regarding the Proposed Fiduciary Rule and the proposed PTE amendments. For the reasons explained in more detail below, for the benefit of American savers, we respectfully urge the Department to withdraw the Proposal.

In the unfortunate event the Department decides to move forward with the Proposal rather than withdraw it as we ask, we recommend a series of modifications to the Proposal that are essential to avoid a dramatically detrimental impact on retirement savers. Even with these modifications, however, we do not believe that the Proposal is justified, as the Department has not met its burden under the Administrative Procedure Act (APA)[4] to fully evaluate the Proposal's costs, including compliance costs, and compare them to the benefits that the Proposal would engender.

Executive Summary

Our comments and recommendations include the following:

- **The Department has not shown a need for the Proposal and should withdraw it.** Although well-intended, this rulemaking (i) will trigger negative, unintended, and costly

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[2] Notice of Proposed Rulemaking – Retirement Security Rule: Definition of an Investment Advice Fiduciary, 88 Fed. Reg. 75890 (November 3, 2023).

[3] Proposed Amendment to Prohibited Transaction Exemption 2020-02, 88 Fed. Reg. 75979 (November 3, 2023) ("Proposed PTE 2020-02"); Proposed Amendment to Prohibited Transaction Exemption 84-24, 88 Fed. Reg. 76004 (November 3, 2023) ("Proposed PTE 84-24"); Proposed Amendment to Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, and 86-128, 88 Fed. Reg. 76032 (November 3, 2023).

[4] 5 U.S.C. § 706(2)(A).

consequences for retirement savers, (ii) is unnecessary due to recent regulatory changes applying best interest standards more broadly, (iii) exceeds the Department's authority and is inconsistent with the Fifth Circuit Court of Appeals' 2018 decision in *Chamber of Commerce v. United States Department of Labor,*[5] and (iv) falls well short of applicable APA standards. The Department would introduce significant uncertainty and confusion in the marketplace if it finalizes a rule that could be overturned again, in part due to failures to identify a need for the Proposal, realistically ascertain its costs, or even attempt to quantify its benefits. As detailed in section 1, we urge the Department to withdraw the Proposal and reconsider the need for additional changes.

- **The proposed definition of fiduciary advice is overly broad and will have negative implications.** Rules governing fiduciary status must provide clarity and must not impede commonplace financial interactions that help investors make informed decisions. To this end, fiduciary status under ERISA should only apply where, as the Fifth Circuit held, the existence of a relationship of trust and confidence is clear. The Proposal is not narrowly tailored to cover only relationships of trust and confidence, despite the Department's claims to the contrary.
  - **The Department is repeating the same mistakes it made in 2016.** The Proposal effectively sweeps in many of the same types of activities and interactions that led the Fifth Circuit to vacate the 2016 Rule. Under a plain and literal reading, the Proposal would ascribe fiduciary status to a broad array of sales activity, information, and guidance that are crucial to a functioning marketplace and serve savers well. It strongly implies that any suggestion relating to an investment or investment strategy, communicated by someone in the business of financial services, would be fiduciary advice. In section 2 we explain the specific aspects of the proposed definition of fiduciary investment advice that lead to this ambiguity and to an overly broad application of fiduciary status.
  - **If finalized, the Proposal could result in investors losing access to crucial investment information and guidance and having fewer choices in the marketplace.** If the Department does not modify the proposed definition of fiduciary investment advice to provide clarity and exclude sales activity and informational resources, many financial services providers will have no choice but to curtail the guidance and assistance they currently make available to savers. Many investors, particularly those with smaller balances, would enjoy fewer choices for the types of investment professionals and compensation arrangements they prefer, leading to poorer results as they try to save for their retirements.

[5] *Chamber of Commerce*, 885 F.3d 360 (5th Cir. 2018).

- **If the Department finalizes the Proposal, it should exclude certain institutional recommendations and provide clarifying examples to illustrate its intent.** The Proposal lacks important carveouts and exclusions that the Department included in the 2016 Rule, such as exceptions for arm's length institutional transactions and for platform providers. Section 2 of our letter recommends certain changes that are necessary if the Department moves forward. Among other things, the Department should clearly exclude from the rule recommendations to institutional and sophisticated investors who are well equipped to understand the limits of their interactions with investment professionals. The Department also should adopt clarifying examples in the final rule's regulatory text, as outlined in section 2.2, to clarify the limits of the rule.
- **The proposed wholesale revisions to the prohibited transaction exemption framework for fiduciary investment advice will not benefit investors.** We explain in section 3.1 that the Department should not shoehorn all fiduciary investment advice into one exemption, PTE 2020-02, while revoking relief under numerous long-standing exemptions such as PTE 77-4. Our members have built substantial compliance programs around these other exemptions, in which the Department included robust conditions specifically tailored to protect investors while allowing for efficient conduct of ordinary and necessary plan transactions. The Department has not demonstrated either a need for, or a benefit from, curtailing these existing exemptions in favor of a blunt one-size-fits-all approach. Rather than leveling the playing field as the Department asserts, applying one set of conditions to all instances of a broad range of industry activities will lead to inefficiencies and higher costs.
- **The changes to PTE 2020-02 would create an unnecessarily complicated, costly, and burdensome compliance framework.** We describe in sections 3.2 through 3.7 our concerns with proposed changes to the policies and procedures, documentation and disclosure, and retrospective review requirements, as well as the troubling proposed expansion of the exemption's ineligibility provision. Among other things, the Department imposes unrealistic and impractical presumptions about conflict mitigation and compensation structures that could cause significant disruption to the delivery of advice to investors who seek and need it. In addition, many of the proposed changes to PTE 2020-02 appear to exceed the Department's authority. More broadly, these exemption changes would impose significant costs on the retirement industry that far exceed the Department's estimates, with no clear evaluation of the need for changes and no demonstrable benefit to investors. Furthermore, it is far too soon to overhaul an exemption that has been in use for less than three years.
- **The Proposal does not comport with the Fifth Circuit's decision and exceeds the Department's authority.** As explained in section 4, the Proposal appears to ignore the Fifth Circuit's decision by arbitrarily expanding the scope of ERISA fiduciary status

beyond that intended by Congress and by using its deregulatory exemptive authority to apply ERISA Title I standards of conduct on Title II fiduciaries.

- **The Proposal improperly imposes fiduciary status onto relationships in which advice is provided on a solely incidental basis.** As discussed in section 4.1, the Proposal contravenes the Fifth Circuit's holding by failing to maintain the critical distinction between brokers and investment advisers, including by treating brokers subject to Reg BI as "fiduciaries" under ERISA. This treatment will undermine both the Department's and the SEC's stated policy goals of preserving investor choice regarding the advisory services they receive and how they pay for them, which will have detrimental implications for retirement savers and retail investors generally. At the same time the Department pays lip service to the Fifth Circuit's emphasis on the importance of an underlying relationship of trust and confidence for fiduciary status to attach, the Department flatly rejects the court's "purported dichotomy" between sales and advice in the retail market.

- **Although the Department has authority to define "investment advice fiduciary" for purposes of Title I and Title II of ERISA, the Proposal exceeds this authority by arbitrarily expanding the concept of fiduciary beyond that intended by Congress and by imposing Title I duties on Title II arrangements.** Section 4.2 explains that the Department's authority over the provision of investment advice is limited to ERISA "fiduciaries," and that it cannot expand those subject to its authority by departing from the common law concept of "fiduciary." The Department also exceeds its authority by using the Proposal (particularly through the elimination of other exemptions in favor of proposed PTE 2020-02) to impose ERISA Title I duties of prudence and loyalty upon Title II arrangements (i.e., IRAs). The Fifth Circuit's 2018 decision confirmed that the Department cannot use its exemptive authority to circumvent what Congress made clear when it chose to *not* impose these duties under Title II.

- **The Proposal has not been issued consistent with the APA.** The Proposal would not meet the APA's standards for the economic analysis or notice and comment requirements, as detailed in section 4.3.

  - **The Department's Regulatory Impact Analysis (RIA) is deficient.** It is incumbent on the Department to fully evaluate the Proposal's costs, including compliance costs, and compare them to the benefits that the Proposal would engender. The Department has not met this standard. As described in section 4.3 and the Appendix, the RIA fails to quantify any purported benefits of the Proposal, while likely grossly underestimating the costs of the changes—both the direct costs of implementation and the costs to investors from loss of access to information and assistance. It is arbitrary for an agency to impose billions of

dollars in new costs—as the Department would here—without identifying benefits that warrant such burdens, and without explaining why less costly alternatives are not being pursued instead. While the Department does list some qualitative benefits, as the Appendix details, these supposed qualitative benefits are speculative in the extreme.

- **The Department fails to meet the APA's notice and comment requirements by not allowing adequate opportunity for the public to provide meaningful input on the Proposal.** The 60-day comment period, which included numerous Federal and religious holidays, was insufficient considering the complexity of the Proposal (including changes to seven different exemptions) to allow stakeholders time to adequately analyze the Proposal's implications. Additionally, the Department took the unprecedented step of holding a public hearing *during* the abbreviated comment period. By setting the hearing date before the close of the comment period, the Department implied that this was merely a "check the box" exercise, rather than an effort to receive meaningful feedback to inform the rulemaking process. Finally, the RIA relies on certain information that the Department did not make available to the public until mid-way through the comment period, which hindered ICI's and others' fair assessment of the Proposal.

- **The proposed effective date is wholly inadequate and unreasonable.** As set forth in section 5, an effective date only 60 days after publication of the final rule in the Federal Register would not permit sufficient time for parties to prepare for and implement the fundamental and far-reaching changes contemplated by the Proposal. Financial institutions would need significantly more time to review every aspect of their businesses—including websites, compliance programs, call center training, fund materials, support provided to intermediaries, and other arrangements with intermediaries—to determine what activities would fall under the scope of the fiduciary definition and determine whether to change or scale back those activities. For any ongoing activities determined to be fiduciary advice, firms would need to make extensive changes to their compliance programs and operating systems, and in many cases design and build brand new ones, to accommodate the expanded definition of investment advice, the numerous changes to PTE 2020-02, and the elimination of several existing advice exemptions firms have used for decades. Operating systems also must undergo testing to ensure changes are operating as intended. Extensive new training of employees would be necessary prior to the effective date, too. The Department should also consider the fact that the financial services industry will be forced to simultaneously implement several new rules adopted by other agencies such as the SEC; these rules involve many of the same employees and systems. Adding new changes to systems already facing substantial modification brings risks. The Department must allow sufficient time for an orderly

implementation. Accordingly, if the Department determines to proceed with the Proposal despite its significant issues, the Department should delay the Proposal's effective date at least by 24 months.

Introduction and Background

The current regulatory definition of investment advice fiduciary, further defining ERISA's statutory definition of "fiduciary,"[6] was adopted by the Department in 1975. Under this definition, known as the "five-part test" (described in 29 CFR §2510.3-21(c)(1)), a person is an advice fiduciary only if they: (1) render advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing, or selling securities or other property; (2) on a regular basis; (3) pursuant to a mutual agreement, arrangement, or understanding with the plan or a plan fiduciary that; (4) the advice will serve as a primary basis for investment decisions with respect to plan assets; and that (5) the advice will be individualized based on the particular needs of the plan.

In October 2010, the Department first proposed amendments to the definition of investment advice fiduciary ("2010 Proposal").[7] Following a 90-day comment period and a subsequent public hearing, the Department announced that it would withdraw the 2010 Proposal and re-propose the rule.[8] In 2015, the Department again proposed a comprehensive overhaul of the 1975 rule, eliminating the five-part test and greatly expanding the scope of the definition,[9] and in 2016, the Department finalized the package (the "2016 Rule").[10] On March 15, 2018, the Fifth

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[6] ERISA § (3)(21)(A) ("Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.").

[7] 75 Fed. Reg. 65263 (October 22, 2010).

[8] See EBSA news release, US Labor Department's EBSA to Re-Propose Rule on Definition of a Fiduciary, (Sept. 19, 2011), *available at* https://www.dol.gov/newsroom/releases/ebsa/ebsa20110919 ("Today's decision to re-propose means that this important consumer protection initiative will benefit from additional input, review and consideration. The agency agrees with stakeholders and lawmakers that more public input and greater research will strengthen the rule.").

[9] In addition to the 2015 proposed regulatory definition, the regulatory package of materials proposed by the Department included (1) two new PTEs: a "Best Interest Contract" exemption ("BIC Exemption"), and a "Principal Transactions" exemption, (2) amendments to several other existing PTEs, and (3) a separate Regulatory Impact Analysis (the proposed regulation, new PTEs and proposed amendments to the PTEs are referred to collectively as the "2015 Proposal").

[10] Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20946 (April 8, 2016); Best Interest Contract Exemption, 81 Fed. Reg. 21002 (April 8, 2016); Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and

Circuit Court of Appeals issued a decision in *Chamber of Commerce v. United States Department of Labor,*[11] vacating the 2016 Rule in its entirety. The court found that the rule conflicted with the underlying statutes (ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B)), and that the rule failed the reasonableness test of *Chevron v. NRDC*[12] and violated the APA.[13] In its opinion, the Fifth Circuit emphasized the importance of the existence of a relationship of trust and confidence between the fiduciary and client in order for a fiduciary relationship to exist.[14] The court also noted the important difference between mere sales conduct, which does not usually create a fiduciary relationship under ERISA, and investment advice for a fee, which does.[15]

Following the vacatur, the Department reinstated the 1975 five-part test in 2020. In conjunction with the reinstatement, the Department proposed and later finalized PTE 2020-02. ICI supported the development of PTE 2020-02,[16] agreeing that there was a need for a permanent exemption based on Field Assistance Bulletin (FAB) 2018-02,[17] and we appreciated the Department's effort

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IRAs, 81 Fed. Reg. 21089 (April 8, 2016); Amendments to Class Exemptions 75–1, 77–4, 80–83 and 83–1, 81 Fed. Reg. 21208 (April 8, 2016); Amendment to Prohibited Transaction Exemption (PTE) 75–1, Part V, Exemptions From Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Certain Broker-Dealers, Reporting Dealers and Banks, 81 Fed. Reg. 21139 (April 8, 2016); Amendment to and Partial Revocation of Prohibited Transaction Exemption 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters, 81 Fed. Reg. 21147 (April 8, 2016); Amendments to and Partial Revocation of Prohibited Transaction Exemption 86-128 for Securities Transactions Involving Employee Benefit Plans and Broker-Dealers; Amendment to and Partial Revocation of PTE 75-1, Exemptions From Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefits Plans and Certain Broker-Dealers, Reporting Dealers and Banks, 81 Fed. Reg. 21181 (April 8, 2016).

[11] *Chamber*, 885 F.3d 360 (5th Cir. 2018).

[12] *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984).

[13] *Chamber*, 885 F.3d 360, 379, 388 (5th Cir. 2018).

[14] *Id.* at 370.

[15] *Id.* at 374.

[16] While ICI supported the adoption of PTE 2020-02, we disagreed with the Department's statements in the preamble to the proposed and final PTE, articulating new interpretations of the five-part test.

[17] According to the Department, "FAB 2018–02 announced that, pending further guidance, the Department would not pursue prohibited transaction claims against fiduciaries who were working diligently and in good faith to comply with the Impartial Conduct Standards for transactions that would have been exempted in the BIC Exemption and Principal Transactions Exemption, or treat such fiduciaries as violating the applicable prohibited transaction rules. In adopting the temporary enforcement policy, the Department cited uncertainty about fiduciary obligations and the scope of exemptive relief following the court's opinion that could disrupt existing investment advice arrangements to the detriment of retirement plans, retirement investors, and financial institutions, as well as the significant resources some financial institutions had devoted towards compliance with the BIC Exemption and the Principal Transactions Exemption." 88 Fed. Reg. at 75895.

to align PTE 2020-02 with the SEC's Regulation Best Interest ("Reg BI") and the fiduciary duty of investment advisers as codified under the Investment Advisers Act of 1940 ("Advisers Act").[18]

Despite the Fifth Circuit's admonition, the Department now proposes another sweeping overhaul of the fiduciary advice definition and the elimination of the five-part test.

Section 1: The Department Should Withdraw the Proposal

ICI strongly supports efforts to promote retirement security for US workers. Our members play a central role in helping retirement savers by making available the investment products through which pension plans, defined contribution (DC) plans and IRAs invest. As fiduciaries, our members manage retirement assets to the highest standard, whether it be ERISA fiduciary standards for plan asset vehicles or under the fiduciary duty standard that applies to investment advisers to regulated funds and other clients.

ICI supports the principle underlying the Proposal—that a financial adviser should always put the interests of its clients first when making recommendations. But there is a difference between this principle and what the Proposal appears to do, which is to impose ERISA fiduciary status on virtually any communication regarding an investment product or strategy made by someone in the financial services business. The fiduciary standard brings considerably higher liability exposure and greater compliance obligations that necessarily increase the costs of providing services, and it should apply only in the context of an established relationship of trust and confidence. **By applying the fiduciary standard too broadly, the rule as proposed will limit investors' access to needed financial and market information, including information about the fund products that our members manage, and could ultimately raise the costs investors bear while saving and investing for retirement.**

The Proposal would make fundamental and far-reaching changes to the existing regulatory framework for advice to retirement plans and IRAs that will impact access and choice for retirement savers, without any meaningful evidence that changes are needed. The following factors weigh against moving forward with the Proposal.

- First, the Department only a few years ago issued a new protective exemption setting parameters around advice to retirement investors—PTE 2020-02. The Department has not provided any evidence demonstrating that this exemption is not working as intended. The Department should let the regulated community continue to use PTE 2020-02 without

[18] The SEC adopted Reg BI and the Form CRS Relationship Summary ("Form CRS") in 2019 and, in Commission interpretations the same year, confirmed the fiduciary duty applicable to investment advisers ("IA Fiduciary Standard") and when a broker-dealer's advisory services are "solely incidental" to its primary business as a broker-dealer. See Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 Fed. Reg. 33318 (July 12, 2019); Form CRS Relationship Summary; Amendments to Form ADV, 84 Fed. Reg. 33492 (July 12, 2019); Commission Interpretation Regarding Standard of Conduct for Investment Advisers, 84 Fed. Reg. 33669 (July 12, 2019); Commission Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer Exclusion from the Definition of Investment Adviser, 84 Fed. Reg. 33681 (July 12, 2019).

prematurely making significant changes to it—and we do view the proposed changes as significant. As the Department stated only three years ago, PTE 2020-02 "provides clear regulatory standards that ensure American workers and retirees have access to high-quality, affordable investment advice."[19]

- Second, as the Proposal notes, the regulatory landscape today is very different than it was even just five years ago, including significantly bolstered investor protection measures that supplement the existing ERISA protections. Other regulatory changes have resulted in the broader application of best interest standards to recommendations even outside the context of a relationship of trust and confidence. In 2019, the SEC adopted Reg BI applicable to broker-dealers recommending securities transactions or investment strategies involving securities to retail customers. And in 2020, the National Association of Insurance Commissioners (NAIC) adopted a model best interest standard for annuity product sales, which in turn has been adopted by the vast majority of states.[20] These standards, particularly when added to ERISA's existing five-part test and the well-established duties applicable to investment advisers under the federal securities law, collectively cover recommendations involving most types of investment products commonly offered to retirement investors. Consequently, any supposed benefits associated with expanding the application of the Department's definition of fiduciary investment advice are greatly and necessarily diminished compared to 2016. These supposed benefits would be outweighed by the costs of reducing access to financial information and the burdens of complying with the proposed revisions to PTE 2020-02. Despite this, the Department's RIA fails to comprehensively account for the significant changes that have occurred since 2016 or to provide a benefit estimate for the Proposal. Additionally, even while estimating significant costs, the Department still significantly underestimates these costs. A thorough cost-benefit analysis that properly accounts for changes to the regulatory baseline would not support the Proposal.

- Third, given the number of major regulatory projects and studies required of the Department by the SECURE 2.0 Act, the Department should not continue to divert significant resources away from Congressionally mandated SECURE 2.0 work that is intended to help Americans save for a more secure retirement.[21]

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[19] See EBSA news release, U.S. Department of Labor Announces Exemption to Improve Investment Advice and Enhance Financial Choices for Workers and Retirees (Dec. 15, 2020), *available at* https://www.dol.gov/newsroom/releases/ebsa/ebsa20201215.

[20] NAIC Suitability in Annuity Transactions Model Regulation, Spring 2020, *available at* https://content.naic.org/sites/default/files/inline-files/MDL-275.pdf.

[21] On December 29, 2022, the President signed the Consolidated Appropriations Act, 2023 (H.R. 2617), which includes the SECURE 2.0 Act of 2022 ("SECURE 2.0 Act"). SECURE 2.0 Act § 319, Consolidated Appropriations Act, 2023, Division T, Pub. L. 117-328, 136 Stat. 3559 (2022). Many SECURE 2.0 Act provisions require the

- Fourth, the Department's prior attempts to expand the fiduciary advice definition have encountered extensive judicial scrutiny. As explained in section 4, we believe the Proposal does not adequately account for the Fifth Circuit's 2018 decision,[22] and once again exceeds the trust and confidence standard the Fifth Circuit looked to. As written, the Proposal's language is no more narrowly tailored than the 2016 Rule. If the Proposal is finalized, its strong resemblance to the 2016 Rule would seem to risk that the rule would be vacated once again by a court following the precedent set by the Fifth Circuit.
- Finally, the Proposal may well be plagued by additional vulnerabilities relating to the RIA, which as mentioned above contains numerous flaws. There would be a strong basis for a court to find the RIA fails to meet the applicable standards under the APA. It is incumbent on the Department to fully evaluate the Proposal's costs, including compliance costs, and compare them to the benefits that the Proposal would engender.[23] Further, it is arbitrary for an agency to impose billions of dollars in costs—as it would here—without identifying benefits that warrant such burdens, and without explaining why less costly alternatives are not being pursued instead. Indeed, the Department's RIA fails to quantify any purported benefits, while grossly underestimating the costs of the changes, in terms of both the direct costs of implementation and the costs to investors from losing access to information and assistance. The Appendix to this letter shows that the RIA does not provide a basis for sound rulemaking that is consistent with the requirements of the APA.

ICI strongly urges the Department to consider the negative, unintended consequences for retirement savers that we believe the Proposal, if adopted, will trigger. Not only is this rulemaking unnecessary given the changes to the applicable regulatory framework since 2016, but the Department has also fallen short of APA standards by not even attempting to quantify the benefits of the Proposal and by grossly underestimating its costs. To avoid introducing uncertainty and confusion in the marketplace by finalizing a rule that could be overturned again and seemingly ignores the Fifth Circuit's decision, we urge the Department to withdraw the Proposal and reconsider the need for additional changes at this time.

Section 2: Proposed Amendments to the Definition of Fiduciary Investment Advice

Under the Proposed Fiduciary Rule, a person is an investment advice fiduciary if (1) they make a covered recommendation (of any securities transaction or other investment transaction or any

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Department to engage in rulemaking and issue further guidance and reports under prescribed deadlines. A recent letter from the US Senate Committee on Health, Education, Labor and Pensions ("HELP Committee") requested that the Department "effectively and expeditiously implement the SECURE 2.0 Act." See letter from Bernard Sanders Chairman of the HELP Committee and Bill Cassidy, M.D., Ranking Member of the HELP Committee, to The Honorable Julie A. Su, Acting Secretary of Labor (May 30, 2023).

[22] See *supra* note 5.

[23] See *Michigan v. EPA*, 576 U.S. 743, 752-53, 759 (2015).

investment strategy involving securities or other investment property),[24] (2) the recommendation is made to a retirement investor, (3) the recommendation is provided for a fee or other compensation, direct or indirect (including to an affiliate), and (4) the person makes the recommendation in one of three alternative contexts discussed below. The Department explains that the threshold element is determining whether a recommendation has been made, and that even if an action rises to the level of a recommendation the advice is only fiduciary advice if the rest of the regulatory test is met.[25]

For purposes of clause (2) above, the Proposal defines "retirement investor" broadly, as did the 2016 Rule, to include a plan, a plan fiduciary, a participant or beneficiary, an IRA, an IRA owner or beneficiary, or an IRA fiduciary.[26] For purposes of clause (3) above, the Proposal defines the phrase "for a fee or other compensation, direct or indirect" broadly, and nearly identical to the definition in the 2016 Rule, to include essentially any amount received, direct or indirect, from any source.[27]

The three contexts noted in clause (4) above that would, in conjunction with the other elements of the above, turn a recommendation into "fiduciary advice" are:

(i) the person either directly or indirectly (e.g., through or together with any affiliate) has discretionary authority or control, whether or not pursuant to an agreement, arrangement, or understanding, with respect to purchasing or selling securities or other investment property for the retirement investor (we refer to this as the discretionary authority context);

(ii) the person either directly or indirectly (e.g., through or together with any affiliate) makes investment recommendations to investors on a regular basis as part of their business and the recommendation is provided under circumstances indicating that the recommendation is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest (we refer to this as the facts and circumstances context); or

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[24] The phrase "recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property" is defined in paragraph (f)(10) of the Proposal, using language that almost exactly tracks language in paragraph (a)(1)(i) and (ii) of the 2016 Rule.

[25] 88 Fed. Reg. at 75904.

[26] *Id.* at 75977. We note that this definition is found in paragraph (c)(1) in the main text of the Proposal, rather than in the definition section (paragraph (f)).

[27] The Department in the preamble to the Proposed Fiduciary Rule explains that "compensation is treated as paid 'in connection with or as a result of' the provision of advice only if it would not have been paid but for the recommended transaction or the provision of advice, or if the investment advice provider's eligibility for the compensation (or its amount) is based in whole or part on the recommended transaction or the provision of advice." 88 Fed. Reg. at 75909.

(iii) the person making the recommendation represents or acknowledges that they are acting as a fiduciary when making investment recommendations (we refer to this as the acknowledged fiduciary context).

As explained below, this proposed definition of fiduciary investment advice, like the definition in the 2016 Rule, sweeps too broadly and captures relationships and transactions that simply are not meant to be (nor are understood by the affected parties to be) fiduciary in nature.

2.1 The Proposed Definition of Fiduciary Investment Advice is Overly Broad and Will Have Negative Implications

The Department explains in the preamble that it intended to craft a definition of fiduciary "investment advice" that is more narrowly tailored than the definition in the 2016 Rule.[28] Although the wording of the proposed functional tests differ from the 2016 Rule, the Proposal effectively would sweep in many of the same types of conversations and interactions that led the Fifth Circuit to vacate the 2016 Rule.

The Department's view of the proposed definition is at odds with a plain and literal reading of the text of the Proposal. In fact, the proposed definition may sweep even broader because it lacks the carveouts and exclusions that the Department included in the 2016 Rule.[29] It is clear that we are assessing the Proposal with a much different lens than the Department,[30] and we

[28] *Id.* at 75901. While much of the operative language in the Proposed Fiduciary Rule is nearly identical to the 2016 Rule (for example, most of the definitions used are nearly identical), the actual functional test is different than the functional test used in the 2016 Rule. "The 2016 Final Rule generally covered: (1) recommendations by a person who represents or acknowledges that they are acting as a fiduciary within the meaning of ERISA; (2) advice rendered pursuant to a written or verbal agreement, arrangement or understanding that the advice is based on the particular investment needs of the retirement investor; and, most expansively, (3) recommendations directed to a specific retirement investor or investors regarding the advisability of a particular investment or management decision with respect to securities or other investment property of the plan or IRA." *Id.* at 75894.

[29] For example, one important exclusion in the 2016 Rule for "transactions with independent fiduciaries with financial expertise" was intended to cover advice to a fiduciary of a plan or an IRA who is independent from the advice provider, with respect to an arm's length sale, purchase, loan, exchange, or other transaction related to the investment of securities or other property. The Department declined to include a similar exclusion in the Proposal, explaining that "[t]o the extent counterparties wish to avoid fiduciary status, they can avoid structuring their relationships to fall within the circumstances described in [proposed paragraph (c)(1)(ii)]." *Id.* at 75907. The 2016 Rule also included an exception from the definition of "recommendation" for platform providers.

[30] Many of our members, as product manufacturers, do not intend to become investment advice fiduciaries under ERISA, and do not hold themselves out as being ERISA fiduciaries. While the Department's focus is ensuring that financial institutions and professionals cannot simply avoid fiduciary status at will, the goal of many of our members is to ensure that they are not inadvertently subject to the rule through interactions like selling products and working with intermediaries. The severe consequences associated with a service provider's inadvertently engaging in a prohibited transaction under ERISA cannot be overstated. See Letter from David Blass and David Abbey, ICI, to Office of Regulations and Interpretations, EBSA (July 21, 2015), at note 9 (addressing the proposed definition of the term fiduciary) ("2015 Letter on Proposed Definition").

explain below why this functional test is not narrowly tailored to capture only established relationships of trust and confidence.

2.1.1 The Department Should Make Clear that a Recommendation Is an Individualized Call to Action

The Department explains that whether a person has made a "recommendation" will serve as "a threshold element in establishing the existence of fiduciary investment advice."[31] While the Department does not define the term "recommendation" in the text of the Proposal, in the preamble it explains: "the Department views a recommendation as a communication that, based on its content, context, and presentation, would reasonably be viewed as a *suggestion* that the retirement investor engage in or refrain from taking a particular course of action."[32] The Department intends this to be an objective rather than subjective inquiry.[33] There are two aspects of this threshold determination—whether a communication is a recommendation—that we believe the Department should clarify or emphasize.

First, the Department should emphasize that to be a recommendation, a communication must be a "call to action." We appreciate that the Department's articulation of what constitutes a recommendation is generally consistent with SEC and FINRA guidance on determining whether a broker-dealer has made a recommendation. We note, however, that for purposes of triggering application of Reg BI, the Reg BI release focuses more on the communication being a "call to action" rather than a mere "suggestion."[34] Given the duties and liability associated with becoming an ERISA fiduciary, the Department should move away from the notion that a mere suggestion should trigger application of this rule.

Second, due to other elements of the proposed test, it is crucial that the Department further emphasize the need for a communication to be individually tailored to be a recommendation. In the preamble, the Department explains that "the more individually tailored the communication is to a specific retirement investor…, the more likely the communication will be viewed as a recommendation; however, the Department cautions that the fact that a communication is made to a group rather than an individual would not be dispositive of whether a recommendation exists."[35] We recommend the Department clarify that a greater level of individualization would be required for application of the ERISA fiduciary standard to a recommendation. This is important because the two status-based tests set forth in paragraphs

[31] 88 Fed. Reg. at 75904.

[32] *Id.* (emphasis added).

[33] *Id.*

[34] The Reg BI release cites underlying FINRA guidance that uses language similar to the Proposal's preamble commentary referring to a "suggestion," but the Reg BI release itself focuses more on the communication being a call to action. 84 Fed. Reg. 33318, 33335, at note 161 (July 12, 2019).

[35] 88 Fed. Reg. at 75904.

(c)(1)(i) and (iii) of the Proposal (i.e., the discretionary authority context and the acknowledged fiduciary context), both are triggered merely by the making of a recommendation. In these two contexts, fiduciary status apparently would apply without any inquiry into the circumstances surrounding the recommendation and whether it is personalized in any way. Furthermore, as explained below, these status-based tests are overly broad in scope. Discretionary authority status, for example, would apply where an affiliate of the party making the "recommendation" manages assets for the investor completely unrelated to the plan or account at issue. Therefore, it appears that a general recommendation that is not personalized in any way could be covered under a literal reading of the proposed definition, even in situations where the Department does not intend fiduciary status to apply.

2.1.2 Incidental Recommendations in the Context of a "Hire Me" Discussion Should not Be Covered

In the Department's discussion regarding what constitutes a recommendation, it explains that it does not intend to cover recommending one's own services (i.e., "hire me" recommendations). The Department believes that this view is made clear by the language in proposed paragraph (f)(10)(ii) that extends to recommendations of "other persons" to provide investment advice or investment management services.[36] The Department cautions, however, that although the "hire me" recommendation itself would not be advice, anything beyond the touting of one's services, such as a description of what the professional would do if hired, *would* be included in the definition. The Department notes its view that this approach is consistent with the SEC's approach in Reg BI regarding recommendations that accompany a "hire me" conversation. Even if that were the case, we believe there is an important distinction worth considering. Under the SEC's rules, the accompanying recommendation will be subject to Reg BI and its associated compliance obligations, which are significantly different from the heightened conditions of PTE 2020-02, as proposed to be amended. **Applying PTE 2020-02 to a relationship that has not yet been established would create significant compliance challenges.** This is particularly true where the investment professional's services will be provided using a different PTE, as would be the case if the proposed services are discretionary management. Financial institutions would incur significant unnecessary expense if they have to comply with PTE 2020-02 simply for seeking to be hired, and then a separate PTE for the services they ultimately provide.

While the 2016 Rule did not include a broader carveout for "hire me" discussions, this concern is of heightened importance here as the Proposal lacks a carveout for sophisticated investors such as the 2016 exception for transactions with independent fiduciaries with financial expertise. This carve-out would have excluded from the 2016 Rule's coverage many "hire me" discussions in

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[36] 88 Fed. Reg. at 75906 ("Under this proposal, the Department does not intend to suggest, however, that a person could become a fiduciary merely by engaging in the normal activity of marketing themselves as a potential fiduciary to be selected by a plan fiduciary or IRA owner, without making a recommendation of a securities transaction or other investment transaction or any investment strategy involving securities or other investment property. Touting the quality of one's own advisory or investment management services would not trigger fiduciary obligations.").

the institutional market. **The Department should at a minimum clarify that responses to RFPs and other plan inquiries are not considered "recommendations," even if the response is tailored (or individualized) to a particular plan.** Broader language that makes clear that the selling of plans and plan investment products, including discussions with independent fiduciaries, is not covered by the definition would also be very helpful.

2.1.3 The Three Proposed Tests are Confusing and Capture Communications that Should Not Be Treated as Fiduciary Advice

As the Department affirms in the preamble, fiduciary status is determined on a functional (and, therefore, transactional) basis.[37] The statute makes this clear by providing that a person is fiduciary *to the extent* their activity meets the functional test. Further, we understand from comments by Department staff that the proposed definition is intended to be applied on a recommendation-by-recommendation basis. However, the commentary seems at odds with the actual proposed definition. Beyond the threshold inquiry of whether there is a recommendation, the three alternative tests comprising the proposed definition are essentially based on a person's status, rather than on their actions relating to a specific transaction.

Paragraph (c)(1) of the Proposal sets forth three different contexts, described above, in which a person making a covered recommendation would be an advice fiduciary. As described below, two of the contexts (paragraphs (c)(1)(i) and (c)(1)(iii)) are overtly status-based. The other context (paragraph (c)(1)(ii))—intended as a modified version of the five-part test—suggests that working in the financial services industry and engaging with clients on investments or investment strategies would be sufficient to bring a person within the definition. Each of these contexts look to the status of the person providing the recommendation rather than whether there exists an established relationship of trust and confidence.

The Department explains that in each of these three contexts, "the Department believes that retirement investors could reasonably place their trust and confidence in the advice provider."[38] But as described below, this definition is circular and outcome driven.

a. The Proposed Discretionary Authority Context Will Lead to Nonsensical and Harmful Results

Under context (i), fiduciary status would attach to a recommendation if the person either directly or indirectly (e.g., through or together with any affiliate) has discretionary authority or control, whether or not pursuant to an agreement, arrangement, or understanding, with respect to purchasing or selling securities or other investment property for the investor.

[37] 88 Fed. Reg. at 75901.

[38] *Id.*

This context is a modified version of a provision in the current definition that applies to discretionary managers with authority or control "with respect to purchasing or selling securities or other property *for the plan*."[39] The Proposal would broaden the existing provision by referencing securities or other investment property *of the retirement investor*, not just an investment for *the plan*.

The Department explains that, like the current rule, "the [P]roposal would extend to circumstances in which the person making the recommendation 'indirectly (e.g., through or together with any affiliate)' has discretionary authority or control over securities or other investment property; in this context, the use of 'indirectly' generally refers to an arrangement in which an affiliate has discretionary authority or control."[40]

The Department considers the proposed formulation of context (i) to be a logical expansion of the current regulation's discretionary authority provision.[41] The Department observes that parties with discretionary authority or control over assets of the investor "necessarily are in a relationship of trust and confidence with" the investor.[42] **But what seems logical at first blush would result in an overreaching application of fiduciary advice status to situations the Department likely did not consider. The extension to discretionary authority over *any investment property* of the investor, combined with the retained reference to affiliates and the lack of any distinction between sales and true fiduciary advice, will lead to nonsensical and harmful results.** Under the proposed change, if a company, or any affiliate of the company, has any discretionary authority over assets of the investor, then it seems that any recommendation made by any person within the control group of the entity *will* be considered fiduciary advice, regardless of whether the recommendation was individualized in any way or even related to the assets over which the company has discretion. There seems to be no ability to define the contours of the relationship or to limit the application under this context.

The examples below illustrate the concerns our members have about activities that could (possibly unintentionally) be pulled into the definition under this context:

Example 1: A financial institution or its affiliate manages a CIT (or other plan asset vehicle) that the plan happens to invest in. Under the Proposal, any "recommendation" to that plan (or plan sponsor, or fiduciary to that plan or plan sponsor), including sales pitches by the manager or its

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[39] Emphasis added. Under this aspect of the current rule, a person will be an ERISA fiduciary if (i) Such person renders advice to the plan as to the value of securities or other property, or makes recommendation as to the advisability of investing in, purchasing, or selling securities or other property; and (ii) Such person either directly or indirectly (e.g., through or together with any affiliate)— (A) Has discretionary authority or control, whether or not pursuant to agreement, arrangement or understanding, with respect to purchasing or selling securities or other property for the plan. 29 C.F.R. § 2510.3-21(c)(1).

[40] 88 Fed. Reg. at 75901.

[41] *Id.*

[42] *Id.*

affiliates, could be automatically treated as fiduciary advice, whether or not it is related to the CIT. It could even potentially include a non-personalized recommendation made to a plan participant who is invested in the CIT.

Example 2: Similarly, if a financial institution or its affiliate provides discretionary management, then any interaction between the asset manager and a financial intermediary who is acting as a fiduciary to a plan or IRA is treated as fiduciary advice. This would include wholesaling activity, because "suggestions" will be made to the intermediary in a sales capacity. The Department expresses belief that wholesaling would not be fiduciary advice under the definition, "because [wholesaling activities] would not involve recommendations based on the particular needs or individual circumstances of the plan or IRA serviced by the intermediary."[43] However, context (i) (and context (iii) described below) does not appear to require any amount of personalization in order for a recommendation to be covered, because all that is needed is the status of being a discretionary fiduciary.[44]

Example 3: A financial institution provides discretionary management to a pension plan. Under the Proposal, any discussions regarding investment strategies such as pension de-risking or liability driven investing risk being captured as fiduciary advice if "suggestions" in these areas are made, irrespective of whether the information is being provided at the request of the pension client or is being relied on by the pension client.

The Department must narrow this context to avoid such overreaching results. We do not agree that having discretionary authority over some assets of an investor should automatically result in fiduciary status for any recommendation made in relation to other assets. We find it an even bigger stretch to assert that an affiliate relationship (broadly defined to include even familial relationships)[45] with a party providing discretionary services with respect to wholly separate assets should result in fiduciary status for recommendations that otherwise have no characteristics of being fiduciary advice.

One important step in narrowing this context is to exclude discretionary management of commingled funds, such as CITs. Under ERISA section 3(21)(B), managing the assets of an investment company registered under the Investment Company Act of 1940 (e.g., a mutual fund) in which a plan invests would not by itself cause the fund's adviser to become an advice fiduciary under ERISA. CITs and other commingled funds used in plans today should be treated

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[43] *Id.* at 75907.

[44] The SEC solves this issue by not covering recommendations to financial intermediaries under Reg BI. Only recommendations to retail investors are covered.

[45] Although the existing discretionary authority provision of the current advice definition does reference affiliates, we note that the contours of this provision are not well defined. There is virtually no guidance on the provision's application. It would be appropriate for the Department to reconsider this aspect of the provision in light of the current landscape of financial services and the implications noted above.

similarly. We do not believe plan fiduciaries (or even plan participants)[46] would view the management of a CIT any differently than a mutual fund in terms of whether the investment manager of that fund is in a general relationship of trust and confidence with the investor such that all recommendations would be considered fiduciary advice. The fact that CITs are considered plan asset vehicles should not necessitate different treatment from mutual funds in this context, as there would be no reasonable expectation that unrelated sales recommendations by the manager or its affiliate are being provided on a fiduciary basis.

If the Proposal moves forward and includes the discretionary authority test, the Department should provide an exclusion for CITs and other commingled funds, and/or otherwise narrow the test so that it applies only to recommendations pertaining to the same plan or account under that party's discretionary authority or control.

b. The Proposed "Facts and Circumstances" Context Would Capture Virtually All Financial Professionals

Under context (ii), fiduciary status would attach to a recommendation if:

- the person either directly or indirectly (e.g., through or together with any affiliate) makes investment recommendations to investors on a regular basis as part of their business, and
- the recommendation is provided under circumstances indicating that the recommendation:
    - is based on the particular needs or individual circumstances of the retirement investor and
    - may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest.

We have concerns with all aspects of this proposed facts and circumstances test. The Department frames this test as an updated version of the five-part test and as "an objective test based on the totality of facts and circumstances."[47] We are at a loss as to how this test can be viewed as objective.

First, the Proposal modifies the "regular basis" prong of the current test to instead capture individuals who make investment recommendations to investors "on a regular basis as part of their business." The Department's stated goal with this modification is to avoid sweeping in those who do not provide advice as part of their business (e.g., human resources employees), while not wholesale excluding one-time advice from the definition. **But the clear failure of this prong is that it has nothing to do with the retirement investor who receives the advice. This**

[46] The Proposal is ambiguous as to whether the discretionary authority test would apply to a recommendation made to a participant in a plan that invests in a CIT.

[47] 88 Fed. Reg. at 75902.

inventive re-phrasing of the regular basis prong appears intended to merely give a nod to the existing rule while serving no legitimate purpose.

Under the current five-part test, the "regular basis" prong functions to capture true relationships of trust and confidence (because it is meant to serve as a proxy for the existence of a relationship between a financial professional and a client). While the Proposal uses the same words, as applied it would include anyone who works in the business of financial services, regardless of whether the person has any actual relationship with the recipient of the recommendation.[48] **In this way, the test suffers the same problems as the 2016 Rule highlighted by the Fifth Circuit: "[c]ritically, the new definition dispenses with the 'regular basis' and 'primary basis' criteria used in the regulation for the past forty years. Consequently, it encompasses virtually all financial and insurance professionals who do business with ERISA plans and IRA holders."**[49]

In addition, the Proposal does not describe how to determine whether investment recommendations are made on a regular basis, other than to state that "[w]hether someone gives investment recommendations on a regular basis as part of their business is an objective test based on the totality of facts and circumstances."[50] This is a vague and open-ended standard. For example, it is not clear whether a firm (such as an asset manager) that does not generally make investment recommendations to retail investors as part of its main business, would be viewed as meeting this criterion if a small part of its overall business involves making recommendations.

Another problematic aspect of this context is its incorporation of affiliates.[51] Rather than focusing on the "regular basis" job functions of the individual providing the recommendation, it looks to not just the entity that employs the individual but the entire control group. If any division of the entity or of an affiliate of the entity is in the business of providing recommendations, fiduciary status would apply automatically to a recommendation by any individual within the entire group. In other words, every employee of the entire controlled group could be found to meet the proposed regular basis prong.

Our members are concerned that applying this evaluation on a firm wide basis would be problematic, requiring coordination across otherwise unrelated lines of business. The implications of incorporating affiliate activities become even more absurd when one considers

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[48] The Department explains that "this proposed provision is properly focused on whether the advice provider is in the business of providing investment recommendations." 88 Fed. Reg. at 75902.

[49] *Chamber*, 885 F.3d 360, 366 (5th Cir. 2018).

[50] 88 Fed. Reg. at 75902.

[51] We understand that the existing definition in 29 C.F.R. § 2510.3-21(c)(1)(ii) includes persons who indirectly (through an affiliate) meet the five-part test. We urge the Department to take a fresh look at the implications of ascribing fiduciary status to a person based on affiliate activities, especially in light of the broader definition of fiduciary advice under the Proposal and the complexity of the financial services business as it exists today.

that the definition of affiliate includes a "relative"[52] of the person making the recommendation. Regardless of the practical difficulties involved, it is unclear why affiliate activities should have any bearing on the facts and circumstances surrounding a recommendation. Applying the presumption in this way simply is not a logical application of the meaning of "regular basis."

In regard to the second part of the proposed test, the Proposal asserts that it "improves upon" the "mutual agreement or understanding" and "primary basis" prongs of the current test by replacing them with a requirement that the advice be provided "under circumstances indicating that the recommendation is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest."[53] This formulation eliminates any notion that the parties agree on the nature of the recommendation. More importantly, virtually anything *may* be relied on by an investor, watering this element down from the "primary" basis standard of current law.

We do not view this new formulation of the test for fiduciary investment advice as an improvement. **Indeed, stripped down to its core—the Department has substituted a two-part test for the five-part test: (1) a party makes a covered recommendation that is (2) individualized. If that is the Department's intent, it should say so. Instead, the Department's formulation seems intended to hide the low bar it has set for fiduciary status.**

The Department states that it intends this new test to apply as an objective standard that focuses on the circumstances surrounding the recommendation, including how the investment professional holds themselves out to the investor and describes the services offered.[54] However, the proposed text and other commentary in the preamble provide mixed signals as to whether the standard is based on what a reasonable third party would think or what the actual investor involved would think, and whether the reasonable expectations of the financial professional are even relevant. It is also unclear whether the test would consider the extent to which the provider actually went through a process of basing the recommendation on the particular needs and circumstances of that individual, or whether only the perception of the recommendation being individualized matters.

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[52] Proposed paragraphs (f)(1) and (12). The term "relative" includes a spouse, ancestor, lineal descendant, spouse of a lineal descendant, brother, sister, or a spouse of a brother or sister.

[53] "Instead of the 'mutual agreement, arrangement, or understanding' requirement—which over time has encouraged investment professionals to hold themselves out as trusted advisers while disclaiming fiduciary status in the fine print—the proposal would focus on the objective 'circumstances' surrounding the recommendation, including how the investment professional held themselves out to the retirement investor and described the services offered. The Department believes that the proposed language will better avoid loopholes and fine print disclaimers, while properly focusing on a reasonable understanding of the nature of their relationship." 88 Fed. Reg. at 75902.

[54] *Id.*

Given this confusion, it is not surprising that vast segments of the regulated community have concluded that if a financial institution employee makes a recommendation to an investor that could be viewed as personalized in any way, it will be considered an advice fiduciary under the proposed facts and circumstances test. **The Proposal seems to lock investment professionals and their firms into only one model of service in the retirement space.** If they work for an organization that provides recommendations, it appears they will not be able to provide any non-fiduciary assistance to retirement plans or participants or IRA owners. We believe this context would capture most broker interactions, which raises problems as discussed in section 4.1 below.

We note below some concerning examples of activity that may be covered by the facts and circumstances test.

- **Platform providers**. Platform providers may design and offer a menu of funds that they have determined to be broadly appropriate for a typical DC plan or a DC plan with certain demographics or characteristics. Under the 2016 Rule, the Department made clear that marketing or making available a platform to a plan fiduciary is not considered a recommendation, provided that the plan fiduciary is independent of the person marketing the platform and the person marketing the platform discloses in writing that the person is not undertaking to provide advice in a fiduciary capacity.[55] There is no such language in the Proposal. The Department explains in the preamble that the inquiry (turning on the threshold question of whether a recommendation has been made) "may turn on whether the provider presents the investments on the platform as having been selected for and appropriate for the investor."[56] Under this formulation, it would seem that simply communicating the suitability of a given menu for a plan with certain characteristics (i.e., essentially just describing the product) could be treated as fiduciary advice. Our members, however, view such activity as no more than building and then selling a product. While the provider may describe what type of investor the product generally is designed for, it is up to the plan fiduciary to determine whether the product is right for its plan. Moreover, while the Department has expressed its dislike for disclaimers, in certain situations—including the services described here—a clear disclosure would further help clarify a provider's role as a non-investment advice fiduciary.[57]

- **Pooled Employer Plan (PEP)**. The Department explains that it would apply a similar analysis in the case of a PEP, as an off the shelf product being sold to a plan sponsor. Similar to the platform provider discussion, our members believe that simply describing the product and marketing it to a plan sponsor should not be considered fiduciary advice

[55] Paragraph (b)(2)(i) of the 2016 Rule.

[56] 88 Fed. Reg. at 75908.

[57] Given the language of paragraph (c)(1)(v) of the Proposal, firms may not have sufficient comfort that such a disclosure would be controlling.

but rather purely selling activity. The Department did not include language excluding the marketing of PEPs in the 2016 Rule because the SECURE Act[58] had not yet created them.

- **Educational models and tools**. The Department confirms in the preamble that it does not intend to change the guidance of Interpretive Bulletin (IB) 96-1, under which providing asset allocation models and interactive investment materials is considered investment education rather than fiduciary advice.[59] While we welcome the Department's confirmation that IB 96-1 survives the Proposal, that conclusion is hard to square with the overly broad definition of fiduciary investment advice since these models are presented to investors, might be relied on, and are individualized.

  It appears that the Department must nonetheless believe that these individualized asset allocation models are not a recommendation. If so, we ask that the Department explain its analysis in the preamble to a final rule so that similar logic can be applied to other individualized circumstances. In addition, if educational models and tools identify specific investment options and are offered to plan participants or IRA owners, it appears this may be enough to cross the line into fiduciary investment advice under the Proposal. Our members share the goal of increasing financial literacy and helping to educate investors. IB 96-1 has long been a vitally important piece of guidance to encourage these efforts. However, many firms will err on the side of providing less information, out of fear of crossing the line into fiduciary advice. Further, we would argue that more generalized tools such as an asset allocation model that does not identify how a plan's investment options fit into the model would not be of much help to participants.

- **Call centers and websites**. Like the 2016 Rule, the Proposal threatens to severely reduce the commonplace exchanges of information currently provided at no cost to millions of retirement savers through call centers, walk-in centers, and websites. Even the most basic information could trigger ERISA fiduciary status, in particular if a mutual fund has an advisor affiliate. As discussed above, while IB 96-1 is helpful and would cover many of the exchanges at issue, firms may see the need to take a conservative approach given the severe consequences of inadvertently becoming an ERISA fiduciary.[60]

- **Education for plan fiduciaries**. Many plan fiduciaries with financial expertise request information from financial institutions on market and investing trends—often outside the

[58] On December 19, 2019, the US Senate approved the Fiscal Year 2020 Consolidated Domestic and International Assistance Package (H.R. 1865), which includes the Setting Every Community Up for Retirement Enhancement Act (the "SECURE Act"). SECURE Act §101 allows otherwise unrelated employers (of any size) to band together and participate in open multiple employer plan (MEP) arrangements (referred to in the bill as "pooled employer plans" or PEPs).

[59] 88 Fed. Reg. at 75911.

[60] See *supra* note 30.

> context of a formal request for proposal. These discussions involving investment strategies may include discussions of products and services offered by the financial institution relevant to a given investment strategy, and the plan fiduciary often will provide background information about the plan in the course of these discussions. It is up to the independent plan fiduciary to determine whether to engage in any particular investment strategy or to work with the financial institution or to purchase any of its products or services. These parties should be permitted to clearly agree that the financial institution is not providing advice in a fiduciary capacity.

c. The Proposed Acknowledged Fiduciary Status Context Sweeps Too Broadly

Under context (iii), fiduciary status would attach to a recommendation if the person making the recommendation represents or acknowledges that they are acting as a fiduciary when making investment recommendations.

With this context, the Department seeks to ensure that if an investment professional holds themself out as a fiduciary they cannot subsequently deny their fiduciary status, but rather must "honor their words"[61] (i.e., if you say you are a fiduciary with respect to the advice, the Department will hold you to it).[62] Further, the Department seems concerned that a retail investor will not appreciate the difference between an ERISA fiduciary and a fiduciary under a different law or standard. While we agree that a person should not be able to tell an investor that they are acting as an advice fiduciary and then disclaim this status when held to it, context (iii) sweeps too broadly and its language is both flawed and imprecise.

The Department states: "[i]t is enough that the investment advice provider told the retirement investor that the investment advice or investment recommendations were or will be made in a fiduciary capacity."[63] The Department seemingly envisions a scenario where an individual financial professional is sitting across the table (or a computer screen) from an individual investor, advising them for example on whether to roll their retirement account from the 401(k) plan to an IRA. However, the Department appears to not have realized how a literal reading of context (iii) could apply much more broadly than in this specific scenario. For example, nothing in the text of context (iii) limits its application to any specific advice or recommendation (i.e.,

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[61] 88 Fed. Reg. at 75903.

[62] We note that the Fifth Circuit opined on a solution to this concern. "To the extent . . . that some brokers and agents hold themselves out as advisors to induce a fiduciary-like trust and confidence, the solution is for an appropriately authorized agency to craft a rule addressing that circumstance, not to adopt an interpretation that deems the speech of a salesperson to be that of a fiduciary, and that concededly is so overbroad that . . . it must be accompanied by a raft of corrections." See *Chamber*, 885 F.3d 360, 379 note 13. (5th Cir. 2018).

[63] For purposes of the Proposal, paragraph (c)(1)(iii) is not limited to the circumstances in which the person specifically represents that they are a fiduciary for purposes of Title I or Title II of ERISA, or specifically cites any particular statutory provisions. It is enough that the investment advice provider told the investor that the investment advice or investment recommendations were or will be made in a fiduciary capacity. 88 Fed. Reg. at 75903.

I've acknowledged that I am a fiduciary *with respect to this advice*). Rather, the context only requires that an investment professional has acknowledged they are acting as a fiduciary *when making investment recommendations* (i.e., when making recommendations generally, not necessarily the instant recommendation). Therefore, it seems that once an investment professional has acknowledged their status as a fiduciary for *any* investment recommendations, under *any* law or standard, context (iii) would be satisfied with respect to any recommendation made to the investor. It is not clear that there are any limits to this fiduciary status, or any ability to define the relationship between the investment professional and the investor any differently.

First, while the language of the Proposal refers to "the person making the recommendation," we understand this to mean the *entity*, rather than just the individual professional or even just the business unit. For example, assume that investment management company X manages a CIT in which plan Y invests. X may confirm to Y that they are acting as an ERISA fiduciary for purposes of managing the CIT. A separate division of X, unrelated to the CIT business, may be involved in selling a new product to plan Y. An acknowledgment of ERISA fiduciary status for purposes of managing the CIT should not mean that for all purposes, entity X would be presumed to satisfy context (iii).

Second, acknowledging that one is acting as a fiduciary outside of the ERISA context should not by itself be sufficient to make one a fiduciary under ERISA. For example, asset managers may act as Advisers Act fiduciaries to financial intermediaries by creating models that incorporate a mix of the asset manager's fund products. The asset manager may then provide these models to the intermediary to help them understand how the funds are best used in combination. The models are not personalized to any one investor. The intermediary may decide to put the models on its platform for use by its representatives working with retirement investor clients. If the representative using one of these models is an advice fiduciary to a client plan or IRA owner, this should not cause the asset manager itself to become an ERISA fiduciary under context (iii). But applying the Proposal as written, the asset manager has acknowledged fiduciary status (under the Advisers Act) and could therefore be viewed as making a recommendation to the fiduciary of a plan or IRA (i.e., the intermediary). This unfortunate result stems from the absence in context (iii) of any requirement for personalization or individualization for an (even indirect) interaction to be considered a fiduciary recommendation. Moreover, the preamble indicates that a communication to a group of investors could be considered a covered "recommendation."[64] This is another example of how the Proposal creates a "daisy chain" problem given the lack of a carveout for sophisticated investors.

Third, acting as a fiduciary for one aspect of the relationship with an investor should not make a person a fiduciary for all purposes. For example, if investment adviser C is managing a non-ERISA account for individual D (e.g., a taxable advisory account), and advisor C sends D a Form CRS which notes that they are a fiduciary under federal securities law, this should not mean that

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[64] 88 Fed. Reg. at 75904.

D is entitled to fiduciary services for every interaction, including with respect to an IRA. But this is precisely what context (iii) appears to do. Exacerbating this situation is the fact that even a clear disclaimer of fiduciary status for the IRA would not be effective. While the Department states that it intends to permit parties to define the nature of their relationship,[65] it is not clear how that can be done when all that is needed for non-disclaimable fiduciary status is a non-personalized recommendation and an acknowledgement of any brand of fiduciary status by any part of an adviser/financial institution.

We understand that a major concern of the Department is the potential to mislead investors. As the above examples illustrate, however, the Department's formulation raises issues even when there is no intent to mislead. Under context (iii), fiduciary status for any given purpose would automatically result in ERISA fiduciary status for any recommendation made on a retirement investment. But it must be possible for a person or entity to act as a fiduciary for some purposes and not others.

Context (iii) also seems to contradict the Department's own assertion that fiduciary status is determined on a transactional basis and (as stated in ERISA section 3(21)) a party is a fiduciary only to the extent they meet the functional test. All that the Department would require here is a non-personalized recommendation and an acknowledgement that the provider is a fiduciary under any standard. As explained earlier, it is not even clear (in either the text of the Proposal or the preamble) that the acknowledgement must relate to the specific recommendation in question. The language of proposed paragraph (c)(1)(iii) sweeps far too broadly—perhaps more broadly than intended. **The Department must make the language more precise and should not equate fiduciary status under another law or regulatory framework to ERISA fiduciary status.**

2.1.4 The Department Should Exclude Recommendations to Institutional and Sophisticated Investors from the Scope of the Rule

As noted in our discussion of the Proposal's three contexts for ascribing ERISA fiduciary status to a recommendation, a literal reading of the text of the Proposal would result in ERISA fiduciary status for many interactions between a financial institution and a financial intermediary where neither party intends a fiduciary relationship. This is a direct result of both the breadth of the three contexts and the Proposal's definition of "retirement investor" in paragraph (c)(1) to include a plan fiduciary or IRA fiduciary. We understand, based on the preamble's discussion of

[65] The Department explains that its "intent in including [paragraph (c)(1)(v) in the Proposal is to permit parties to define the nature of their relationship, but also to ensure that any disclaimer be consistent with oral communications or actions, marketing material, State and Federal law, and other interactions based on all relevant facts and circumstances. When the disclaimer is at odds with the investment advice provider's oral communications, marketing material, State or Federal law, or other interactions, the disclaimer is insufficient to defeat the retirement investor's legitimate expectations." 88 Fed. Reg. at 75903. According to footnote 108, "[t]his discussion of disclaimers applies to the regulation proposed herein, defining an investment advice fiduciary, and would not extend to a circumstance in which a financial professional has investment discretion over a retirement investor's assets." *Id.*

wholesaling activities by product manufacturers to financial intermediaries,[66] that the Department may not intend for the proposed definition to cover all interactions between financial institutions. **Rather than relying on commentary in the preamble to clarify this intent, we urge the Department to provide a broad exclusion from the fiduciary advice definition for recommendations to institutional and sophisticated investors. At a minimum, however, the Department should narrow the definition of retirement investor so that it does not include an intermediary (i.e., a professional fiduciary hired to act on behalf of the retirement investor).[67]**

We believe the Department's intent with the Proposal is to provide stricter protections to retail investors. Clarifications providing comfort that interactions in the institutional space (especially those between asset managers and intermediaries) will not be covered should not frustrate this goal. Department staff have informally indicated that sophisticated parties ought to be able to define and agree on the terms of their relationship (and therefore avoid application of the fiduciary advice rule). Despite this, many financial institutions would not be comfortable relying on these assurances given the text of the Proposal, including the clear inclusion of plan and IRA fiduciaries in the definition of retirement investor and statements in the Proposal drawing negative inferences around disclaimers. In addition, as explained at length in the discussion of proposed paragraphs (c)(1)(i) and (c)(1)(iii), in the discretionary authority context and acknowledged fiduciary context, there is no requirement to consider the facts and circumstances surrounding the communication and whether it was based on the individual needs of the investor. This only adds to the ambiguity surrounding institutional conversations.

An important example of where this concern comes into play is the creation and use of model portfolios. As described above in section 2.1.3, asset managers often create model portfolios as a service to the intermediaries who sell their products.[68] An intermediary, such as a broker-dealer

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[66] 88 Fed. Reg. at 75907 ("In the context of 'wholesaling' activity, which involves communications by product manufacturers or other financial service providers to financial intermediaries who then directly advise plans, participants, beneficiaries, and IRA owners and beneficiaries, the Department believes that communications to financial intermediaries would typically fall outside the scope of proposed paragraph (c)(1)(ii) because they would not involve recommendations based on the particular needs or individual circumstances of the plan or IRA serviced by the intermediary. There may also be other circumstances in which application of proposed paragraph (c)(1)(ii) would not result in a covered recommendation being treated as fiduciary investment advice. In general, however, the Department envisions that proposed paragraph (c)(1)(ii) would apply broadly to recommendations to plan and IRA fiduciaries acting on behalf of plans and IRAs.").

[67] The SEC took a similar approach in Reg BI by defining "retail customer" as: "a natural person, or the legal representative of a natural person, who: (A) receives a recommendation of any securities transaction or investment strategy involving securities from a broker-dealer; and (B) uses the recommendation primarily for personal, family, or household purposes." § 240.15l–1(b)(1). The SEC clarifies that for purposes of this definition, a "legal representative" is only a "non-professional legal representative." 84 Fed. Reg. at 33343.

[68] In addition to the scenario described in section 2.1.3, an asst manager may create a model that replicates an index or other specifications of a third party, that is then made available on the intermediary's platform for use by a retirement investor client directly or a third-party intermediary's advisor. Generally, this would be a nondiscretionary recommendation under the Advisers Act.

firm, may then make these models available on its platform for use by its representatives when working with investor clients. It is not clear whether the Department would consider the creation and provision of a model portfolio by the asset manager to be a recommendation under the Proposal. If providing a model to an intermediary (who is a plan fiduciary or IRA fiduciary) is deemed to be a recommendation, then under a literal reading of the proposed test for determining whether a recommendation constitutes fiduciary advice, the model provider could become an ERISA advice fiduciary. This could occur if the asset manager represented that it is a fiduciary in any context (e.g., providing the model as a fiduciary under the Adviser's Act), or if it manages any other assets of an intermediary's retail investors.

We find this result to be unreasonable. The asset manager's creation of a model portfolio for use by financial intermediaries working with their clients is not individualized for any one retirement investor. In fact, the asset manager will not know the identity of the intermediary's underlying investor clients. The asset manager and the intermediary will have a clear understanding that the creation and provision of the model is not intended to be fiduciary advice under ERISA. And the investor has no relationship to or expectation of the asset manager. For these reasons, the Department should clearly exclude this type of asset manager activity from the scope of the investment advice fiduciary definition.

Revising the definition of retirement investor to not include intermediaries acting as fiduciaries to investors would be helpful but would not go far enough. As explained above, a broader exclusion for recommendations to institutional and sophisticated investors would lead to greater efficiencies in the marketplace while not excluding interactions the Department appears concerned about. Prior to crafting such an exclusion, the Department should meet with stakeholders to gather input on possible approaches and then propose a solution for public comment. Engaging in a discussion with the regulated community before finalizing an exclusion would help avoid the type of unfortunate situation caused by the 2016 Rule's exclusion for transactions with independent fiduciaries with financial expertise. That exclusion resulted in disruption to well-functioning institutional relationships through representations and warranties that both were of little value and required significant resources. We urge the Department not to recycle that exclusion here.

To be clear, while we urge the Department to clarify that institutional/sophisticated investor recommendations (including recommendations to "hired" fiduciaries) are outside the scope of this fiduciary definition, such a clarification would not cure all defects in the Proposal. The Proposal would still be inconsistent with the Fifth Circuit decision, would fail to meet the requirements of the APA, and would embody the numerous other concerns detailed in this letter.

2.2 If the Department Finalizes the Proposal, It Should Include Clarifying Examples

The Proposed Fiduciary Rule is overly broad and fails to account for the important changes to the regulatory landscape since the 2016 Rule. However, to the extent that the Department still chooses to move forward with the Proposed Fiduciary Rule, we urge the Department to adopt

clarifying examples in the final rule's regulatory text. The Department routinely includes examples in its regulations and such examples in the regulation itself will supply needed certainty to the regulated community as opposed to preamble discussion or subsequent FAQs. Moreover, the examples are not exceptions or exclusions that might be viewed skeptically in the context of a fact intensive definition. Instead, they are simply the Department's application of the regulation to facts, and as such would provide helpful clarity and certainty to the regulated community.

Set out below are a number of common fact patterns that we believe do not constitute fiduciary advice. We request that the Department include them in a final rule to the extent that the rule moves forward. To be clear, ICI is not suggesting that the inclusion of these examples will cure the significant faults of the Proposal.

Clarifying Example 1: Communications Between Investment Professionals

X, a representative of a mutual fund complex, discusses with Y, a registered investment adviser, which of its mutual funds, including which share class, are appropriate for small retirement plans, including specific small retirement plans. X has not represented to Y that it is providing investment advice or acting as a fiduciary. Has X provided fiduciary advice to Y?

No. These types of communications between institutional parties are not provided under circumstances indicating that the recommendation is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions.

Clarifying Example 2: Providing Financial Education to Groups #1

A representative of a mutual fund complex, X, is speaking to a group at a conference, one member of which is Y, a fiduciary of an employer sponsored plan. X provides a presentation on target date funds that can be integrated into a defined contribution plan line up, including a target date fund sponsored by X. X states that this particular suite of target date funds is well suited for plans looking to manage investments through retirement rather than simply to retirement. Y is looking to offer target date funds that manage assets through retirement. Has X provided fiduciary advice to Y?

No, despite knowing that some members of the audience might be retirement investors seeking to offer target date products that manage assets through retirement, the statement made in the context of a conference is not provided under circumstances indicating that it is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in Y's best interest.

Clarifying Example 3: Providing Financial Education to Groups #2

Representative of recordkeeper X is meeting with a group of plan participants Y, for an employer that utilizes the recordkeeper's services, including its investment platform. In meeting with the

employees, X discusses the importance of asset allocation and how the target date fund in the employer's plan is designed to appropriately allocate assets over time and recommends the fund for those participants that do not wish to spend time actively monitoring their portfolio allocation. These target date funds are affiliated with the recordkeeper. Has X provided fiduciary advice to Y?

No, although some plan participants may elect a target date fund as a result of the meeting with X, the statement made by X is not provided under circumstances indicating that it is based on the particular needs or individual circumstances of Y.

Clarifying Example 4: Discretionary Manager Recommending Itself #1

X is a discretionary manager with no existing relationship to plan Y. Y has issued an RFP seeking an investment manager for a separately managed account with Y. In connection with the RFP, and during finalist meetings with the investment committee for Y, X touts its expertise, performance history and quality of services in fulfilling similar investment mandates to that requested by Y and includes investment ideas for Y to consider. Has X provided fiduciary advice to Y?

No. In this context, X's presentation is not a "recommendation." Covered recommendations under the rule do not include recommending oneself. Moreover, marketing presentations including RFP responses are not provided under circumstances that indicate the interaction may be relied upon by the retirement investor as a basis for investment decisions.

Clarifying Example 5: Discretionary Manager Recommending Itself #2

Same fact pattern as clarifying example 4, except that X is a discretionary manager that already offers a CIT to plan Y.[69] In connection with its participation in the RFP for a new investment mandate with Y, has X provided fiduciary advice to Y?

No. X's presentation is not a "recommendation." Covered recommendations under the rule do not include recommending one's own investment management services (including affiliates).

Clarifying Example 6: Platform Recommendations #1

X is a defined contribution plan recordkeeper that has no existing relationship to plan Y. Y has issued an RFP seeking proposals for recordkeeper services. In connection with the RFP, and during finalist meetings with the investment committee for Y, X discusses the various investment platforms it offers to plans of this size and type. X discusses the range of investment products offered on the different platforms and their relevant fees and share classes and notes which platform option may provide the best choice for Y. X does not recommend any particular

[69] This example assumes that offering a CIT would cause the manager to satisfy the discretionary authority test under proposed paragraph (c)(1)(i). As explained earlier, we believe the Department should provide an exception under this test for offering CITs.

investment products available on its platform as being the right one for Y. Has X provided fiduciary advice to Y?

No. X's presentation is not a "recommendation." Covered recommendations under the rule do not include recommending oneself (including affiliates). Moreover, marketing presentations including RFP responses are not provided under circumstances that indicate the interaction may be relied upon by the retirement investor as a basis for investment decisions.

Clarifying Example 7: Platform Recommendation #2

Same fact pattern as clarifying example 6, except that X is a discretionary manager that already offers a CIT to plan Y.[70] In connection with its participation in the RFP for recordkeeping services, has X provided fiduciary advice to Y?

No. X's presentation is not a "recommendation." Covered recommendations under the rule do not include recommending oneself (including affiliates).

Clarifying Example 8: Recommending an Advisory Program

X has established a self-directed IRA with Y. X is assigned a representative of Y and meets annually to receive investment education within the meaning of IB 96-1. During one of the annual meetings, Y notices that the asset allocation strategy selected by X is not consistent with the models presented to X under IB-96-1. Y suggests that X consider a managed account program offered by Y's affiliate that invests in mutual funds and adjust allocations over time. Has Y provided fiduciary advice to X?

No. In this context, Y's presentation is not a "recommendation" that is covered by the rule. Covered recommendations under the rule do not include recommending oneself (including affiliates) to provide investment advisory services.

Clarifying Example 9: Existing Discretionary Manager Relationship

Employer X is a fiduciary to its defined benefit plan. Investment manager Y is a discretionary manager to such plan and is a fiduciary under ERISA section 3(21)(A)(i). Z is an affiliate of Y and sends unsolicited emails and marketing materials to many businesses, including X, suggesting that interest rates are favorable for any pension plan to consider a pension risk transfer. The communication contains information that the communication is marketing. Has Z provided fiduciary advice to X?

No. The provision of marketing materials by Z does not constitute a recommendation under the rule (it is not a call to action in this context).

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[70] Like clarifying example 5, this example assumes that offering a CIT would cause the manager to satisfy the discretionary authority test under proposed paragraph (c)(1)(i). As explained earlier, we believe the Department should provide an exception under this test for offering CITs.

Section 3: Discussion of Proposed PTE Amendments

PTE 2020-02 was adopted, and came into effect, in a fluid regulatory environment. The SEC in 2019 adopted Reg BI and Form CRS. The NAIC in 2020 adopted a model best interest standard for annuity product sales, which in turn has been adopted by the vast majority of states. In the face of these numerous changes—the full impacts of which are yet to be felt—the Department nonetheless has seen fit to overturn the apple cart by proposing systemic changes to the fiduciary investment advice exemptive framework only three years after PTE 2020-02 was finalized, and where its various requirements have only been fully in effect for 18 months.

We are extremely concerned about the significant adverse market impacts that will result from this effort. Most importantly, the 2023 proposal has the same framework as 2016—it expands the definition of advice and then forces all advisers into a single restrictive exemption, a beefed-up PTE 2020-02—by significantly narrowing numerous long-standing class exemptions that financial institutions have long relied on. **The Department is undertaking this effort despite the fact that there has not been sufficient time to determine the true effectiveness of (to say nothing of the costs and benefits of) the adoption of PTE 2020-02 and other recent regulatory changes noted above**.[71]

Financial institutions faced with the new, expanded regulatory and exemptive regime proposed by the Department may seek to minimize the situations in which they become investment advice fiduciaries under ERISA by pulling back much of the guidance and education and planning tools currently offered to investors. Firms also may impose or increase account minimums for relationships that would newly require the firm to use PTE 2020-02, as well as some relationships currently falling under PTE 2002-02.[72] These changes may be needed to ensure they will be able to recoup significantly higher compliance costs and compensate for increased risk. These costs are amplified by the fact that companies currently relying on PTE 2020-02 only recently finished building the systems needed to comply with the exemption. As discussed further below, many of the proposed changes to PTE 2020-02 and other exemptions would require these companies to revise—or completely rebuild—their systems at great cost and with an indeterminate benefit to investors from the Department's proposed changes. These changes

[71] ICI's review of the Department's Regulatory Impact Analysis, enclosed as an Appendix, details several errors in the Department's Regulatory Impact Analysis. These errors materially underestimate the significant burden of costs to the asset management sector, as well as the retirement services sector in general, of the Proposal.

[72] NAIFA Survey, Expected Minimum Thresholds Will Change if DOL Rule Implemented (Dec. 2023), *available at* https://2635471.fs1.hubspotusercontent-na1.net/hubfs/2635471/NAIFA%20Members%20Respond%20to%20the%20Proposed%20US%20DOL%20Rule.pdf (finding that whereas 70% of financial security professionals surveyed currently impose no minimum asset threshold for potential clients, if the Proposal is adopted only 28% would continue to not impose an assets minimum for potential clients). We note that there was a similar response to the 2016 Rule. See Letter from Brian Reed and David Blass, ICI, to Office of Regulations and Interpretations, EBSA, note 13. (March 17, 2017). The industry responses to the 2016 Rule are discussed in further detail in section 4.4 of this letter.

will not be protective of plans and other investors. Plans and other retirement investors instead will enjoy fewer options for investment advice and guidance, whether fiduciary in nature or not, and those options that are available will be at higher cost. Moreover, this will disproportionately impact smaller balance investors. To this end, we also are concerned that the expansion and wholesale revision of the fiduciary investment advice exemptive regime may have the effect of negating many of the benefits to Main Street investors from the SECURE Act and the SECURE 2.0 Act.

Contrary to the Department's assertion in the preamble to Proposed PTE 2020-02,[73] many financial institutions already complying with PTE 2020-02 and Reg BI will not find the Department's proposed changes easier to implement than if they were starting from a blank slate. In many cases financial institutions built a PTE 2020-02 compliance framework to serve the needs of a particular business unit. In addition to needing to update systems to meet any new requirements, these frameworks may not be well-suited to broader adoption without significant revisions or even wholesale rebuilding. Similarly, as discussed below many financial institutions structured their businesses to not be investment advice fiduciaries subject to PTE 2020-02, but still built PTE 2020-02 compliance systems as a backstop to cover situations where they may inadvertently find themselves providing fiduciary investment advice for a fee (hence their use of "to the extent" language in their fiduciary acknowledgements). Without wholesale rebuilding, these systems are ill-equipped to handle a financial institution's entire volume of business that would now be considered fiduciary investment advice subject to an expanded PTE 2020-02.

The Department discounts the fact that the framework set out in Proposed PTE 2020-02 differs significantly from the current SEC regulatory framework. While Reg BI may be *similar* in many ways to Proposed PTE 2020-02, in practice these two frameworks are substantively different. A financial institution currently complying with Reg BI for business units that would find themselves newly subject to PTE 2020-02 will face significant challenges in building the systems to comply with Proposed PTE 2020-02. **Beyond these challenges, we urge the Department to consider the confusion and increased cost for both investors and financial professionals of having to comply with two different compliance regimes for providing essentially the same services with respect to retirement and non-retirement accounts.**

As discussed in more detail below, we urge the Department to reconsider its ill-timed and ill-advised proposed revision to the fiduciary investment advice exemptive framework, as well as the proposed amendments to the definition of fiduciary investment advice. The Department should withdraw the entire Proposal and go back to the drawing board, considering modifications to the current regulatory framework only after the retirement market has had an opportunity to fully realize the benefits of recent changes, including the still-new PTE 2020-02. Only then can the Department properly determine whether changes are truly needed, and if the significant costs of such expansion are warranted in light the benefits that would be realized. We note that while

[73] 88 Fed. Reg. at 75984, 94.

ICI believes this is the appropriate course of action, we nonetheless have suggested modifications to Proposed PTE 2020-02 and other proposed amended class exemptions should the Department elect to pursue a different path.

3.1 The Department Should Not Apply an Ill-Suited, One-Size-Fits-All Exemption to Fiduciary Investment Advice

ICI disagrees with the Department's clear intention to provide a one-size-fits-all class exemption for investment advice fiduciaries. This approach will lead to a less effective, and more inefficient and burdensome, exemptive framework. The one-size-fits-all nature of Proposed PTE 2020-02 is exacerbated by the absence of important exclusions in the Proposal, such as those for recommendations to sophisticated investors and investment experts, discussed above. The absence of such exclusions here further highlights the challenges different industry segments will face when complying with Proposed PTE 2020-02.

It is important that prohibited transaction class exemptions be tailored to fit the provision of specific products and services. Class exemptions are more effective at both protecting the rights of participants and beneficiaries and enabling the efficient delivery of necessary services to plans and other retirement investors if they are tailored to specific situations. Industry participants face different challenges in how they mitigate conflicts and risks, as well as manage product offerings when providing fiduciary investment advice. These different challenges may be due to the structures of the products offered, different models for service delivery, a focus on different market segments, and different overlapping regulatory regimes (*e.g.*, securities law, state insurance regulation, etc.).

The Department proposes to amend PTEs 75-1, 77-4, 80-83, 83-1, and 86-128 to make them unavailable for the provision of investment advice. These exemptions are designed to cover specific types of transactions that financial services firms commonly undertake for plan or IRA investors. The conditions built into these exemptions are specifically tailored to protect investors, while allowing for efficient conduct of ordinary and necessary plan transactions. For example, PTE 77-4 (available for a plan's purchase or sale of shares of a mutual fund where the fund's investment adviser is also a fiduciary to the plan) prevents charging multiple layers of advisory or management fees, and provides no relief for the receipt of a sales commission. It also requires disclosures to a second plan fiduciary (who is independent of the adviser) specifically addressing issues relevant to the plan fiduciary's decision-making. In contrast, **Proposed PTE 2020-02 would act like a drag net in capturing a wide range of transactions across multiple product segments. The efficiencies associated with the current more tailored exemptions the Department proposes to amend would be lost, resulting in higher costs and fewer benefits to investors.**

One example of these higher costs is that the Proposal would require a party relying on one of the other exemptions in question (such as PTE 77-4) to now rely on a second exemption—PTE 2020-02—in connection with the same services. While the current exemptive relief in PTE 77-4

would continue to be available for providing discretionary management services, the firm would need to build a second process to comply with PTE 2020-02 for the initial recommendation in connection with its hiring. (Currently PTE 77-4 is available for both initial recommendations of proprietary funds and for ongoing discretionary management.) The Department appears to have not factored this significant additional compliance burden or its attendant costs into its regulatory impact analysis, further understating the cost both to build PTE 2020-02 compliance structures and to comply with PTE 2020-02 on a go-forward basis.

The Department has applied a more tailored approach to PTEs for decades. The Department here proposes to deviate from its historical practice by applying one set of conditions not only to financial institutions that occupy materially different market segments, but also collapsing different products currently covered by seven class exemptions into one class exemption—PTE 2020-02. Rather than leveling the playing field as the Department asserts, applying one set of conditions to all instances of a broad range of industry activities will lead the industry to offer fewer tools and less assistance to plans, participants, and IRA owners, and fewer options in the marketplace. Such a result would make PTE 2020-02 less protective of, and less in the interests of, plans and plan participants.

The Department also has not demonstrated either a true need for, or a benefit from, curtailing numerous long-standing exemptions in favor of an omnibus PTE 2020-02. We view the Proposal and its attendant effects detailed herein as an effort by the Department to leverage is deregulatory exemptive authority to impose additional regulatory burdens on retirement industry. This is the same impermissible "backdoor regulation" the Fifth Circuit called the Department out for in connection with the 2106 Rule.[74]

3.2 The Proposed Restrictions on Differential Compensation Are Unreasonable and Conflict with the SEC's Approach

Proposed PTE 2020-02 would significantly expand the limitations on permitted compensation practices in connection with providing fiduciary investment advice by reverting to the language previously used in the now-vacated BIC Exemption. In addition to banning numerous forms of compensation commonly utilized in the industry, the Department proposes to apply a presumption against differential compensation[75] in stark contrast to the Department's past practice and the SEC's approach under Reg BI.

As amended, section II(c)(2) would provide that "Financial Institutions may not use quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, *differential compensation*, or other similar actions or incentives that are intended, or that a reasonable person

[74] *Chamber*, 885 F.3d 360, 387-88.

[75] Neither Proposed PTE 2020-02 nor any other portion of the Proposal defines "differential compensation." When we discuss differential compensation, we are referring to any compensation that differs depending on the investment advice provided.

would conclude are likely, to result in recommendations that are not in Retirement Investors' Best Interest" (emphasis added).[76] When PTE 2020-02 was adopted only three years ago, the Department was clear that there is a benefit to allowing different compensation arrangements.

> This exemption will generate several benefits. It will provide Financial Institutions and Investment Professionals with flexibility to choose between this new exemption or existing exemptions, depending on their needs and business models. In this regard, the exemption will help preserve different business models, compensation arrangements, and products that meet different needs in the market. This can, in turn, help preserve the existing wide availability of investment advice arrangements and products for Retirement Investors.[77]

The proposed restrictions are inconsistent with the Department's long-standing principles-based approach to the regulatory framework around fiduciary investment advice.[78] Blanket proscriptions can be—and here are—unnecessarily overbroad. Indeed, a proscriptive approach incorrectly implies that certain practices are "right" or "wrong," irrespective of the circumstances. ICI is concerned that the use of proscriptive rules will result in less innovation, higher costs, and a narrower range of options for investors. Moreover, to the extent that the explicit inclusion of proscriptive language in the policies and procedures provisions of PTE 2020-02 could be read to require levelized compensation across different types of products, it could lead to the elimination of the full-service brokerage business model in the retirement space. This is contrary to the Department's stated goal when adopting PTE 2020-02 of preserving differential compensation models.[79] The Department specifically declined to include specific mandates regarding conflict mitigation as it wanted to avoid reducing the utility of PTE 2020-02.

> Financial Institutions that continue to offer transaction-based compensation would focus on both financial incentives to Investment Professionals and supervisory oversight of investment advice to meet the standards. The exemption lacks additional specific mandates regarding conflict mitigation in order to accommodate the wide variety of business models used throughout the financial services industry. The type and degree of conflicts is susceptible to change over

[76] Proposed PTE 2020-02 § II(c)(2), 88 Fed. Reg. at 76001.

[77] 85 Fed. Reg. at 82847.

[78] The preamble to PTE 2020-02 describes the exemption as principles based. *Id.* at 82800 ("this new exemption provides relief for multiple categories of Financial Institutions and Investment Professionals, and extends broadly to their receipt of reasonable compensation as a result of the provision of fiduciary investment advice. The conditions are principles-based rather than prescriptive, so as to apply across different financial services sectors and business models.").

[79] E.g., *Id.* at 82835 (noting that "establishing differential compensation based on neutral factors" is a mitigation strategy that financial institutions can look to in compensating investment professionals).

> time. The Department believes that prescriptive conflict mitigation provisions would decrease the utility of the exemption, now and in the future.[80]

ICI considers this approach a well-reasoned balancing of the Department's concerns with the commercial realities of a varied marketplace. As a practical matter, different compensation structures have different impacts depending on the market and the product, as well as the nature of the target investor. Moreover, the SEC in adopting Reg BI wisely adopted a similar approach, declining to dictate a laundry list of prohibited forms of compensation.[81] As SEC staff has applied and further interpreted Reg BI, they have confirmed that firm-level conflicts, with some exceptions, generally can be addressed by disclosure (as opposed to mitigation).[82] Importantly, Reg BI focuses on the mitigation (and potential elimination) of conflicts at the individual broker level, recognizing that the primary concern with regard to conflicts of interest is those that "create an incentive for an associated person to place his or her interests ahead of the interest of the retail customer," and therefore "removing [from the final rule] the affirmative mitigation requirement at the firm level."[83] The SEC also recognized the need for a flexible framework, as some firm-level conflicts of interest may require policies and procedures for mitigation or elimination. As the SEC further noted in adopting Reg BI: "[w]e believe that this approach appropriately balances our goal of reducing the potential harm conflicts of interest may have on broker-dealers' recommendations to retail customers and preserving retail access (in terms of choice and cost) to brokerage products and services."[84]

In sharp contrast to the approach and reasoning of PTE 2020-02 and Reg BI, the Department now effectively proposes to require the *elimination* of differential compensation without any consideration of the fact that compensation practices differ depending on the specific facts and circumstances—not only the products and services at issue, but also the market segments being served.[85] These market segments include not only retail versus institutional, but also larger

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[80] *Id.* at 82834.

[81] Exchange Act rule 15*l*-1(a)(2)(iii)(D), 17 CFR § 240.15l-1(a)(2)(iii)(D) (specifically limiting types of compensation only as follows: '[i]dentify and eliminate any sales contests, sales quotas, bonuses, and non-cash compensation that are based on the sales of specific securities or specific types of securities within a limited period of time").

[82] SEC Staff Bulletin, *Standards of Conduct for Broker-Dealers and Investment Advisers Conflicts of Interest*, modified Aug. 3, 2022, *available at* https://www.sec.gov/tm/iabd-staff-bulletin-conflicts-interest ("Firms also may find that there are some conflicts that they are unable to address in a way that will allow the firm or its financial professionals to provide advice or recommendations that are in the retail investor's best interest. In such cases, firms may need to determine whether to eliminate the conflict or refrain from providing advice or recommendations that could be influenced by the conflict to avoid violating the obligation to act in the retail investor's best interest.").

[83] 84 Fed. Reg. At 33387.

[84] 84 Fed. Reg. at 33390.

[85] This highlights the dangers, discussed above, of pursuing a one-size-fits-all exemption approach.

versus smaller plans. Moreover, the Department in Proposed PTE 2020-02 provides no meaningful justification for this significant shift in its approach.

ICI views this extreme approach as far beyond what is reasonably required to effectively mitigate conflicts of interest due to differential compensation. As Reg BI highlights, conflicts arising from differential compensation can reasonably be addressed short of eliminating differential compensation. To the extent the Department is concerned about an outsized adverse impact from specific types of differential compensation, we urge the Department to adhere to its traditional principles-based approach. This approach would place the entities best situated to evaluate the impacts of forms of differential compensation in the position of actually doing so, subject to Department guidance. To this end, the Department should accord wide latitude as to how financial institutions mitigate the potential effects of differential compensation in their policies and procedures.

When PTE 2020-02 was adopted, the preamble explained that financial institutions should look to conflict mitigation strategies identified by their other regulators. The SEC explicitly eschews a one-size-fits-all approach, recognizing that different firms face different circumstances that warrant flexibility in crafting reasonable policies and procedures. To that end, the SEC provides a number of potential mitigation methods that a firm could utilize, which the Department included as examples in the preamble to PTE 2020-02:

- avoiding compensation thresholds that disproportionately increase compensation through incremental increases in sales;
- minimizing compensation incentives for employees to favor one type of account over another; or to favor one type of product over another, proprietary or preferred provider products, or comparable products sold on a principal basis, for example, by establishing differential compensation based on neutral factors;
- eliminating compensation incentives within comparable product lines by, for example, capping the credit that an associated person may receive across mutual funds or other comparable products across providers;
- implementing supervisory procedures to monitor recommendations that are: near compensation thresholds; near thresholds for firm recognition; involve higher compensating products, proprietary products or transactions in a principal capacity; or, involve the roll over or transfer of assets from one type of account to another (such as recommendations to roll over or transfer assets in an ERISA account to an IRA) or from one product class to another;
- adjusting compensation for associated persons who fail to adequately manage conflicts of interest; and

- limiting the types of retail customer to whom a product, transaction, or strategy may be recommended.[86]

The Department should not deviate from this approach.

ICI also questions the Department's assertion that differential firm level compensation poisons the well for investment professionals whose compensation may be based in part on the financial institution's profit. The Department in the preamble to Proposed PTE 2020-02 describes its concern as follows.

> The Financial Institution must pay close attention to any Conflicts of Interest that may exist within the Financial Institution itself. For example, it is not enough merely to pay Investment Professionals the same percentage of the Financial Institution's compensation for a recommended investment product, as for other products, if the Financial Institution receives more compensation from recommending that product rather than other products. In such cases, the ''level'' compensation percentage effectively directly transmits the Financial Institution's conflict of interest to the Investment Professional, as the Investment Professional's compensation is increased in direct proportion to the profitability of the investment to the firm. Thus, Section II(c) requires the Financial Institution to look carefully at its own incentives and ensure that all recommendations are focused on the Retirement Investor's Best Interest rather than the Financial Institution's interests. [87]

By this logic, any profit inuring to a financial institution in connection with fiduciary investment advice would create an incurable conflict.

The fact that a financial institution receives different compensation in different scenarios and for different products does not by definition create a conflict that is then transferred to the investment professional when they provide advice to an investor. As the SEC observed in deciding to not unduly restrict firm-level compensation in Reg BI: "rather than requiring mitigation of all firm-level financial incentives, we have determined to refine our approach by generally allowing firm-level conflicts to be generally addressed through disclosure."[88] At the same time, the SEC recognized that some—but not all—firm level conflicts may in fact require firm-level mitigation.[89] **The SEC's acknowledgement that conflicts are not equal in all**

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[86] SEC, *Frequently Asked Questions on Regulation Best Interest* (modified Aug. 4, 2020), *available at* https://www.sec.gov/tm/faq-regulation-best-interest (recognizing that this is not intended to be an exhaustive list of potential mitigation practices).

[87] 88 Fed. Reg. at 75987.

[88] 84 Fed. Reg. at 73390.

[89] *Id.*

situations reflects a balanced approach that is lacking in Proposed PTE 2020-02. In situations where the SEC decided that disclosure alone is insufficient, the need to mitigate versus eliminate the conflicts is appropriately left to the discretion of the institution.[90] This approach recognizes that conflict mitigation is not a one-size-fits-all solution, but rather one that requires consideration of each firm's specific facts and circumstances.

In addition, section 22(d) of the Investment Company Act of 1940 limits a broker-dealer firm's ability to establish the price at which mutual fund shares are sold. Specifically, section 22(d) prohibits a mutual fund, the fund's principal underwriter, and dealers in the fund's shares from selling the fund's shares at a price other than a current public offering price disclosed in the fund's prospectus.[91] This public offering price includes any front-end sales load, deferred sales charge, or 12b-1 fee charged by the mutual fund. As a result of section 22(d) and other legal and practical limitations, it may not be possible for a broker-dealer firm to levelize the compensation it receives from different funds for selling their shares. While a broker-dealer firm can, under certain circumstances[92] in its discretion, charge uniform commissions on so-called "clean shares" offered by different fund families,[93] this approach is not always possible or preferable and would not permit the broker-dealer firm to receive fund-level compensation, such as sales loads and 12b-1 fees. Further, not every fund family offers clean shares, and other classes of shares may be beneficial for certain fund investors. More generally, it is not practical for each fund family whose shares the broker-dealer offers to agree to align its sales load schedule, breakpoints, and 12b-1 fees paid to the firm with those paid by other fund families. Such a requirement also would raise a question as to whether, to achieve levelized firm compensation, the firm's compensation for other comparable products, such as ETFs, would need to be similarly levelized with the mutual fund compensation the firm receives.

In light of the above as well as more generally, we also are concerned that a requirement to levelize firm compensation could reduce competition by introducing an artificial barrier on how different investment products compete in the marketplace. The Department in reducing price competition could reduce investor choice and make it more difficult for retirement investors to distinguish among investment products and solutions. ICI views it as important that regulators seek to foster, rather than reduce, competitive investor choice.

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[90] *Id.*

[91] 15 U.S.C. § 80a-22(d). See 17 C.F.R. § 270.22d-1.

[92] The broker-dealer firm must be acting solely as a broker (i.e., in an agency capacity).

[93] The restrictions of section 22(d) do not apply where a firm is acting solely as a broker, on behalf of its customers. In these circumstances, the SEC staff has taken the position that a broker may charge its customers commissions (determined in its discretion) for effecting transactions in "clean shares," which are a class of mutual fund shares without any front-end load, deferred sales charge, or other asset-based fee for sales or distribution. Capital Group, SEC Staff Interpretive Letter (Jan. 11, 2017), *available at* https://www.sec.gov/divisions/investment/noaction/2017/capital-group-011117-22d.htm.

Proscriptive rules such as those in proposed section II(c)(2) also have an adverse collateral effect of restricting or eliminating forms of compensation that are beneficial to investors. One such example is rights that may be acquired appurtenant to specific types of investments. Class A share mutual funds, for example, may include upon acquisition rights of appreciation ("ROA") and/or rights of exchange ("ROE"), both of which an investor would have decided to pay for up front as part of their decision to invest in the share class. ROA enable an investor to aggregate purchases within a given fund family to realize lower commissions as they make additional purchases. ROE grant an investor the right to sell the acquired shares and then acquire additional shares of another fund in the same fund family without paying a commission on the purchase. These rights have meaningful value to investors.

Our members are concerned that to the extent the above restrictions on forms of compensation and differential compensation are interpreted to prohibit the use of such rights going forward, investors will have lost value that they have already paid for. For example, an investor with ROE granted when they acquired a fund may consider selling their position and investing in another fund. As a result of the ROE they previously acquired, if they use the proceeds to purchase another fund in that family the broker will receive zero commission. If, however, the investor uses the proceeds to purchase a fund in a different fund family, the broker would receive a commission on that purchase. The ROE in this scenario results in differential compensation to the broker; it would be an unfortunate and, we assume, unintended result of Proposed PTE 2020-02 to prohibit such an arrangement.

ICI recommends the Department revert to the principles-based approach to policies and procedures embodied in current PTE 2020-02. Short of this, the Department should confirm that, irrespective of any prohibition in PTE 2020-02, differential compensation that is beneficial to an investor is permitted. Such an exception would be consistent with the Department's stated goal of furthering retirement investors' best interest. At a bare minimum we urge the Department to provide grandfather treatment to existing arrangements (such as ROA and ROE) that would result in differential compensation but provide rights to the investor.

3.3 The Enhanced Documentation and Disclosure Requirements Are Both Unnecessary and Unduly Burdensome

ICI understands the Department's focus on providing investors with appropriate information. However, the significant increase in the amount of information provided to investors under Proposed PTE 2020-02 will add minimal, if any, incremental value for investors while imposing significant additional costs on the retirement system. **We are increasingly concerned that as more disclosures are provided to investors (both under PTE 2020-02 and in many other contexts under ERISA and the securities laws), there is less likelihood that these additional disclosures will be effective.** Indeed, both the Department and Congress have acknowledged this

concern.[94] Our concerns are amplified by the undue burden that would be imposed on the retirement industry from the new requirements in Proposed PTE 2020-02 and other exemptions.

We highlight below a few specific concerns.

3.3.1 Requiring an Unqualified Acknowledgement of Fiduciary Status Is at Odds with Both the Proposed Fiduciary Rule and the Realities of the Marketplace

ICI is concerned that the proposed changes to the fiduciary acknowledgement are at odds both with ERISA and with the Proposed Fiduciary Rule, and moreover completely ignore the realities of how parties manage their businesses in delivering unconflicted advice. ERISA § 3(21) provides that:

> a person is a fiduciary with respect to a plan *to the extent* (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.[95]

The preamble to the Proposed Fiduciary Rule takes pains to emphasize that the Proposal purportedly preserves the statutory requirement that fiduciary status is determined on a transactional basis:

> It is important to note that each required component of the new proposed regulatory definition would have to be satisfied with respect to any particular recommendation for the recommendation to constitute fiduciary investment advice. In accordance with the statute, fiduciary status is determined on a transactional basis. Under the statutory text, a person is a fiduciary with respect to advice ‘‘to the extent . . . [they] render[] investment advice for a fee or other compensation, direct or indirect.’’ The proposed rule, like the statute, applies fiduciary status on a transaction-by-transaction basis. One is only a fiduciary ‘‘to the extent’’ the person making the recommendation meets the rule’s requirements with respect to the particular advice transaction at issue.[96]

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[94] DOL in the preamble to Proposed PTE 2020-02 has noted this concern, observing that “[d]ue to the complexity of some disclosures as well as investors’ propensity to ignore lengthy disclosures, disclosures often fail to accomplish their goals.” 88 Fed. Reg. at 75962. See SECURE 2.0 Act § 319.

[95] ERISA § 3(21) (emphasis added).

[96] 88 Fed. Reg. at 75901.

Unfortunately, this reference in the preamble to the statutory limitation does not carry through to Proposed PTE 2020-02. Sections II(b)(1) and (2) of Proposed PTE 2020-02 would require that prior to engaging in a transaction covered by Proposed PTE 2020-02, a financial institution provide a retirement investor with, among other items:

> (1) A written acknowledgment that the Financial Institution and its Investment Professionals are providing fiduciary investment advice to the Retirement Investor and are fiduciaries under Title I, the Code, or both when making an investment recommendation;
> (2) A written statement of the Best Interest standard of care owed by the Investment Professional and Financial Institution to the Retirement Investor….[97]

While the Department properly couches the acknowledgement as relevant "when making an investment recommendation," this qualification reads hollow in the context of the Proposed Fiduciary Rule. First, to the extent the financial institution or investment professional has *any* discretion or control under the "discretionary authority or control" context of the Proposed Fiduciary Rule test, they may well be deemed an investment advice fiduciary in all instances. Second, when viewed alongside the Proposed Fiduciary Rule, these disclosures under Proposed PTE 2020-02 may improperly create an impression on the part of an investor that fiduciary investment advice is being provided, even when such a result is not intended. In short, the above acknowledgement and written statement would themselves define one's status as an investment advice fiduciary. We view it as inappropriate for the Department to construct an exemption that effectively declares fiduciary status under the Proposed Fiduciary Rule, going well beyond those situations where the exemption properly should apply only "to the extent" such advice is provided.

In a similar vein, the Department misconstrues the reasons financial institutions provide qualified acknowledgements of fiduciary status. While the Department implies parties utilize "artful phrasing"[98] to sidestep fiduciary status, as noted above fiduciary status under ERISA section 3(21) is accorded only "to the extent" that one meets the statutory definition. Our members have indicated that in addition to reflecting the statutory language, parties utilize conditional language to reflect business realities. Specifically, a firm may construct its business model to reflect that it does not intend to provide fiduciary investment advice. However, as no processes are perfect, an employee in a business unit may inadvertently cross the threshold of providing fiduciary investment advice. To avoid a non-exempt prohibited transaction, the firm may have built a

[97] Proposed PTE 2020-02 § II(b), 88 Fed. Reg. at 76000-01.

[98] *Id.* at 75984.

"backstop" PTE 2020-02 compliance process that is triggered only if fiduciary investment advice is inadvertently provided.[99]

3.3.2 The Requirement to Provide Enhanced Fee Disclosures Upon Request is Unwarranted

Proposed PTE 2020-02 would impose a new requirement on financial institutions to provide retirement investors, upon request, detailed information about how the financial institution and investment professional are compensated in connection with their recommendations.[100] However, the Department offers no explanation as to why this significant new requirement is warranted. Additionally, as detailed in the Appendix, the Department greatly underestimates the costs associated with this requirement.[101]

The Department in its RIA incorrectly notes: "the Department expects that many financial institutions' disclosures, as required by the existing PTE 2020–02, already substantially comply with this regulation or would require modest adjustments to do so."[102] Moreover, the RIA makes numerous incorrect assumptions that significantly underestimate not only the effort required to build systems to comply with this requirement, but also the burden of complying.[103]

Contrary to the Department's assumption that many firms already have the necessary systems in place, our members have informed us that systems for complying with PTE 2020-02 may not exist for the institutional market, as many firms do not currently use PTE 2020-02 in that context. Depending on a financial institution's current infrastructure, it may be very challenging, costly, and time consuming to build capabilities to comply with this proposed requirement.

Additionally, while as contemplated by the Department this enhanced fee disclosure need not detail the costs and fees generated by each transaction with an investor, it nonetheless must provide extensive details beyond the standard disclosure. Indeed, it is unclear from the preamble where the balancing point is between not needing to detail compensation for individual recommendations and "demonstrat[ing] how the Financial Institution and its Investment Professionals are compensated in connection with their recommendations"—especially where recommendations may be made in different circumstances and across product lines. And for

[99] This backstop differs from the Department's criticism of backup methods of compliance in the preamble to PTE 2020-02. 85 Fed. Reg. at 82828. Here, the party does not intend to provide fiduciary investment advice.

[100] 88 Fed. Reg. at 75985. Proposed PTE 2020-02 § II(b)(4), *id.* at 76000.

[101] See Appendix pages 34-5.

[102] 88 Fed. Reg. at 75994.

[103] As discussed in the Appendix, DOL's cost estimates represent only a fraction of the actual implementation and compliance costs of the requirement. For example, DOL estimates only 10 requests per financial institution per year, and a total industry implementation and compliance cost in the first year of ~$2.85 million.

certain products. a detailed picture of a firm's compensation cannot be accurately conveyed in dollar terms at a single point in time.

We urge the Department to remove this proposed new requirement, as it is not supported by an adequate cost-benefit analysis.

3.3.3 The Enhanced Rollover Documentation and Disclosures Are Impractical and Unduly Burdensome

Proposed PTE 2020-02 would require a detailed disclosure in advance of either engaging in a rollover or recommending the post-rollover investment of assets. The proposal would add into the text of the exemption certain factors relevant to a rollover recommendation that were identified in the preamble to current PTE 2020-02:

> *(5) Rollover disclosure.* Before engaging in a rollover, or making a recommendation to a Plan participant as to the post-rollover investment of assets currently held in a Plan, the Financial Institution and Investment Professional must consider and document the basis for their conclusions as to whether a rollover is in the Retirement Investor's Best Interest, and must provide that documentation to the Retirement Investor. Relevant factors to consider must include but are not limited to:
> (A) the alternatives to a rollover, including leaving the money in the Plan or account type, as applicable;
> (B) the fees and expenses associated with the Plan and the recommended investment or account;
> (C) whether an employer or other party pays for some or all of the Plan's administrative expenses; and
> (D) the different levels of services and investments available under the Plan and the recommended investment or account.[104]

The addition of these enumerated factors into the text of the exemption raises concerns. In a plan-to-IRA rollover, it is not practical to require in every case that an investment professional must both consider, and provide documentation to an investor addressing, the investments, fees and expenses, and service levels of the plan from which assets would be transferred.[105] These concerns come to light when comparing this proposed requirement with the plan-to-IRA rollover requirements of Reg BI. While Reg BI generally flags the same considerations as Proposed PTE 2020-02, the SEC importantly retained a principles-based approach in not mandating the factors

[104] Proposed PTE 2020-02 § II(b)(5), 88 Fed. Reg. at 76000.

[105] This detailed, individualized discovery and analysis on an investor's plan also will require many financial institutions to make significant modifications to the systems they only recently built to facilitate PTE 2020-02 compliance.

a broker-dealer must consider. Rather, the SEC observed that "certain factors may have more or less relevance, or not be relevant at all, depending on the particular facts and circumstances of each recommendation."[106] Unlike the Department, the SEC recognized that the relevant considerations in a plan-to-IRA rollover may differ depending on the nature of the recommendation and the investor.

Another significant difference between the Reg BI approach and the Proposed PTE 2020-02 approach is that Proposed PTE 2020-02 mandates a detailed disclosure to the investor. Financial institutions will incur significant expense to build potentially large and complex systems both to gather this information and to export it to notices to investors.[107] To the extent firms currently collect this information, it generally is not maintained in a format that would facilitate meeting this new proposed disclosure requirement. We urge the Department to consider the significant costs, time, and effort that would be required to comply with this requirement, to say nothing of the additional expense to investors (discussed below).

The preamble to PTE 2020-02 provides an alternative path for financial institutions that cannot obtain plan-specific information from an investor, suggesting that the institution instead look to alternative resources such as Form 5500 filings or benchmarks of typical plan fees or expenses—and that these alternative sources then be used in preparing the disclosure to the investor.[108] The use of such generalized or non-plan specific information significantly undercuts the value to an investor of the rollover disclosure, as the plan comparator information would not be accurate as to any specific plan. To that end, we question the utility in this case of requiring a financial institution to compare retaining assets in what is effectively a hypothetical plan with hypothetical fees, versus moving to a proposed IRA investment.

Were the Department to nonetheless continue down this path, rather than encouraging firms to provide inaccurate rollover disclosures based on estimates, we recommend the Department consider requiring a comparison to the current plan only where the investor has provided the necessary information to the financial institution, which information should be limited to that contained in a plan's annual participant fee disclosure.[109] When one considers that a rollover disclosure is being provided for the benefit of the investor, it strikes us as inapposite to require a

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[106] 84 Fed. Reg. at 33383.

[107] See Appendix pages 30-33.

[108] 88 Fed. Reg. at 75986.

[109] While the Department observes that information regarding a plan may be available to an investor in the various participant fee disclosures required under 29 C.F.R. § 2550.404a-5, even if that is the case the theoretical availability of information is a far different matter than the practical ability and/or desire of a participant to locate the information and transmit it to the financial institution. Moreover, were the Department to require additional information regarding a plan beyond the annual participant fee disclosure, we believe it would materially lower the chances that a financial institution would receive the information, and also would significantly increase the costs and time required for financial institutions to train personnel to evaluate the information to determine what information is acceptable for comparison purposes.

financial institution to go to additional effort to provide an inaccurate rollover disclosure based on estimates where the retirement investor has declined or is unable to provide the information. Instead, the rollover disclosure could note that a comparison to the plan was not provided because the investor declined to provide the needed information. We believe that this approach would properly balance the investor's interests while not unduly burdening a financial institution with providing an inherently inaccurate rollover disclosure.

We are concerned that the practical effect of the enhanced documentation and disclosure requirements for a plan to IRA rollover will result in less guidance and assistance to plan participants seeking help in connection with the decision of whether to roll over, stay in the plan, or take a distribution. We appreciate the Department's recognition in the preamble to Proposed PTE 2020-02 that a financial institution may charge reasonable compensation for this plan comparison,[110] as this comparison will involve additional effort warranting incremental compensation to the financial institution. Moreover, we believe that such compensation is necessary to both ensure that financial institutions will be in a position to provide this review, and to provide clarity to investors as to the costs of this requirement. We are concerned, however, that this new requirement—and the necessary associated fees—could have a disproportionate impact on lower- and middle-income investors with smaller plan balances, because these fees would represent a proportionately larger share of their account balances.

Providing this "rollover" disclosure for IRA-to-IRA or account to account transfers may be of less value to investors than providing the information in connection with a plan-to-IRA rollover. We believe these other types of transfers also should be of lesser concern to the Department. Where monies have already been rolled out of a plan and are sitting in a non-ERISA IRA account, we believe it is more appropriate for other regulatory regimes such as the SEC to take the lead in regulating the investor-adviser relationship. And as a practical matter, a financial institution may face greater challenges in obtaining the requisite information than in the plan-to-IRA-rollover context, as the information would be that of a direct competitor.

We are also concerned that Proposed PTE 2020-02 would require a comparison with the current investment of assets in a range of situations where a comparison may not be warranted. Retaining assets in their current location may not be an option, such as in the case of a plan termination, a mandatory distribution under Code section 411(a)(11), or where an IRA account is being transferred/terminated. In cases such as this, the Department should make clear that a comparison to alternatives to the rollover recommendation—including any comparison to plan information—is not required.

[110] 88 Fed. Reg. at 75985.

3.3.4 The Department Should Not Implement an Additional, Duplicative Website Disclosure

Proposed PTE 2020-02 seeks feedback as to whether the Department should require, as part of PTE 2020-02, financial institutions to maintain certain website disclosures.[111] These disclosures would be available both to retirement investors and to the investing public in general. The contemplated website disclosure would include the required pre-transaction disclosure, a description of the financial institution's business model, associated conflicts of interest (including arrangements that provide third-party payments), and a schedule of typical fees;[112] and would be in addition to other required disclosures. While the Department does not elaborate on how frequently the website would need to be updated, we assume that regular updates could be required as the website would include details on a wide range of relationships with product manufacturers and other parties. As we note elsewhere in this comment letter, the Department in the Proposal acknowledges that increased disclosures may not be effective.

Our members view this contemplated website disclosure as duplicative and overly costly. Proposed PTE 2020-02 already would mandate new disclosures addressing, among other things, services provided and conflicts. Moreover, many clients already receive the disclosures required under PTE 2020-02 electronically. As such, this requirement would not drive better outcomes for investors while imposing significant additional expenses on financial institutions.

Beyond the above concerns, we are troubled by the fact that the Department is contemplating disclosure targeting the "investing public," as stated in the preamble to Proposed PTE 2020-02.[113] This goal is a significant regulatory overreach by the Department beyond ERISA governed plans. Moreover, we struggle to understand the import to the "investing public" in general of information regarding commercial relationships within the ERISA regulated plan space to justify what would be a significant undertaking for financial institutions.

In short, while we appreciate the Department's desire to explore additional ways to provide investors with transparency as to the fees they pay, the contemplated web disclosures are not an appropriate or reasonably administrable solution.

[111] 88 Fed. Reg. at 79585.

[112] 88 Fed. Reg. at 75986.

[113] 88 Fed. Reg. at 75986.

3.3.5 The Heightened Requirements for Limited Menus of Proprietary Products or Products that Generate Third-Party Payments Create an Inappropriate Presumption Against Limited Menus

The Department in the preamble to Proposed PTE 2020-02 confirms that restricted menus of proprietary products and products that generate third-party payments would still be permitted.[114] However, the Proposal infers a strong presumption that such limited menus are inherently conflicted and warrant heightened scrutiny by requiring that, to limit its offerings, a financial institution must adopt special and more robust policies and procedures. In the preamble, the Department provides an example of a framework that would suffice.[115] Our members are concerned that this enhanced policies and procedures framework misconstrues the nature of limited investment menus—particularly limited menus of proprietary products.[116] Practically speaking, all fiduciaries limit the scope of their duties and the universe of products they recommend. It is not feasible for *any* fiduciary to be in a position to prudently evaluate the entire range of offerings in the marketplace. Rather than providing a detailed prescriptive example of compliant policies and procedures, we urge the Department to reaffirm the principles-based approach outlined in the preamble to current PTE 2020-02. This approach properly accords financial institutions flexibility in how they comply with the best interest standard of PTE 2020-02 for restricted menus of proprietary products and products that generate third-party payments.

3.3.6 The Requirement to Provide Financial Institution Policies and Procedures to the Department Within 10 Business Days is Unreasonable

Proposed PTE 2020-02 would restate section II(c)(3) to require that financial institutions provide their complete policies and procedures to the Department within 10 business days upon request.[117] While this requirement may seem straightforward to the Department, in practice it may be challenging for financial institutions to comply with.

In most instances, an institution's policies and procedures do not exist as a stand-alone document that can be pulled off a shelf upon request. Rather, they are maintained in a manner so as to be of most use to the business. Policies and procedures more commonly are integrated into processes across different business segments. Compiling these documents for a Department request may

[114] 88 Fed. Reg. at 75987.

[115] *Id.*

[116] The Department in the preamble to PTE 2020-02 recognized these considerations. 85 Fed. Reg. at 82837. We urge the Department to confirm these views should it determine to move forward with a final amended exemption.

[117] 88 Fed. Reg. at 76001.

require reprogramming, as well as meaningful personnel time to translate them into a format for the Department.[118]

At a minimum we would request that the Department extend the time frame for compliance to 30 business days, with additional flexibility to the extent a financial institution reasonably requires more time to comply with a request. This would be a modest and reasonable extension. Absent such an extension and accommodation, many financial institutions will have no choice but to implement costly new procedures and build new processes in order to be able to comply with a potential Department request. We also request that the Department clarify in the text of PTE 2020-02 that a financial institution would not be required to provide a copy of its policies and procedures to a party other than the Department under any other provision of PTE 2020-02, such as the recordkeeping amendments the Department is considering. In addition to the time and expense such a requirement would entail, a financial institution's policies and procedures contain confidential proprietary business information that would be inappropriate to share with parties beyond the Department.

3.4 The Expanded Retrospective Review Imposes Unrealistic Burdens on Financial Institutions While Arguably Exceeding the Department's Authority

The expanded retrospective review exceeds what is reasonably warranted to foster compliance with PTE 2020-02. Among other things, the Department appears to exceed the scope of its regulatory authority in proposing to require that a financial institution confirm to the Department its compliance with certain Code requirements. Moreover, some of the requirements are at odds with applicable law. The Department proposes to require, as a condition of PTE 2020-02, that a financial institution confirm it has filed Form 5330 with IRS to report any non-exempt prohibited transaction related to the provision of fiduciary investment advice under the Code, has corrected these transactions, and has paid any resulting excise taxes. Under applicable guidance, Form 5330 reporting and payment/collection of excise taxes are matters reserved for IRS.[119] While the Department cites the Fifth Circuit's decision in *Chamber of Commerce v. DOL* to support this proposed requirement, the cited portion is an inapposite discussion relating to the absence of a private lawsuit provision in Title II of ERISA.[120] The Department's attempt to coopt enforcement authority that is exclusively the realm of IRS/Treasury is inappropriate. We urge the Department to eliminate the new section II(d)(3)(B) of proposed PTE 2020-02.

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[118] For example, policies and procedures may live on an Intranet in a format not conducive to being simply printed out.

[119] President's Reorganization Plan No. 4 of 1978, §§ 102, 105, 43 Fed. Reg. 47713 (Oct. 17, 1978) (expressly reserving for IRS/Treasury enforcement of the excise tax provision of 26 U.S.C. § 4975).

[120] 88 Fed. Reg. at 75988.

Specific to the requirement that a financial institution confirm it has filed Form 5330 for each non-exempt prohibited transaction, this requirement also overstates the scenarios in which Form 5330 is required. A taxpayer is not required to file Form 5330 if it self-corrects a failure and no excise tax is due. Again, we urge the Department to remove this requirement to review and confirm Form 5330 filings.

Beyond proposed section II(d)(3)(B), we are concerned that the Department's expectations of financial institutions do not comport with how real-world compliance operates. For example, proposed section II(d) states that the retrospective review must be "reasonably designed to assist the Financial Institution in detecting and preventing violations of, and achieving compliance with, this exemption…"[121] While this requirement (which is essentially the same as current PTE 2020-02) may appear a straightforward element of a reasonable compliance program, the Department states in the preamble that if certain failures are discovered, both (i) correcting transactions and (ii) revising policies and procedures would be expected in short order.[122] This requirement incorrectly implies that any failure is a fatal flaw in the policies and procedures. Policies and procedures are not guarantees—to expect such a result would lead to policies and procedures that are unworkable in the real world. The Department should clarify that a compliance failure under PTE 2020-02 does not necessarily mean that the policies and procedures are inadequate.[123]

The Department also seeks to impose unrealistic requirements on the senior executive officer providing the certification in connection with proposed section II(d)(3)(B). While the language of proposed section II(d)(3)(B) requires confirmation of the financial institution's actions, the Department in the preamble expands on this by explaining that it proposes to require the certifying officer to "carefully review transactions, correct violations, and pay any required excise taxes."[124] But the responsibility to correct violations and pay any required excise taxes lies with a financial institution, and not an individual. Additionally, larger organizations can have many *de minimis* errors that occur in the ordinary course. It is unreasonable to expect that a senior executive officer would be in a position to review each transaction. While we believe—as discussed above—that this section is inappropriate in the context of a Department exemption, to the extent the Department determines to retain it we urge the Department to reasonably and appropriately delineate parties' responsibilities by clarifying in the preamble that the certifying senior executive officer is not expected to conduct such a review.

[121] *Id.* at 76001.

[122] *Id.* at 75988.

[123] A violation could mean, for example, that additional or revised training is warranted, or that individual personnel action may address the issue.

[124] 88 Fed. Reg. at 85988.

We note that the retrospective review is effectively an annual policies and procedures review. Rather than continue to require a separate, often duplicative, process in the form of a retrospective review, we recommend the Department provide alternative paths for complying with the retrospective review requirement. For example, the Department could achieve its goals by providing that a financial institution's retrospective review can be satisfied by a policies and procedures review that provides similar effectiveness, testing, and review and potential updates to policies and procedures. Similarly, as the Department noted in finalizing PTE 2020-02: "Financial Institutions that are subject to the FINRA regulation should already be conducting a similar type of review."[125] In the spirit of encouraging efficiency and avoiding duplicative and overlapping regulatory requirements, we urge the Department to consider also providing that a FINRA review that meets the aforementioned requirements would satisfy the retrospective review element of PTE 2020-02.[126] The Department's concerns of fostering a culture of compliance should be well addressed through the comprehensive FINRA annual review process.

We also reiterate our earlier request[127] that the Department remove the requirement that the report, certification, and supporting data be provided to the Department within 10 business days of a request. The requirement to quickly turn over documents is unnecessary because the Department already has well-established enforcement mechanisms that allow it to obtain documents from financial institutions through voluntary requests and subpoenas.[128]

3.5 The Department Should Not Expand Access to Records to Parties Other Than the Department and IRS

When the Department adopted PTE 2020-02 it observed that the exemption struck a balance in limiting access to records demonstrating compliance with PTE 2020-02 to the Department and IRS, while also requiring that investors be provided with documentation explaining the reasons a rollover recommendation was in their best interest.[129] ICI believes this approach represented a proper balancing of interests, and appropriately considered the concerns of financial institutions. As the Department noted: "[t]he Department accepts that financial institutions may have concerns about internal compliance records, particularly the record of their retrospective reviews, becoming widely accessible."[130]

The proposed updated Section IV described in the preamble to Proposed PTE 2020-02 would completely ignore these previously acknowledged financial institution concerns. While the

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[125] 85 Fed. Reg. at 82839.

[126] Importantly, the FINRA annual review process entails direct hands-on involvement by a FINRA examiner.

[127] Letter from Susan Olson and David Abbey, ICI, to Office of Exemption Deters., EBSA (Aug. 6, 2020), at 12.

[128] See ERISA § 504.

[129] 85 Fed. Reg. at 82845.

[130] *Id.*

Department notes that it "believes that most parties will likely not request records,"[131] this is of little comfort considering the heightened risk of litigation such access would create. As such, we recommend that the Department retain the current language of Section IV.

The Department has ample other authority to enforce and oversee compliance with the terms of the exemption with respect to ERISA plans. Extending availability of compliance records to employers, unions, and participants, beneficiaries and IRA owners and their authorized representatives (i.e., plaintiff's lawyers), raises the specter of unnecessary litigation. In addition, such a requirement would appear to grant plan sponsors (or contributing employers with respect to a multiple employer plan) access to records of a financial institution's recommendations to individual participants. We do not believe the Department intends for such a result. **Given the Department's statement in the preamble to Proposed PTE 2020-02 that it does not intend to create a private right of action as between a financial institution or investment professional and an investor,[132] limiting access to records to the appropriate regulators should be sufficient.**

Should the Department determine to adopt the proposed revised Section IV notwithstanding these concerns, at a minimum we urge the Department to clarify in the text of PTE 2020-02 that a financial institution would not be required to provide a copy of any materials to the extent they contain confidential proprietary business information that would be inappropriate to share with parties beyond the Department and IRS.[133]

As a corollary to the litigation risk that expanding access to internal compliance records would engender, our members have indicated that the heightened risk of litigation will make firms less willing to avail themselves of PTE 2020-02. As firms structure their business to not fall under PTE 2020-02, retirement investors will find it harder to obtain investment advice.

3.6. Proposed PTE 2020-02 May Create a Private Right of Action for IRA Owners, Despite Department Claims to the Contrary

The Department in the preamble to Proposed PTE 2020-02 states that it does not intend to create any new causes of action for retirement investors:

> Neither the existing PTE 2020–02 nor the proposed amendment creates any new causes of action or requires Financial Institutions to provide enforceable warranties to Retirement Investors. The primary penalty for an IRA fiduciary that engages in a nonexempt prohibited transaction by failing to satisfy the exemption

[131] 88 Fed. Reg. at 75990.

[132] *Id.* at 75980

[133] While the Department references privileged information in proposed section IV(a)(3), 88 Fed. Reg. at 75990, this term typically is not used in the context of confidential business information and trade secrets other than when legal advice is implicated.

> conditions of amended PTE 2020–02 would be the prohibited transaction excise tax imposed under Code section 4975 and enforced by the Department of the Treasury and the Internal Revenue Service (IRS).[134]

While ICI appreciates the Department's stated intent, we are concerned that Proposed PTE 2020-02 would inadvertently create a private right of action for IRA owners.

Proposed PTE 2020-02 would require that retirement investors be provided with a statement of the best interest standard of care, which embodies the standard of care set forth in ERISA section 404. As such, it may be the case that the standard could be legally imposed and enforced without a written contract.[135] For IRAs, established contract law precedents and the doctrine of promissory estoppel may provide for enforceability of a unilateral contract acknowledged by the advice provider. In a unilateral contract, only one of the contracting parties makes a promise; the other party manifests assent by performance.[136] The unilateral contract is supported by the same consideration that would support a signed bilateral contract.[137] The components of a unilateral contract are clearly compatible with Proposed PTE 2020-02, where only the advice provider and not the investor is assuming new duties and responsibilities. The advice provider is affirmatively acknowledging acceptance of such duties and responsibilities and agreeing to act in a manner consistent with those duties and responsibilities in a notice provided to the investor at the times services are offered. The investor accepts the advice provider's offer by proceeding to use the firm's services, thereby forming an enforceable agreement under basic principles of contract law.[138]

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[134] 88 Fed. Reg. at 75980

[135] This would also be true for standards adopted by the SEC and FINRA.

[136] *Corbin on Contracts* § 1.23 (3d ed. 2004); see also *United States ex rel. Modern Elec., Inc. v. Ideal Elec. Security Co.*, 81 F.3d 240, 241 (D.C. Cir. 1996) (citing the "well-recognized" principle that "in a unilateral contract, performance constitutes acceptance of an offer"). Accordingly, "[t]he legal result is that the promisor is the only party who is under an enforceable legal duty. The other party to this contract is the one to whom the promise is made, and this promise is the only one in whom the contract creates an enforceable legal right." *Corbin on Contracts* § 1.23.

[137] *17A Am. Jur. Contracts* § 173; see also *Allen v. National Video, Inc.,* 610 F. Supp. 2d 612, 631 (S.D.N.Y 1985) *citing 1Williston, Law of Contracts* §90A ("[A] written contract need not be signed to be binding against a party, so long as the party indicates through performance of its terms or other unequivocal acts that it intends to adopt the contract"); see also *Wells v. JPC Equestrian, Inc.,* No. Civ.A.13-2575, 2015 U.S. Dist. LEXIS 3776 (M.D. Pa. Jan. 13, 2015) *citing Sullivan v. Allegheny Ford Truck Sales, Inc*., 423 A.2d 1292 (Pa. Super. Ct. 1980) ("A document signed by one party may be enforceable as long as both accept and act under its terms.")

[138] See *Corbin*, *supra*; see also *Coulier v. United Airlines, Inc.*, 2015 WL 2452393, at *5 (S.D. Tex. May 21, 2015) (the portion of defendant's website guaranteeing lower price for tickets purchased on the website was a "unilateral contract that the customer must accept by performance"); *Edquist v. Bidz.com, Inc.*, at *1 (D. Mass. Mar. 29, 2013) ("[A] person such as the plaintiff who accepts the terms offered by the defendant on its website by participating in an online auction governed by those terms has entered into a contractual relationship with the defendant.").

This is buttressed by the doctrine of promissory estoppel, pursuant to which a party that acts or refrains from acting in reliance upon a clear and unambiguous promise can enforce the promise even though the essential elements of a contract are not present.[139] These well-established legal principles may be sufficient to bind the advice provider to the ERISA duties and responsibilities embodied in Proposed PTE 2020-02.

This potential newly created private right of action for IRA investors may not be limited to contract claims. The potential application of ERISA Title I's fiduciary duties of prudence and loyalty to IRA assets beyond the rollover of assets from a Title I plan may carry with it the ERISA section 502 civil enforcement remedies for breaches of these duties. Specifically, section 502(a)(2) provides for actions brought by a participant, beneficiary, or fiduciary of a plan for a fiduciary's breaches of its fiduciary duties under ERISA—including of the duties of prudence and loyalty. As such, the Department may be (we assume unintentionally) exposing Title II IRA plans to private actions brought under ERISA section 502(a)(2).

The Fifth Circuit in vacating the BIC Exemption provisions regarding lawsuits held that providing a private right of action for IRA owners violates the separation of powers.[140] The court stated that:

> [o]nly Congress may create privately enforceable rights, and agencies are empowered only to enforce the rights Congress creates. In ERISA, Congress authorized private rights of action for participants and beneficiaries of employer sponsored plans, 29 U.S.C. § 1132(a), but it did not so privilege IRA owners under Title II. DOL may not create vehicles for private lawsuits indirectly through BICE contract provisions where it could not do so directly.[141]

This is precisely what we believe the Department is inadvertently doing in Proposed PTE 2020-02—creating a private right of action for IRA owners. This result runs directly at odds with the Fifth Circuit's decision. [142] The likelihood that the Department is creating a private IRA cause of action under ERISA, as well as state law contract claims, is heightened by the various enhanced disclosures in Proposed PTE 2020-02. Indeed, it may well be that these disclosures end up being

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[139] Restatement (Second) of Contracts § 90; see also Williston on Contracts § 8:7 (4th ed. 2008) ("[B]oth versions of the Restatement recognize that in certain circumstances, a promise might be enforced despite the absence of consideration – and, according to some courts, despite the absence of other elements necessary to form a traditional contract – based on the promisee's foreseeable, reasonable, justified and detrimental reliance on the promise"); *Allen v. A.G. Edwards & Sons, Inc.*, 606 F.2d 84, 87 (5th Cir. 1979) (recognizing promissory estoppel where broker-dealer, "[h]aving benefitted from oral agreements transacted through local agents, appellant cannot now be heard to complain of failure to observe formalities").

[140] 885 F.3d at 377.

[141] *Id.* (citing *Alexander v. Sandoval*, 532 U.S. 275 (2001), and its progeny. *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1387-88 (2015)) (citation omitted).

[142] 885 F.3d at 381-84.

of far more use to the plaintiffs' bar than to investors. The plaintiffs' bar will likely be attracted by this new opportunity to flesh out untested standards, knowing that defending such suits will be expensive and raise the potential for large settlements.

3.7 The Expanded Ineligibility Provisions Are Both Unnecessary and Inappropriate

Proposed PTE 2020-02 also expands the circumstances under which a financial institution or investment professional no longer could rely on PTE 2020-02. While the Department describes these expanded circumstances as "mostly for clarity,"[143] they would represent a significant broadening of the ineligibility provisions. The import of this expansion is all the greater in light of the proposed elimination (via amendment) of alternative exemptions under which an investment advice fiduciary would be able to receive compensation.[144]

3.7.1 The Expanded List of Criminal Convictions Triggering Loss of Eligibility Is Beyond Those Reasonably Related to PTE 2020-02

ICI is concerned with the Department's proposed expansion of those criminal convictions triggering a loss of eligibility for PTE 2020-02. Currently, PTE 2020-02 provides for ineligibility due to "a conviction of any crime described in ERISA section 411 arising out of such person's provision of investment advice to Retirement Investors…."[145] Proposed PTE 2020-02 would significantly expand this to convictions:

> by a U.S. Federal or state court as a result of any felony involving abuse or misuse of such person's employee benefit plan position or employment, or position or employment with a labor organization; any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company or fiduciary; income tax evasion; any felony involving larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime in which any of the foregoing crimes is an element; or a crime that is identified or described in ERISA section 411….[146]

We appreciate that PTE 2020-02 currently provides a mechanism for a convicted party to petition the Department for "a determination that the Financial Institution's continued reliance on the

[143] 88 Fed. Reg. at 75988.

[144] DOL's reference to the availability of other available administrative prohibited transaction exemptions in proposed section III(d) is a hollow assurance, considering DOL's proposed amendments to numerous class exemptions to make them unavailable for the provision of fiduciary investment advice.

[145] PTE 2020-02 § III(a)(1), 85 Fed. Reg. at 82864.

[146] Proposed PTE 2020-02 § III(a)(1)(A), 88 Fed. Reg. at 76001.

exemption would not be contrary to the purposes of the exemption."[147] **Unfortunately, the combination in Proposed PTE 2020-02 of a litany of crimes triggering loss of eligibility, the loss of an opportunity to be heard in many instances, and the structure of the opportunity to be heard all call into question the true utility of Proposed PTE 2020-02.**

The expanded list of crimes triggering loss of eligibility is unreasonably broad. The preamble asserts that this expanded list will, in the Department's view, "help foster a culture of compliance throughout the organization in recognition of the importance of investment advice to Retirement Investors."[148] However, the purpose of the various requirements of PTE 2020-02 itself is to promote a compliance culture within the firm providing investment advice. In a large organization, unrelated convictions (including those on the Department's proposed expanded list) may occur irrespective of robust processes and checks in connection with the provision of investment advice to retirement investors.

Including these additional crimes as triggers for a loss of eligibility takes PTE 2020-02 well beyond the regulation of investment advice to an attempt to broadly police the culture and behavior of entire organizations, including affiliates that have nothing to do with the provision of investment advice. For example, it is unclear why the conviction of an employee of a foreign affiliate with no connection (other than an indirect ownership link) to the US business unit and the investment professional providing advice to a US retirement investor would be relevant to the qualification of the business unit or the investment professional to provide such advice. The Department has no authority to promote a "culture of compliance" in entities it cannot regulate directly. We respectfully request that the Department retain the current scope of crimes triggering ineligibility.

In this vein, we also recommend that the Department restrict such convictions to those committed by an entity relying on PTE 2020-02, and to not include convictions of affiliates of the entity. The Department in explaining this proposed expansion to affiliates notes that it "remains concerned that a Financial Institution facing ineligibility for its actions affecting retirement investors could merely change its corporate form and continue to rely on the exemption."[149] However, there are less burdensome ways in which the Department could address this concern. At a minimum, we would ask that the Department clarify in the language of the exemption that affiliate crimes where the conviction date is prior to the effective date of amended PTE 2020-02 would not be grounds for ineligibility.

Moreover, as we noted in our comment letter when PTE 2020-02 was originally proposed,[150] the Department already has the ability to limit use of prohibited transaction exemptions through its

[147] PTE 2020-02 § III(c)(1)(A), 85 Fed. Reg. at 82864.

[148] 88 Fed. Reg. at 75989.

[149] 88 Fed. Reg. at 75989.

[150] Letter from Susan Olson and David Abbey, ICI, to Office of Exemption Deters., EBSA (Aug. 6, 2020).

well-established enforcement mechanisms. In this respect, the Department has authority under ERISA to enter into settlement agreements with financial institutions and investment professionals providing services to ERISA plans requiring them to structure their advice programs in reliance on other exemptions (or to not engage in prohibited transactions), or to pursue judgments or consent decrees requiring them to do so.[151]

Proposed PTE 2020-02 clarifies in section III(a)(1) that a conviction triggers ineligibility as of the conviction date, irrespective of the pendency of appeals, in a departure from the current exemption. We request that an opportunity to be heard be reinstated for determinations of ineligibility due to such convictions.

We would also ask that the Department clarify in the language of the exemption that crimes that occurred prior to the effective date of amended PTE 2020-02 would not be grounds for ineligibility.

3.7.2 The Department Should Exclude Foreign Criminal Convictions from the List of Disqualifying Crimes

Proposed PTE 2020-02 would expand the criminal convictions that trigger ineligibility for PTE 2020-02 to include criminal convictions "by a foreign court of competent jurisdiction as a result of any crime, however denominated by the laws of the relevant foreign or state government, that is substantially equivalent to" the above-referenced domestic criminal convictions.[152] The Department provides no explanation for the inclusion of foreign criminal convictions, other than the aforementioned goal of fostering a culture of compliance throughout an organization. The proposed inclusion of foreign criminal convictions as triggering ineligibility is unnecessarily broad.

Proposed PTE 2020-02 would disqualify a financial institution from using PTE 2020-02 even where the only connection between the investment advice entity and the entity convicted of a foreign crime is a small, indirect ownership interest (e.g., 5%). Similarly, automatic disqualification can occur because of foreign convictions that involve conduct completely unrelated to the provision of fiduciary investment advice. **These proposed modifications to Section III(a) are overly broad and, thus, are likely to disqualify more entities than is reasonably necessary to achieve the Department's stated objective.**

The proposed changes to Section III(a) also raise serious questions of fairness, national security, and US sovereignty.[153] Not all countries have fair criminal justice systems and independent

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[151] ERISA § 504.

[152] 88 Fed. Reg. at 76001.

[153] These issues also have been raised by members of Congress both in Congressional hearings and in correspondence with DOL. See Letter from Sen. Bill Cassidy to Acting Sec'y of Labor Julie Su (Nov. 29, 2023)

judiciaries. For example, Secretary of State Blinken has raised "significant concerns with Russia's legal system… to advance its own agenda, using individuals as political pawns."[154] Yet the proposed amendment grants Russia and all other foreign jurisdictions the ability to leverage their courts to negatively impact the operations of domestic US financial institutions and the financial markets.

Indeed, in our view disqualifying a financial institution based on foreign convictions under legal systems that may have vast differences form the US legal system raises substantial due process concerns. The Department is ill equipped to judge the fairness of foreign legal systems, or to assess the comparability of provisions of foreign criminal laws to disqualifying US convictions. Moreover, the inclusion in Proposed PTE 2020-02 of foreign criminal convictions would impermissibly expand the Department's jurisdiction extraterritorially.[155] Congress in enacting ERISA specifically enumerated that convictions by federal or state courts—not foreign courts—form a basis for ineligibility to act as a fiduciary under ERISA. The policy implications of this position deserve consideration by other relevant agencies within the Administration, including the State Department, the Justice Department, and the Department of Commerce.

Given the foregoing, we urge the Department to exclude foreign criminal convictions from the list of disqualifying crimes. If the Department nonetheless determines it is necessary and appropriate to make some foreign criminal convictions disqualifying, we encourage the Department at a minimum to (i) reduce the resulting cost and disruption by more narrowly tailoring the list of disqualifying foreign criminal convictions to those where there is a clear and direct nexus between the conduct that resulted in the foreign conviction and the fiduciary investment advice that is the subject of PTE 2020-02 and (ii) provide that ineligibility due to foreign convictions would not be triggered until all applicable appeals have been exhausted. As to this last point, delaying a trigger until applicable appeals have been exhausted would help account for the fact that many foreign jurisdictions do not accord due process protections in line with US state and federal courts.

(criticizing the inclusion in proposed amended PTE 84-14 of foreign convictions as potentially disqualifying an entity from relying on the exemption).

[154] Press Statement of US Secretary of State Blinken (Aug. 4, 2022), *available at* https://www.state.gov/convictionand-sentencing-of-u-s-citizen-brittney-griner-in-russia/. See also Fact Sheet entitled "Issuance of a Hong Kong Business Advisory," Office of the Spokesperson, US Department of State (July 16, 2021), *available at* https://www.state.gov/issuance-of-a-hong-kong-business-advisory/ ("Businesses operating in Hong Kong may face heightened risks and uncertainty related to PRC retaliation against companies that comply with sanctions imposed by the United States and other countries, including through enforcement of the PRC's Countering Foreign Sanctions Law.").

[155] See *Small v. United States*, 544 U.S. 385 (2005).

3.7.3 The Availability of Individual Exemptions as Alternative Exemptive Relief Following Ineligibility Provides Little Comfort

Proposed PTE 2020-02 sections III(b)(2)(C) and III(d) provide that if an entity has become ineligible to rely on PTE 2020-02, exemptive relief may be available through an individual prohibited transaction exemption. While we appreciate this acknowledgement, in practice it provides little comfort for parties determined to be ineligible under PTE 2020-02. While subsection (C) is new, the practice of granting an individual exemption where a party no longer satisfies the requirements of a class exemption is not. Asset managers have regularly applied and worked with the Department on individual exemptions, such as when the QPAM Exemption becomes unavailable due to convictions.[156] Until fairly recently, the Department was willing to work with asset managers to come to an agreement regarding workable, appropriate exemption terms.

Our concerns regarding this new subsection are similar to the concerns we voiced in our comment letter to the Department regarding its proposal on procedures governing the filing and processing of prohibited transaction exemption applications (the "PTE Procedures Proposal").[157] As in the PTE Procedures Proposal, the Department is increasingly adopting onerous conditions for granting individual exemptions and seems even less likely to grant them in the future.[158] Moreover, the time required to obtain an individual exemption has grown significantly. In the end, we fear that a party disqualified under PTE 2020-02 may be unlikely to receive an individual exemption that is usable, assuming one could even be obtained.

The Department also proposes to reduce the timing of ineligibility from one year to six months after a finding of ineligibility. The Department describes this change as being made to simplify the process and create uniformity.[159] As a practical matter, however, we view this shortened time frame as making the chances of timely obtaining an individual prohibited transaction even more remote. This result is even more significant because the Department is proposing to eliminate alternative paths for exemptive relief for providing fiduciary investment advice under numerous

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[156] For example, since the initial grant of the QPAM Exemption DOL has granted 14 individual exemption requests from QPAM applicants in connection with a foreign conviction. See 87 Fed. Reg. at 45216; https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/exemptions/individual.

[157] Letter from David Abbey and Shannon Salinas, ICI, to Office of Exemption Deters., EBSA (May 31, 2022).

[158] In recent years, the Department has become increasingly reluctant to grant administrative exemptions. DOL granted four individual exemptions in 2022, three in 2021, and one in 2020, though the Department did grant at least 20 in 2023 (of which eight were related). The Department has only granted three class exemptions in the past 16 years (and those three were all in connection with the Department's changes to the definition of the term "fiduciary"). This slowdown of the exemption process has discouraged parties from requesting individual relief and prevented plans and service providers from developing new and innovative offerings for retirement savers**.** See EBSA Index of Individual Exemptions, *available at* https://www.dol.gov/agencies/ebsa/laws-andregulations/rules-and-regulations/exemptions/granted.

[159] 88 Fed. Reg. at 75989.

other commonly relied on class exemptions, making PTE 2020-02 the only available class exemption. The consequence is that an ineligible party is much more likely to find itself no longer able to provide fiduciary investment advice for a fee.

We recommend the Department modify Proposed PTE 2020-02 to reflect the realities of the individual prohibited transaction exemption process. Specifically, we recommend the Department revise the dates as of which ineligibility would take effect to provide that, where an ineligible entity has applied for an individual prohibited transaction exemption within 90 days following any of the circumstances outlined in proposed section III(b)(1), the person would not become ineligible under PTE 2020-02 until such time as the application is either (i) granted and effective (at which time the terms of the individual exemption would take effect), or (ii) 180 days after the date such application is rejected. These changes would ensure that a party can avail itself of the administrative individual exemption process, while providing the Department with the means to avoid a result where a party could indefinitely delay ineligibility.

3.8 The Department Should Expand the Scope of Covered Principal Transactions to Benefit Retirement Investors

ICI believes there is a meaningful opportunity for the Department to include additional principal transactions that are beneficial to investors as it considers changes to PTE 2020-02. As an initial matter, PTE 2020-02's limited relief for Covered Principal Transactions is inconsistent with the treatment of principal transactions under SEC rules. Under Reg BI, the SEC does not prohibit principal transactions; rather, Reg BI addresses any conflicts through the rule's disclosure and conflict of interest provisions.[160] Permitting only Covered Principal Transactions involving a specified set of investments as proposed ignores the important safeguards provided under the federal securities laws with respect to principal transactions. It also effectively conflicts with ERISA's prescription against the creation of "legal lists" of permissible investments[161] and the Department's historic practice of not designating certain classes of investments as prudent or not prudent for plans.[162]

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[160] In the preamble to Reg BI, the SEC explains that the rule does not prohibit a broker-dealer from making recommendations where conflicts of interest are present, including recommending a security underwritten by the broker-dealer or a broker-dealer affiliate, including initial public offerings, and recommending a transaction to be executed in a principal capacity. The broker-dealer must, however, ensure that its interests are not placed ahead of the investor's interest by satisfying Reg BI's requirements. 84 Fed. Reg. at 33334.

[161] Congress explained that it did not intend for ERISA to contain a legal list of investments. S. Rep. No. 93-383, 1974 U.S.C.C.A.N. 4889, 4984 (Aug. 21, 1973).

[162] Preamble to ERISA Section 404 Regulation, 44 Fed. Reg. 37221, 37225 (June 26, 1979).

At a minimum, we urge the Department to reconsider our 2020 request to expand the definition of Covered Principal Transaction to include sales to a plan or IRA of closed-end fund (CEF) shares during an initial public offering (IPO).[163]

CEFs do not present the types of conflicts of interest, valuation, or liquidity concerns that the Department previously raised for securities typically traded in principal transactions.[164] In a typical operating company equity IPO, for example, the issuer consults with its underwriters and sets a specific capital target that the offering must raise at a valuation determined by a negotiation between the issuer and the underwriters. In contrast, the assets raised in a CEF IPO depend solely upon investor demand discerned during the initial offering period. For the CEF IPO, the underwriting syndicate members are committing only to the shares needed to fill their clients' indications of interest—rather than issuer and syndicate goals. Beyond that, the underwriters hold little or no additional inventory.

In addition, no valuation concerns are present as the CEF holds only cash proceeds immediately following the offering, which are then promptly invested in a pool of securities in accordance with the fund's investment mandate. Pricing is known at the outset of the IPO and high transparency and liquidity opportunities continue after launch.[165] CEFs also offer an important choice for long-term investors in IRAs and tax-deferred accounts—they offer investors access to less-liquid investments, increased leverage, and consistent distributions to shareholders. Because these funds are offered at inception through principal transactions, the Department's position could hurt both retirement and other investors in ways that cannot be remedied simply by allowing plans and IRAs to purchase CEFs in the secondary market. We therefore urge the

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[163] Letter from Susan Olson and David Abbey, ICI, to Office of Exemption Deters., EBSA (Aug. 6, 2020). Like an open-end mutual fund, a CEF is a pooled investment vehicle that offers shares almost exclusively through a public offering registered under the Securities Act of 1933, with applicable fees, expenses, and offering costs fully disclosed in an initial prospectus. CEFs differ from open-end mutual funds in that they are generally not offered continuously and typically have a fixed number of shares issued during the IPO. Notably, CEFs generally do not issue redeemable shares; after the IPO, investors buy and sell shares on the secondary market at prices established through market trading. The exchange and market participants provide investors with price transparency and liquidity throughout the trading day. Because a CEF does not need to maintain cash reserves or sell securities to meet redemptions, the fund has the flexibility to invest in less-liquid portfolio securities. CEFs also may access increased leverage, enabling them to provide enhanced distributions (with relatively higher risk).

[164] 85 Fed. Reg. at 40840.

[165] For example, the Investment Company Act of 1940 subjects CEFs to important investor protections, including board-approved valuation procedures and ongoing board oversight. Similar to open-end funds, CEFs must determine a per share net asset value (NAV) periodically and the vast majority of closed-end funds publish them each business day, which enables investors to effectively compare the CEF's NAV to its market price on any given day. See, e.g., Duvall, James, and Irina Atamanchuk, "The Closed-End Fund Market, 2022" ICI Research Perspective 29, no. 5 (May 2023), *available at* www.ici.org/files/2023/per29-05.pdf (more than 95 percent of exchange-listed closed-end funds calculate the value of their portfolios every business day, while others calculate their portfolio values weekly or on some other basis).

Department to modify the Covered Principal Transaction definition so IRA owners and other savers in retirement accounts can have the opportunity to participate in CEF IPOs.

The Department in rejecting the requested expansion of Covered Principal Transactions to CEF IPOs (and other types of potential investments) in 2020 stated it was declining to do so "based on the potentially acute conflicts of interest created by principal transactions" and that it viewed the individual prohibited transaction exemption process as a more appropriate means to obtaining exemptive relief for such transactions.[166] For the reasons noted above, the Department's concerns are misplaced in the case of CEF IPOs. Moreover, due to the timing of CEF IPOs and the amount of time required to obtain an individual prohibited transaction exemption from the Department, offering the prospect of individual exemptive relief has the effect of shutting plans and IRAs out of the CEF IPO market.

3.9 Amended PTE 84-24 Should Retain Relief for Pre-Approved Plan Providers

The Department in the preamble to Proposed PTE 84-24 requested comments on whether parties will use the relief in proposed section II(a) for the transactions outlined in section III(a)-(f). It also asks whether parties are currently relying on section III(f) for pre-approved plans. ICI members have indicated that section III(f) is still relied on in the marketplace, and that it is important that this relief continue to be available. For pre-approved plan providers where the plan offers the sponsoring investment company's funds, loss of section III(f) relief would make it difficult to continue to offer these products to the marketplace.

On a separate note, we also have concerns with proposed section IX that are similar to those expressed above in connection with the recordkeeping provisions of PTE 2020-02. As discussed in detail above, we believe it is inappropriate for the Department to provide parties other than the Department with access to detailed records, here of a principal underwriter or investment company, in connection with PTE 84-24. Should the Department nonetheless determine to provide such access, we urge the Department to restrict access to records that contain confidential business, commercial, or financial information.[167]

3.10 The Department Should Permit Investment Advice Under PTE 77-4

We have serious concerns with the Department's proposed changes to PTE 77-4. As the Department is aware, PTE 77-4 has been in place for over 40 years, and it provides strong investor protections. Eliminating the availability of PTE 77-4 for fiduciary investment advice would be highly disruptive and would create material new costs which will ultimately be borne by plans and participants.

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[166] 85 Fed. Reg. at 82817.

[167] While the Department does propose to restrict access to "privileged" commercial and financial information, this term is typically utilized only in connection with information that contains or reflects legal advice and not confidential information.

PTE 77-4 already provides robust protections for plans and participants. It prohibits financial institutions from "double dipping" by charging multiple layers of advisory or management fees. It also includes "safeguards [that] require that appropriate disclosure be made to a second plan fiduciary… with particular emphasis on the nature of the investment advisory and other fees paid by the mutual fund to its investment adviser and how such fees differ from the fee paid directly by the plan to its fiduciary."[168] **Importantly, PTE 77-4 does not provide relief for the receipt of sales commissions, effectively addressing a conflict of particular interest to the Department. PTE 77-4's protections are so robust that they have served as the basis for dozens of individual exemptions issued by the Department over the past four decades.**

The Department has not provided any enforcement or other data indicating that PTE 77-4 is not sufficiently protective of investors. The Department's primary concern with PTE 77-4 appears to be that the availability of multiple exemptions creates an "unlevel playing field," and the Department would prefer that most financial institutions move to PTE 2020-02. As discussed above this single-exemption approach is inconsistent with the framework of ERISA, which has always included a patchwork of custom-tailored exemptions, and it fails to account for the fact that some financial institutions will still be able to rely on existing individual or statutory exemptions instead of PTE 2020-02.

In addition, as explained earlier in section 3.1, the proposed change would result in firms needing to use two different exemptions for services where currently one exemption covers the activity. As proposed by the Department, a financial institution would need to use Proposed PTE 2020-02 for the initial advice element, and would still need to use PTE 77-4 for discretionary management services.

In sum, the proposed changes to PTE 77-4 will require financial institutions to change longstanding business practices and create entirely new compliance regimes. These changes will have costs that the Department has failed to properly identify, analyze, and account for. In our view, the costs of the disruption alone far outweigh any theoretical benefit to plans and participants.

Section 4: The Proposal Violates the Administrative Procedure Act (APA) and Does Not Comport with the Fifth Circuit's Decision

As discussed in greater detail in the Appendix, the Department has failed to adequately analyze the tremendous cost of this overly broad Proposal. Moreover, the Proposal raises the same concerns expressed by the Fifth Circuit in 2018. As the Fifth Circuit explained, this regulation must withstand APA review, ensuring it is not arbitrary, capricious, contrary to law, or in excess of statutory authority.[169] As we describe below, the Proposal does not meet any of these

[168] Notice of Pendency of Proposed Class Exemption Requested by T. Rowe Price Associates, 41 Fed. Reg. 50516, 17 (Nov. 16, 1976). See also DOL Adv. Op. 93-12 (Apr. 27, 1993).

[169] 5 U.S.C. § 706(2)(A).

thresholds. Rather, the Proposal is unnecessary[170] and would have detrimental consequences for the very investors the Department seeks to protect.

4.1 The Proposal Fails to Follow the Fifth Circuit's Decision by Improperly Imposing Fiduciary Status on Relationships in Which Advice Is Provided on a Solely Incidental Basis

With the broad proposed definition of an investment advice fiduciary (particularly the facts and circumstances test in proposed paragraph (c)(1)(ii)), the Department intentionally captures investors' transactions with brokers, as the 2016 Rule also was intended to do. As we have explained to the Department in prior letters, this will lead to the broader adverse effects we warned of in our 2015 comment letters, such as reduced access to various investment products, services, and tools.[171]

The SEC recognized these implications when it crafted Reg BI, which is a robust standard that significantly enhances the existing standard of conduct applicable to broker-dealers providing recommendations to retail customers. The SEC in developing Reg BI intentionally adopted a standard of conduct for broker-dealers that is distinct from the fiduciary standard that applies to investment advisers under the Advisers Act. This was in recognition of the key differences between the broker-dealer and investment adviser business models, consistent with the SEC's goal of preserving choice for retail investors regarding the advisory services they receive and how they pay for them.[172] Among these differences are that broker-dealers provide recommendations on a transactional basis for a commission or other transaction-based compensation and, unlike an adviser who typically has an ongoing relationship for which an

[170] The Department asserts that the Proposal is necessary to cover recommendations of rollovers out of ERISA-covered plans, but the current test already applies to rollovers, provided that the five-part test is met. This is particularly true since the Department has withdrawn DOL Advisory Opinion 2005-23A (the "Deseret Letter"). (Under the Deseret Letter, the Department stated that it is not fiduciary advice to make a recommendation as to distribution options even if that advice is accompanied by a recommendation as to how the distribution should be invested.) In assessing the 2016 Rule, the Fifth Circuit observed: "[t]he Rule expressly includes one-time IRA rollover or annuity transactions where it is ordinarily inconceivable that financial salespeople or insurance agents will have an intimate relationship of trust and confidence with prospective purchasers." *Chamber*, 885 F.3d 360, 380 (5th Cir. 2018). Because the Proposal aims to cover rollover recommendations in much the same manner as the 2016 Rule, we believe the court's assessment would continue to hold true. It is worth noting that rollover recommendations that fall outside of the five-part test are covered under other standards—the SEC's Reg BI, the SEC's IA Fiduciary Standard, and the NAIC model, as adopted by the majority of states.

[171] See *infra* section 4.3.

[172] The SEC explained that it had "declined to subject broker-dealers to a wholesale and complete application of the existing fiduciary standard under the Advisers Act because it is not appropriately tailored to the structure and characteristics of the broker-dealer business model (i.e., transaction-specific recommendations and compensation), and would not properly take into account, and build upon, existing obligations that apply to broker-dealers, including under FINRA rules." 84 Fed. Reg. 33318, at 33322 (July 12, 2019).

asset-based fee is paid, a broker-dealer may provide monitoring only to the extent it is solely incidental to its primary brokerage business.

The SEC cautioned that applying the Advisers Act fiduciary standard to broker-dealers "would result in fewer broker-dealers offering transaction-based services to retail customers, which would in turn reduce choice and may raise costs for certain retail customers."[173] ICI agreed with this approach and supported Reg BI. The SEC took a well-reasoned, well thought out approach regarding the standard to apply to broker-dealers because it understood the importance of preserving the brokerage business model. **The Department, on the other hand, again has failed to heed warnings that its actions will have the result of limiting choice and reducing access for the very people it seeks to protect.**[174]

The Department should recognize Reg BI as a meaningful and robust standard of conduct for broker dealers that complements—but is distinct from—the investment adviser fiduciary standard of conduct. Consistent with this and to provide strong protections while retaining access to advice for retail investors, we urge the Department to reflect the vital differences between true "fiduciary" relationships and those in which advice is provided on a "solely incidental" basis. Failure to maintain this critical distinction, for example, by treating those persons subject to Reg BI as "fiduciaries" under ERISA, will undermine both the Department's and the SEC's stated policy goals and have detrimental implications for retirement savers and retail investors generally.

The Fifth Circuit stressed the importance of this age-old distinction, noting with approval that the five-part test "echoed" the distinction between brokerage and advisory business models.[175] The court found that, with the 2016 Rule, the Department improperly disregarded legitimate differences between investment advisers (who have well-settled relationships of trust and

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[173] 84 Fed. Reg. 33318, at 33330 (July 12, 2019). Further, the SEC explained that it did not believe that applying the same standard "would provide any greater investor protection (or, in any case, that any benefits would justify the costs imposed on retail investors in terms of reduced access to services, products, and payment options, and increased costs for such services and products)." *Id.* at 33322. The Department recognizes the SEC's support for this business model, noting in footnote 24 of the Proposal that "[t]he SEC stated in the Regulation Best Interest release that 'there is broad acknowledgment of the benefits of, and support for, the continuing existence of the broker-dealer business model, including a commission or other transaction-based compensation structure, as an option for retail customers seeking investment recommendations.'" 88 Fed. Reg. at 75893 (citing 84 Fed. Reg. 33318, 33319 (July 12, 2019)).

[174] The Department refers to the 2016 Rule and notes that it had "cited evidence that holding broker-dealer representatives to fiduciary standards at the State level does not impair access to their services." 88 Fed. Reg. at 75894. We would note that, generally, while state-level fiduciary rules do affect the standard of conduct itself, they do not impose the prohibited transaction rules, necessitating PTEs, which ERISA imposes on fiduciaries.

[175] "The [1975] regulation also echoed the then thirty-five-year old distinction drawn between an 'investment adviser,' who is a fiduciary regulated under the Investment Advisers Act, and a 'broker or dealer' whose advice is 'solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor.'" *Chamber*, 885 F.3d 360, 365 (5th Cir. 2018).

confidence with their clients) and brokers and insurance agents (who receive compensation for completed sales). As the court noted, Congress was well aware of this distinction when it enacted ERISA.[176] There is ample evidence Congress did not intend ERISA to disrupt the lawful functioning of the securities markets, prevent retirement investors from accessing information on investments, or turn the "ordinary functions of consultants and advisers" into fiduciary activities.[177]

As the Fifth Circuit made clear, fiduciary status turns on the existence of a relationship of trust and confidence between the fiduciary and the client.[178] The Department makes frequent use of the terms "trust" and "confidence" in the preamble to the Proposal. For example, the preamble posits "under each of these three contexts [where fiduciary status applies], the Department believes that retirement investors could reasonably place their trust and confidence in the advice provider."[179] **But based on the actual elements of the Proposal, Department appears to be paying mere lip service to the Fifth Circuit's emphasis on the importance of a relationship of trust and confidence for fiduciary status to attach.**

It is not just semantics to point out the flaw in this application of the phrase "trust and confidence" to a relationship. A relationship is a two-way street and cannot be viewed from one side alone. While the Department is focused solely on the perspective of the retirement investor—an important perspective, we agree—the Department makes no effort to address the other side of the equation—that is, whether the party in question intended to enter into a fiduciary relationship. In doing so, the Department has left no viable way for a person or financial institution to define their relationship with an investor by stating clearly and unequivocally (and not in a fine print disclaimer) that it is not acting as a fiduciary.[180] In each of the three alternative contexts comprising the definition of fiduciary investment advice, a

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[176] *Id.* at 372.

[177] See ERISA Conference Report, P.L. 93-406, at 323 ("…the ordinary functions of consultants and advisers (other than investment advisers) may not be considered as fiduciary functions…"); *Id.* at 309 (some otherwise prohibited transactions "nevertheless should be allowed in order not to disrupt the established business practices of financial institutions" and directing the Secretaries of Labor and Treasury to grant an administrative exemption for brokerage services).

[178] *Chamber*, 885 F.3d 360, 370 (5th Cir. 2018). The court further explains: "Moreover, all relevant sources indicate that Congress codified the touchstone of common law fiduciary status—the parties' underlying relationship of trust and confidence—and nothing in the statute 'requires' departing from the touchstone." *Id.* at 369.

[179] 88 Fed. Reg. at 75901.

[180] The Department states that its "intent in including [paragraph(c)(1)(v)] in the proposal is to permit parties to define the nature of their relationship" and that "[t]o the extent counterparties wish to avoid fiduciary status, they can avoid structuring their relationships to fall within the circumstances described in that subparagraph." 88 Fed. Reg. at 75903 and 75907. However, as we explained above, the status-based nature of the tests within the definition makes this difficult to do with any certainty.

financial institution could be unintentionally swept into the proposed definition due to the status-based nature of the contexts.

The Fifth Circuit also noted the importance of the distinction between mere sales conduct, which does not usually create a fiduciary relationship under ERISA, and investment advice for a fee, which does.[181] The Department flatly disagrees, stating: "the Department rejects the purported dichotomy between a mere 'sales' recommendation to a counterparty, on the one hand, and advice, on the other, in the context of the retail market for investment products."[182] While the Department may disagree with the Fifth Circuit's interpretation and its distinction between sales and advice, **c**ourts (and not the Department) ultimately have conclusive authority to determine the meaning of a statute.

This position is further evidenced by the lack of exclusions in the proposed definition for any type of selling activity. We acknowledge that the Fifth Circuit criticized the Department's use of "carve-outs," as evidence that the definition itself was overly broad. However, we are at a loss to understand how the appropriate solution could be to craft an equally broad rule and simply leave out needed exclusions. The Proposal suffers the same problems as the 2016 Rule, and therefore the same need exists for exclusions.[183] Not including them does not change the need and does nothing to cure the Proposal from its fatal overbreadth.

We also note that the Fifth Circuit disagreed with the Department's broad interpretation of the statutory language "advice for a fee or other compensation" because it captures payments related to sales activity.[184] The Proposal's definition of "for a fee or other compensation, direct or indirect" is nearly identical to the definition included in the 2016 Rule, and in our view this expansive language runs afoul of the Fifth Circuit's decision.

[181] The court stated, "Congress does not 'hide elephants in mouseholes.' … Had Congress intended to abrogate both the cornerstone of fiduciary status—the relationship of trust and confidence—and the widely shared understanding that financial salespeople are not fiduciaries absent that special relationship, one would reasonably expect Congress to say so." *Chamber*, 885 F.3d 360, 376 (5th Cir. 2018).

"When enacting ERISA, Congress was well aware of the distinction, explained further below, between investment advisers, who were considered fiduciaries, and stockbrokers and insurance agents, who generally assumed no such status in selling products to their clients. The Fiduciary Rule improperly dispenses with this distinction." *Id.* at 372.

[182] 88 Fed. Reg. at 75907.

[183] The activities excluded under the 2016 Rule included: transactions with independent fiduciaries with financial expertise, swap and security-based swap transactions, and employees. The 2016 Rule's exclusions from "recommendation" included: platform providers, selection and monitoring assistance, general communications, and investment education.

[184] The court explains, "Further, DOL's interpretation conjoins 'advice' with a 'fee or other compensation, direct or indirect,' but it ignores the preposition 'for,' which indicates that the purpose of the fee is not 'sales' but 'advice.'" *Chamber*, 885 F.3d 360, 373 (5th Cir. 2018).

4.2 The Proposal Exceeds the Department's Authority

Although the Department has authority to define "fiduciary" for purposes of Title I and Title II of ERISA, the Proposal exceeds this authority by arbitrarily expanding the concept of fiduciary beyond that intended by Congress and by imposing Title I duties on Title II arrangements.

After providing an overview of "Other Regulatory Developments" such as the SEC's 2019 regulatory package and the NAIC's efforts in this area, the Department asserts that "[a]fter careful review of the existing regulatory landscape, the Department too has concluded that existing regulations should be revised to reflect current realities in light of the text and purposes of Title I of ERISA and the Code."[185] The difference between the SEC's issuance of Reg BI and this effort is that Congress gave the SEC express authority in section 913 of the Dodd-Frank Act to create a standard for broker-dealers.[186] Under ERISA, conversely, the Department's authority over the provision of investment advice is limited to those who are "fiduciaries." **The Department cannot simply decide who it would like to subject to its authority by departing from the common law concept of "fiduciary."** As the Fifth Circuit stated: "[a] perceived 'need' does not empower DOL to craft de facto statutory amendments [expanding its authority to Title II plans] or to act beyond its expressly defined authority."[187]

The Department also exceeds its authority by imposing Title I duties upon Title II arrangements. When Congress enacted ERISA, it imposed duties of prudence and loyalty under Title I on parties acting as fiduciaries to ERISA plans (i.e., employer-sponsored retirement plans).[188] Congress purposely declined to impose these duties with respect to non-ERISA arrangements (i.e., IRAs) under Title II (although it did determine it appropriate to apply prohibited transaction rules under both Title I and Title II). As the Fifth Circuit confirmed, "IRA plan 'fiduciaries,' though defined statutorily in the same way as ERISA plan fiduciaries, are not saddled with these

[185] 88 Fed. Reg. at 75893. The Department further explains "If these investment advice providers [who do not meet the current five-part test] are not fiduciaries under Title I or Title II of ERISA, they do not have obligations under Federal pension law to either avoid prohibited transactions or comply with the protective conditions in a prohibited transaction exemption (PTE)." 88 Fed. Reg. at 75892.

[186] The Second Circuit affirmed that the SEC properly issued Reg BI under this authority. *XY Planning Network v. SEC*, 963 F.3d 244 (2d Cir. 2020).

[187] *Chamber*, 885 F.3d 360, 379 (5th Cir. 2018). The court was clear that Congress was aware of IRAs when ERISA was enacted, and "chose not to require advisers to individual retirement plans to bear the duties of loyalty and prudence required of Title I ERISA plan fiduciaries." *Id.*at 378-9.

[188] ERISA § 404(a)(1) provides that a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan; with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims[.]"

duties, and DOL is given no direct statutory authority to regulate them."[189] However, just as the Department did with the 2016 Rule, it has crafted the Proposal to impose Title I duties of prudence and loyalty onto IRAs.[190]

The Department points out several times that, unlike under the BIC Exemption, the Department did not include in Proposed PTE 2020-02 a contract or warranty provision enforceable by IRA owners (provisions which the court had criticized) as a requirement of PTE 2020-02.[191] However, the Department does not provide an explanation for its failure to heed the court's admonition regarding its imposition of these new duties onto IRAs. While the Department does have authority to exempt prohibited transactions under both Title I and Title II of ERISA, it does not have authority to extend Title I fiduciary duties to actors Congress did not intend to so cover.[192]

The Fifth Circuit, however, was clear on these points, stating: "[e]xpanding the scope of DOL regulation in vast and novel ways is valid only if it is authorized by ERISA Titles I and II. A regulator's authority is constrained by the authority that Congress delegated it by statute."[193] And further, "[d]espite the differences between ERISA Title I and II, DOL is treating IRA financial services providers in tandem with ERISA employer-sponsored plan fiduciaries. The [2016] Fiduciary Rule impermissibly conflates the basic division drawn by ERISA."[194] The Department has repeated this erroneous conflation with the Proposal.

4.3 The Proposal Has Not Been Issued in Conformance with the APA

We urge the Department to consider that there is a strong basis for a court to find that the Proposal's RIA (if included in any final rule) fails to meet the applicable standards under the APA. Under the APA, it is incumbent on the Department to fully evaluate the Proposal's costs,

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[189] *Chamber*, 885 F.3d 369, 381 (5th Cir. 2018). As the court further explained, "[t]hat times have changed, the financial market has become more complex, and IRA accounts have assumed enormous importance are arguments for Congress to make adjustments in the law, or for other appropriate federal or state regulators to act within their authority." *Id.* at 379.

[190] The Department accomplishes this by crafting an extremely broad definition of "investment advice fiduciary" and then forcing all investment advice fiduciaries to comply with PTE 2020-02, which includes the same "Impartial Conduct Standards" as the BIC Exemption, which the Fifth Circuit objected to, as applied to Title II. See *id.* at 383 (rejecting the Department's attempt through the BIC Exemption to extend Title I's prudence and loyalty duties to brokers and insurance representatives selling to IRA plans). The *Chamber* court further criticized the Department for effecting what it described as "dramatic industry-wide changes" due to the impracticality of separating IRA transactions from non-IRA securities advice and brokerage. *Id.*at 385-6. The Department arguably seeks to do the same with the Proposal.

[191] 88 Fed. Reg. at 75962.

[192] *Chamber*, 885 F.3d 369, 381 (5th Cir. 2018).

[193] *Id.* at 379.

[194] *Id.* at 381.

including compliance costs, and compare them to the benefits that the Proposal would engender.[195] Our review of the rule, focusing on the economic analysis provided within it, finds that the Proposal does not meet this requirement. **Further, it is arbitrary for an agency to impose billions of dollars in costs—as it would here—without identifying benefits that warrant such burdens, and without explaining why less costly alternatives are not being pursued instead**.

As described in more detail in the Appendix, the RIA fails to quantify any purported benefits,[196] while likely grossly underestimating the costs of the changes, in terms of both the direct costs of implementation and the costs to investors from loss of access to information and assistance. While the Department does list some qualitative benefits, as the Appendix details, these supposed qualitative benefits are highly speculative.

Although the Department refuses to quantify any benefits of *this* Proposal, it nevertheless seeks to recycle benefit estimates it cited in its flawed RIAs for the 2015 Proposal and the 2016 Rule. The Department based much of its 2015 RIA on its supposition that funds sold through a broker underperform, contending that such underperformance could cost IRA mutual fund investors $340 billion over 10 years and nearly $1 trillion across the next 20 years. The RIA for the 2015 Proposal did not, however, provide an adequate basis for the supposition that broker-sold funds in fact do "underperform," as ICI pointed out in several comment letters.[197] Nor did the 2015 RIA address the significant net societal harm that could result from the rule by causing investors to pay more for advice and service or by reducing their access to such advice. Thus, the Department's previous benefit estimates were in large part illusory. The Department cannot refuse to provide updated quantitative benefit estimates in this Proposal, but nonetheless continue to cite its deeply flawed benefit estimates from the 2015 RIA and 2016 Rule.

As was true of the Department's RIAs for the prior iterations of the rule, the Proposal's RIA does not consider or discuss the likelihood that the Proposal would harm retirement investors. Although the Department dismissed ICI's concerns that the issuance of its 2016 Rule would harm retirement savers, there can be no denying that the pending application of the final rule was already having a consequential impact on the marketplace by 2017.[198] As we explained to the Department in 2017:

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[195] See *Michigan v. EPA*, 576 U.S. 743, 752-53, 759 (2015).

[196] "The Department is unable to quantify all benefits, costs, and transfers of the proposal but has sought, where possible, to describe these non-quantified impacts." 88 Fed. Reg. at 75929.

[197] In fact, our findings, based on our own analysis of the actual performance of fund investors in broker-sold funds, contradict the RIA's "underperformance" claims. See pages 16 to 24 of letter from Brian Reid and David W. Blass, ICI, to Office of Regulations and Interpretations, EBSA (July 21, 2015).

[198] For a more fulsome discussion of the harms to investors caused by the anticipated applicability of the 2016 Rule, see pages 7 through 18 of letter from Brian Reid and David Blass, ICI, to Office of Regulations and Interpretations, EBSA (April 17, 2017) ("ICI's April 2017 RIA Letter").

> [a]s has been widely reported, several large intermediaries have announced a variety of changes to service offerings, including firms announcing that they will no longer offer mutual funds in IRA brokerage accounts; others no longer offering any IRA brokerage accounts at all; firms reducing web-based financial education tools; and others announcing that account minimums will be raised or that advisory services for lower-balance accounts will be discontinued.[199]

We also explained to the Department that the pending application of the 2016 Rule was accelerating the shift from commission-based accounts to fee-based accounts, which would cause many investors to pay more for advice.[200] Indeed, in many instances our members were informed by their intermediary partners that they would no longer service certain account holders in light of the 2016 Rule. We noted that some investors, particularly those with smaller account balances, would find themselves unable to find a broker willing to serve them and would be unable to meet the minimum balances required for a fee-based account.

Further, regarding the Department's process for soliciting comments on the Proposal, the APA requires the Department to give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation. While there is not a specified time period under the APA to allow for comment, we would argue that the Department has violated the APA with its compressed comment period.

The Proposal makes significant and novel changes to the current regulatory framework that will require significantly more time for meaningful analysis and comment, and to understand how the Proposal would impact access and choice for retirement savers. As we have explained, while the Proposal effectively sweeps in a broad range of sales, marketing, and educational communications like the 2016 Rule did, many of the details of the proposed changes are different from the 2016 Rule and require extensive and careful review. The Proposal's 60-day comment period is simply insufficient to allow interested parties adequate time to provide meaningful

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[199] *Id.* at p. 7, citing "A Complete List of Brokers and Their Approach to 'The Fiduciary Rule'," Wall Street Journal (February 6, 2017), *available at* https://www.wsj.com/articles/a-complete-list-of-brokers-and-their-approach-to-the-fiduciary-rule1486413491. The SEC also noted these harms in explaining its reasons for adopting Reg BI. 84 Fed. Reg. at 33322 ("Our concerns about the ramifications for investor access, choice, and cost from adopting either of these approaches are not theoretical. With the adoption of the now vacated [2016 Rule], there was a significant reduction in retail investor access to brokerage services, and we believe that the available alternative services were higher priced in many circumstances."). See also "Analysis of the Effects of the 2016 Department of Labor Fiduciary Regulation on Retirement Savings and Estimate of the Effects of Reinstatement," Hispanic Leadership Fund (November 8, 2021), *available at* https://hispanicleadershipfund.org/wp-content/uploads/2021/11/FINAL_HLF-Quantria_FiduciaryRule_08Nov21.pdf.

[200] See page 5 of ICI's April 2017 RIA Letter.

input on the Proposal.[201] As we explained in our joint request for an extension of the comment period,[202] which the Department denied, the Department provided the public much longer comment periods in prior iterations of this Proposal.[203] In this case, the Department only granted 39 workdays for interested parties to review and comment. This approach significantly limits the utility of public input and results in less fulsome analysis of the implications of the changes. Additionally, the timing of the publishing of the Proposal in the Federal Register means that the comment period fell over multiple federally recognized holidays as well as numerous recognized days of religious observance, with comments due on January 2. This has only further complicated and limited the ability of industry stakeholders and other interested parties to provide meaningful input on the Proposal.

Furthermore, holding the hearing on December 12 and 13 (a mere 39 days after the Proposal's publication in the Federal Register) effectively shortened the 60-day comment period for those who requested to testify at the hearing because they needed to prepare at least some of their comments in time for the hearing. By setting the hearing date before the close of the comment period, the Department implied that this was merely a "check the box" exercise, rather than an effort to receive helpful feedback.[204] Holding the hearing after the end of the comment period

[201] See letter from Senators Jon Tester, Gary C. Peters, Joe Manchin III, Christopher A. Coons, Benjamin L. Cardin, Margaret Wood Hassan, Kyrsten Sinema, and John Hickenlooper to Acting Secretary of Labor Julie Su, DOL (December 20, 2023) ("Given the broad impacts of this potential rulemaking, we are concerned that you are rushing this process and the people that will be hurt are the ones you are trying to help the most. We believe that a thorough and thoughtful comment processes yield better results for those impacted by rulemakings."). See also letter from Major L. Clark, III and Meagan Singer, Office of Advocacy, U.S. Small Business Administration, to Lisa M. Gomez, Assistant Secretary, EBSA (December 20, 2023) ("Small entities have told Advocacy that they lack the resources necessary to respond to such an extensive proposal within the current time frame….As such, small entities impacted by this rulemaking have been disadvantaged in the process.").

[202] Letter from 18 Associations to Lisa Gomez, Assistant Secretary, EBSA (November 8, 2023). Similar concerns have been expressed to the Department from members of Congress. See letter from Rep. Virginia Foxx, Chairwoman, House Committee on Education and the Workforce, to Julie Su, Acting Secretary, DOL (November 17, 2023).

[203] In connection with the 2010 Proposal, the Department initially set a 90-day comment period that was then extended 14 days. The Department then held a public meeting, followed by a 15-day comment period for response. For the 2015 Proposal, the Department initially allowed for a 75-day comment period and then granted a 15-day extension. A further 15-day comment period followed the public hearing. As such, the Department allowed a total comment period of 129 days in connection with the 2010 Proposal, and 105 days in connection with the 2015 Proposal. Were one to align these time frames with that proposed here by also including the intervening days between the end of the extended initial comment periods and beginning of the post-hearing comment periods, the effective comment periods were 157 days and 128 days, respectively.

[204] In the Department's response letter denying the joint trade request for an extension, Ms. Gomez said, "one benefit of holding the public hearing before the comment period closes is that the testimony will inform the comments EBSA receives. EBSA encourages all interested parties to testify, watch the virtual hearing, and respond to, clarify, and emphasize points that are made during the hearing when submitting their comments by the January 2, 2024 deadline." Letter from Lisa Gomez, Assistant Secretary, EBSA, to Lisa Bleier, SIFMA (November 14, 2023). However, as each organization did not have sufficient time to complete its analysis prior to the hearing, those

would have allowed for the Department to ask questions about the comments that they had received, fostering clarification and better understanding. Commenters also would have been able to provide feedback to the Department on the input provided by others.

The APA also requires that the Department show its work as part of the RIA.[205] In at least two instances the Department failed to provide underlying documentation, and thereby failed to show its work in a timely manner. In the first instance, the Department references a new consultants' study, cited as an "unpublished draft" from August 2023.[206] ICI was unable to locate this document. Ultimately, we submitted a FOIA request, accompanied by a direct request to the Department, requesting the release of this study.[207] While the Department promptly sent a link to the study after receiving our request (on November 29, 2023), we had no ability to access the study for nearly half of the already short 60-day comment period. This study actually undermines the Department's case for the need for the Proposal. The Department cites the study as showing that investors in load funds improved the timing of their trades after Reg BI took effect and speculates that Reg BI's enhanced standard of conduct caused the improvement. However, the study does not actually support the Department's claim that the Proposal is needed. When we were finally able to obtain and review the study, we found that it confirms that the market has changed significantly, which further limits any potential benefits from this Proposal.[208]

In the second instance, the Department relied on Form 5500 data for 2021 in its discussion of the impact on retirement investors, citing to the "forthcoming" Private Pension Plan Bulletin.[209] Although tabulated using July 2023 data, and labeled as a September 2023 publication, the report was not made available to the public until nearly mid-December 2023—over halfway through the 60-day comment period.

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watching the hearing were only benefiting from partially developed comments. Thus, we are not convinced that holding the hearing before the close of the comment period provided any meaningful benefit.

[205] See *Owner-Operator Indep. Drivers Ass'n v. FMCSA*, 494 F.3d 188, 199 (D.C. Cir. 2007) (citing *Solite Corp. v. EPA*, 952 F.2d 473, 484 (D.C. Cir. 1991), explaining that integral to the APA's notice and comment requirements "is the agency's duty to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules."). See also *Chamber of Commerce v. SEC*, 443 F.3d 890, 900-01 (D.C. Cir. 2006)("By requiring [that] the 'most critical factual material' used by the agency [in support of its position] be subjected to informed comment, the APA provides a procedural device to ensure that agency regulations are tested through exposure to public comment, to afford affected parties an opportunity to present comment and evidence to support their positions, and thereby to enhance the quality of judicial review.")

[206] Constantijn Panis & Karthik Padmanabhan, Buy Low, Sell High: The Ability of Investors to Time Purchases and Sales of Mutual Funds, Intensity, LLC. (August 14, 2023). Unpublished draft, cited in footnote 414, 88 Fed. Reg. at 75943.

[207] See letter from Susan Olson and Elena Chism, ICI, to Office of Regulations and Interpretations, EBSA (November 28, 2023).

[208] See Appendix pages 8-9.

[209] See footnotes 290 and 299 of the Proposal, 88 Fed. Reg. at 75930 and 75931.

The Department's reliance on information not made available to the public until halfway through the unusually short 60-day comment period hindered ICI's assessment of the Proposal. This, coupled with the premature hearing and the Department's unwillingness to extend the comment period, is further evidence of the Department's rush to judgement in issuing the Proposal before it has demonstrated a need for it or a benefit from it.

Section 5: The Proposed Effective Date (60 Days After Publication) is Wholly Inadequate and Unreasonable

Beyond the numerous substantive concerns with the Proposal, we and our members are concerned about the proposed effective dates in the Proposal. The Department proposes that the final package, including both the amended definition and the various amended PTEs, would be effective 60 days after publication in the Federal Register. Irrespective of whether our concerns with the Proposal as outlined in this letter are fully addressed, a 60-day effective date is wholly inadequate to permit sufficient time to prepare for these changes. As the Department is well aware, many of the PTEs that the Department proposes to extensively overhaul have been in use for decades. And other than the three-year-old PTE 2020-02, the exemption regime that many companies have relied on for decades and upon which they have structured their businesses would no longer be available.

An effective date of 60 days after the Proposal is finalized stands in sharp contrast to earlier efforts. The 2010 Proposal (which did not include amendments to PTEs) was proposed to be effective 180 days after publication of the final rule in the Federal Register.[210] While the 2016 Rule became effective 60 days after publication in the Federal Register, the requirements of the final rule (including the BIC Exemption) were generally not applicable until 12 months after publication of the final rule.[211] Similarly, when PTE 2020-02 was finalized in 2020, it had an effective date of 60 days after publication of the final PTE. However, the effective dates of important aspects of the exemption were delayed until, in some cases, more than 18 months after publication of the final PTE.[212] In setting these prior effective and applicability dates, the Department recognized that coming into compliance with major changes like these simply requires time.

[210] 75 Fed. Reg. at 65269.

[211] 81 Fed. Reg. at 20946; 81 Fed. Reg. at 21002.

[212] 85 Fed. Reg. at 82845. As transition relief to allow financial institutions to develop compliance structures, the Department allowed parties to continue to rely on FAB 2018–02 until December 20, 2021 (one year following publication of the final exemption). See note 17 *supra*. Also see FAB 2021-02 (providing that through January 31, 2022, the Department would not pursue prohibited transaction claims against investment advice fiduciaries who were working diligently, and in good faith, to comply with the Impartial Conduct Standards for transactions exempted in PTE 2020-02; and that the department would not enforce the specific documentation and disclosure requirements for rollovers in PTE 2020-02 through June 30, 2022).

It is possible that some asset managers would not use the exemptions associated with the Proposal because they do not intend to become ERISA fiduciaries by providing investment advice.[213] Even for these firms, a 60-day period to come into compliance is not sufficient. This is because such financial institutions will need to review every aspect of their business (e.g., websites, call center training, informational and marketing materials regarding offerings and funds, support provided to intermediaries and the relationships with intermediaries, and other lines of business). Further, they must respond to the needs of intermediaries who are relying on the exemptions, in particular the proposed changes to PTE 2020-02 (especially if the proposed restrictions on differential compensation are retained).

While we recognize that many financial institutions may already be relying on PTE 2020-02 for *a part* of their business, it is inaccurate to infer from this that these companies can easily port in the significant activities that will be covered under the revised definition of an investment advice fiduciary. First, many institutions, as explained above, have structured their business (or least significant parts of their business) to not require reliance on PTE 2020-02. Nonetheless, some have established systems for compliance with PTE 2020-02 as a backstop to cover any potential instances where they inadvertently find themselves providing fiduciary investment advice under current law. These existing systems may not be able to accommodate the sudden influx of a large portion of an organization's business, as the Proposal would require. Modifying these systems to accommodate such a change is itself a significant undertaking that cannot reasonably be accomplished in 60 days. Second, those systems that do exist will need to be extensively revised to account for changes to PTE 2020-02. These revisions will require new procedures and extensive reprogramming. Moreover, the systems will need to be revised to account for new interconnections (such as the above-referenced detailed fee disclosures upon request and the Department's ability to request policies and procedures) not currently required. Third, the proposed expanded restrictions on the permissible forms of compensation will require extensive reworking of business models, compensation structures, and internal policies and procedures. Many client relationships also will need to be reexamined and potentially renegotiated to account for forms of compensation that would no longer be permitted.

Further, the Department should consider the fact that the financial services and asset management industries are facing several regulatory changes from the SEC (including several proposals that are pending or planned) that have the potential to fundamentally alter the current regulatory landscape. Many of the systems and people that would be called upon to implement the changes required by the Proposal will be the same ones to implement the various SEC rules, likely together and at the same, or close in, time, resulting in significant enhancements and changes to existing systems or the need to build new systems. The specter of so many new

[213] See *supra* note 30.

requirements applying simultaneously raises risks and bears serious consideration to ensure a more orderly implementation which would better serve investors.[214]

In short, the proposed extensive reworking of the exemptive regime relied on by a significant portion of the retirement industry, combined with forcing numerous new lines of business into PTE 2020-02 and imposing significantly more onerous requirements for its use, will require significantly more than 60 days for impacted companies to address. As noted in the Appendix, the industry will bear significantly greater expenses to comply with the amended PTEs than the Department has estimated. These costs will be vastly higher if financial institutions are left with no choice but to rely on ad hoc, manual processes while they build the necessary systems and revise their processes and renegotiate relationships as needed to comply with the amended PTEs. Such manual process will only increase the chances of inadvertent breaches. **As such, we urge the Department to delay the Proposal's effective date by 24 months.**

We note that to the extent the Department were to consider non-enforcement relief for a period of time after the effective date, this would not provide meaningful comfort for impacted parties (though such relief would be necessary if the Department proceeds with a 60-day effective date). A party availing itself of this non-enforcement relief may still be in the position of having engaged in a prohibited transaction, and as such would still be liable for excise taxes under the Code. Moreover, the party presumably would be required to report the resulting prohibited transactions in its retrospective review and potentially face disqualification under PTE 2020-02 if the insufficient time to prepare results in a large number of breaches. Importantly, the party would be exposed to potential claims brought by private parties for causing a plan to engage in a prohibited transaction.[215] If the Department moves forward with this flawed Proposal, it is essential to give regulated parties a reasonable time for implementation.

* * *

We respectfully submit the foregoing comments with the objective of assisting in your review of the Proposal and its role in protecting the interests of retirement investors. For the reasons discussed in this letter, ICI strongly opposes the Department adopting the Proposal.

[214] See letter from Eric J. Pan and Susan Olson, ICI, to Chair Gary Gensler, SEC (August 17, 2023), *available at* https://www.sec.gov/comments/s7-04-22/s70422-246959-547222.pdf.

[215] Such claims are common in private excessive fee litigation. Our concern here relates to the monetary and reputational costs of defending a lawsuit where the Department may not even intend that a party incur such potential liability for engaging in a prohibited transaction.

We provide below ICI staff to contact on the matters covered.

If you need additional information or you have questions regarding this letter, please contact Elena Chism, Deputy General Counsel – Retirement Policy at elena.chism@ici.org, Shannon Salinas, Associate General Counsel – Retirement Policy at shannon.salinas@ici.org, or David Cohen, Associate General Counsel – Retirement Policy, at david.cohen@ici.org.

For questions regarding the Appendix, please contact Sean Collins, Chief Economist at scollins@ici.org, Sarah Holden, Senior Director, Retirement & Investor Research at sholden@ici.org, or Jason Seligman, Senior Economist, Retirement & Investor Research at jason.seligman@ici.org.

We welcome the opportunity to discuss these comments further or provide additional information to you and your staff.

Sincerely,

/s/ Eric J. Pan

Eric J. Pan
President and CEO

/s/ Elena Barone Chism

Elena Barone Chism
Deputy General Counsel – Retirement Policy

Attachment—Appendix

Appendix: ICI's Economic Analysis of the Department's Proposed Rulemaking on Definition of an Investment Advice Fiduciary

Summary: Proposal's RIA Lacks Economic Evidence of Need for Rule

The Department of Labor (the "Department") issued a proposed rulemaking on the definition of an investment advice fiduciary ("Proposal")[1] that, according to the Department's intentions, "better protects the interests of retirement investors" by addressing "an important gap in those advice relationships where the advice is not currently required to be in the retirement investor's best interest."[2]

It is incumbent on the Department to fully evaluate the Proposal's costs, including compliance costs, and compare them to the benefits the Proposal would engender.[3] Further, it is arbitrary for an agency to impose billions of dollars in costs—as it would here—without identifying benefits that warrant such burdens, and without explaining why less costly alternatives are not being pursued instead. **The Proposal is unnecessary[4] and would have detrimental consequences for the very investors the Department seeks to protect.**

Our review of the Regulatory Impact Analysis (RIA) finds that the Proposal does not meet this test because:

- **It fails to factor in the significance of developments in the retirement and fund markets over the past two decades, which vitiate the need for the Department's Proposal.** These market developments include retirement investors incurring substantially lower fees for investing in mutual funds, the rise of head-to-head competition between broker-sold and no-load funds, and a sea-change by financial intermediaries and investors away from load- to no-load share classes (or funds).

- **The RIA does not contemplate that the Proposal may harm retirement investors.** As this appendix details, industry participants indicate that the Proposal, if adopted, could lead them to curtail retirement investors' access to educational materials, product information, and "nudges" to save (such as reminding investors to contribute to their IRAs before April 15, or letting 401(k) plan participants know they are not contributing enough to get the full employer matching contribution).

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[1] See *Notice of Proposed Rulemaking – Retirement Security Rule: Definition of an Investment Advice Fiduciary*, 88 Fed. Reg. 75890 (November 3, 2023), available at https://www.govinfo.gov/content/pkg/FR-2023-11-03/pdf/2023-23779.pdf ("Proposal").

[2] Ibid. at 75890 and 75899.

[3] See *Michigan v. EPA*, 576 U.S. 743, 752-53, 759 (2015).

[4] See note 179 in the main comment letter, supra.

- **The Department declines to quantify any benefits of the Proposal.** Nevertheless, the Proposal refers at times to benefit estimates the Department offered in conjunction with the 2015 Proposal and the 2016 Rule. These previous estimates were very large, totaling between $95 billion to $189 billion over 10 years and $202 billion to $404 billion over 20 years.[5] But as ICI has previously pointed out, these estimates were based on obsolete data and embodied fundamental errors. **The RIA does posit a few "non-quantified benefits," but as discussed in this appendix, those supposed non-quantified benefits are at best highly speculative, and in our view many components of the Proposal work against achieving them.** In addition, the RIA cites a number of studies as purportedly supporting the need for the proposal. In some cases, however, the RIA misrepresents or overstates these studies' results. In other cases, the RIA simply recycles previous analyses that have been proved to be erroneous or are no longer relevant.

- **By the Department's own assessment, the costs of the Proposed Rule included in the RIA would be quite significant, totaling roughly $220 million per year into the foreseeable future. Still, the Department's figures are likely greatly understated.** The figures presented are based on many assumptions, which often lack support or are inconsistent with the studies cited within the RIA. Sensitivity exercises based on modest and reasoned adjustments to just a few of the Department's key assumptions lead to cost estimates *for the first-year alone* that are many times higher than those in the RIA.

In sum, the Department fails to demonstrate any net benefit from the Proposal. The Department's economic analysis offers no quantitative estimated benefits—gross or net. The Proposal omits potential harms associated with the loss of consumer benefits when compared to the regulatory baseline. The Proposal's supposed "non-quantified" benefits are highly speculative. Finally, the cost of the Proposal, if adopted, will be quite large and vastly larger than the Department suggests.

Section A.1: Markets for Regulated Retirement Products and Investment Advice Have Changed

Beginning well before and continuing well after the Department embarked in 2010 on its efforts to expand the application of fiduciary advice standards for retirement investors and impose new compliance burdens on those who are fiduciaries, **market developments have worked to vitiate the need for such regulatory changes. The Department's failure to incorporate and quantify these developments raises serious concerns about the adequacy of the RIA**.

Market Developments Have Eliminated Load Fees as a Justification for the Proposal

In its 2015 Proposal and 2016 Rule, the Department evinced considerable concern that retirement investors were being harmed by using brokers. Although we have long believed that these claims are baseless—financial professionals, whether brokers or not, provide valuable services to clients—the Department cited a number of academic studies that it claimed supported its view.

[5] 88 Fed. Reg. at 75894.

However, as we pointed out to the Department in comment letters in 2015 and 2016, the market for distributing mutual funds and paying for investment advice had already undergone a sea-change, effectively rendering obsolete the studies the Department cites.[6] In the late 1990s, mutual fund markets were segregated, with little head-to-head competition between broker-sold funds and direct-sold funds or funds that did not otherwise charge a sales load ("no-load" funds). In particular, in 2000, only about half of the funds with a front-end load share class also had a no-load share class.

Several of the academic papers the Department cited argued that this segmentation led to broker-sold funds having weaker competitive pressures to produce returns. However, this segmentation had disappeared by 2010. By then, 90 percent of funds with a front-end load share class also offered a no-load share class. This created head-to-head competition between broker-sold and no-load funds, transforming the market and the ways that investors could pay for advice. This was significant, because many of the studies the Department had cited in support of its 2015 Proposal and 2016 Rule relied heavily on data before, or early on, in this sea-change period. Thus, for the purposes the Department wished to use them, these studies were already obsolete by 2015 to 2016.

Nevertheless, the current Proposal persists in suggesting that these outdated studies, which rely heavily on load fees, help justify the need for a revised ERISA fiduciary regulation.[7] In fact, market developments since 2016 have rendered this argument even more passé than it was at that time. Assets in back-end load share classes of long-term mutual funds have dwindled to about zero and those in level-load share classes are following close behind. Front-end load share classes have seen net outflows in every single year since 2007 with only one exception (positive but near zero inflows in 2009), and these outflows cumulated to over $2 trillion by 2022. In

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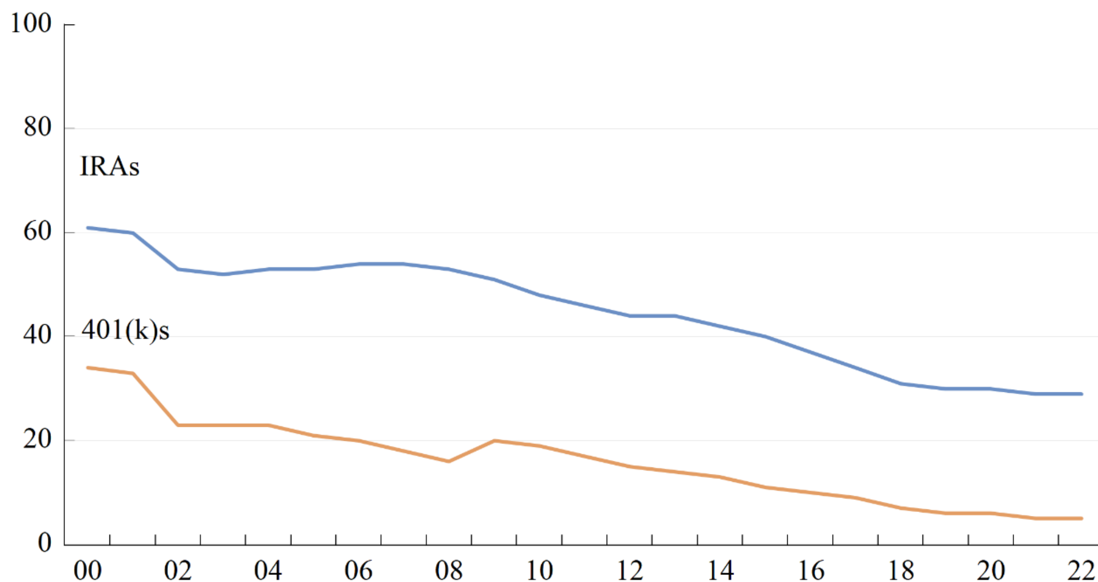
[6] See ICI comment letter from Brian Reid and David W. Blass to EBSA Re: RIN 1210-AB32: Regulatory Impact Analysis, Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice, July 21, 2015; ICI comment letter from Brian Reid and Sean Collins to Joseph Piacentini, Chief Economist, EBSA, Re: RIN 1210-AB32: Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice/ZRIN 1210-ZA25: Proposed Best Interest Contract Exemption, December 1, 2015; ICI comment letter from Brian Reid and David W. Blass to EBSA Re: RIN 1210-AB79; Proposed Rule; Re-examination of Fiduciary Rule, April 17, 2017. See also Fed. Reg. at 75927, footnote 272, citing a study by Jasmin Sethi, Jake Spiegel, and Aron Szapiro, Conflicts of Interest in Mutual Fund Sales: What Do the Data Tell Us?, 6(3), The Journal of Retirement 46–59 (Winter 2019); this study updates the findings of the Christofferson, Evans, and Musto (2013) study that the Department cites, concluding that "After 2009, we do not find any statistically significant effect of excess loads [paid by brokers] on excess performance when we control for previous returns." In other words, with updated data, the results in Sethi et al. (2019) indicate that results in the Department's 2016 RIA do not hold.

[7] 88 Fed. Reg. at 75939 (footnotes 372 and 373 citing research published in 2002 and 2013), 75942 (footnote 402, showing loads to be relatively inconsequential to the current market); 75943 (footnote 407 citing front-end load funds for which loads were already paid as of 2017 and thus for which a transition to T shares would have negative impacts for investors); 75943 (footnote 411, citing work published in 2008); 75943 (footnotes 412 and 413, both citing work from 2013); and finally at 75943 (footnote 414, citing better transaction timing in work from 2023, a period reflecting current market circumstances). All but one of these citations is from before the current regulatory base line. One is misrepresented (footnote 272), one offers a hypothetical which would harm investors (footnote 407). The one that is relevant (footnote 414) shows load investors to be more adroit, this fails to motivate any concern with front-end load compensation models on the part of the Department and cannot be used as a basis for this Proposal.

contrast, over the same period, in all but three years, no-load share classes saw net inflows, which totaled roughly $1.5 trillion.[8]

Figure A.1
Proportion of Assets in Load Share Classes Has Fallen Substantially
Percentage of mutual fund assets in IRAs or 401(k) accounts that are held in load share classes



Source: Investment Company Institute

The same trends are apparent in 401(k) plans and IRAs. For example, in 2000, 34 percent of mutual fund assets in 401(k) plans were held in load share classes (front-end load, back-end load, or level load; Figure A.1). That percentage fell to 5 percent by 2022.[9] The share of IRA long-term mutual fund assets in load share classes, although starting at a higher level in 2000 (61 percent), fell about the same amount, ending up in 2022 at 29 percent.

[8] The emphasis on no-load funds is also evident in gross sales. In 2022, 91 percent of gross sales of long-term mutual funds went to no-load funds without 12b-1 fees, compared with 68 percent in 2010, 59 percent in 2005, and 46 percent in 2000. See Figure 4 in Duvall and Rybak, 2023, "Trends in the Expenses and Fees of Funds, 2022," *ICI Research Perspective* 29(3), available at https://www.ici.org/system/files/2023-03/per29-03.pdf.

[9] See Holden, Rybak, and Chism, 2023, "The Economics of Providing 401(k) Plans: Services, Fees, and Expenses, 2022," *ICI Research Perspective* 29(6), available at https://www.ici.org/system/files/2023-07/per29-06.pdf. Specifically, see Figure 5 in the accompanying Supplemental Tables, available at https://www.ici.org/system/files/2023-07/per29-06-data.xlsx.

The Department acknowledges these changes only in general terms,[10] but without noting their full extent or significance. In addition, the Department acknowledges that the SEC's adoption of Regulation Best Interest (Reg BI)[11] in 2019 is likely to have mitigated some of its concerns about harms to retirement investors.[12] This is significant because these developments reduce any potential benefits, quantified or not, of this Proposal.

The Department's acknowledgement that the world has changed is important in a different respect: it demonstrates a lack of consistency between the preamble and the RIA. The Department acknowledges that changes occurring since at least 2016 have reduced harms to retirement investors. Nevertheless, the preamble states, "*As noted earlier, advisory conflicts … are very costly for retirement investors. The cost is high both on aggregate and for individual retirement investors*."[13]

The Department cites analyses it relied on for its 2015 Proposal and 2016 Rule, which relied very heavily on pre-2010 data on load- versus no-load share classes (or funds); in cases the data in those studies date back to 2000 or earlier. What was true in 2015 and 2016 is even more true today: those studies are now extremely obsolete, study a market structure that no longer exists, and cannot form any basis of support for this Proposal.[14]

Moreover, despite the RIA's acknowledgement that the market has changed, it fails to quantify any benefits of this Proposal, and the preamble simply recycles the problematic benefit estimates that the Council of Economic Advisers (CEA) and Department offered up in 2015. Those

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[10] 88 Fed. Reg. at 75927, stating that "The 2016 Final Rule and recent SEC actions highlighted inherent conflicts of interest in how broker-dealers or investment advisers are compensated for recommending certain share classes of mutual funds. Since then, share classes without traditional conflicts of interest have increased in popularity."

[11] *Regulation Best Interest: The Broker-Dealer Standard of Conduct*, 84 Fed. Reg. 33318 (July 12, 2019) ("Reg BI").

[12] 88 Fed. Reg. at 75921, stating that "Under the Investment Advisers Act and Regulation Best Interest, investment advisers and broker-dealers must have a reasonable basis to believe both the rollover itself and the account being recommended are in the retail investor's best interest … [T]he SEC's regulatory framework is likely to mitigate some of the aforementioned harms to retirement investors."

[13] 88 Fed. Reg. at 75938.

[14] Indeed, one of the studies that Department in its April 2016 RIA as evidence of the need for the 2016 Rule was subsequently redone by one of the authors who found that their earlier results were reversed upon consideration of newer data. The April 2016 RIA states at page 151 that "Del Guercio and Reuter (2014) find that broker-sold funds underperform direct-sold funds by an average of 1.15 percentage points per year after accounting for risk and other factors. The authors identify misaligned incentives in the broker-sold market as the cause of the underperformance." That study used mutual data covering 1992 to 2004 (see Diane Del Guercio and Jonathan, "Mutual Fund Performance and the Incentive to Generate Alpha," *Journal of Finance*, vol LXIX, no. 4, August 2014, 1673-1704). In a subsequent paper, Jonathon Reuter revisited his earlier analysis with Diane Del Guercio using mutual fund data for 2003-2012 and found results he interprets as indicating that "the average broker-sold fund has become more competitive with the average direct-sold fund." He reports that broker-sold funds underperformed direct-sold funds by only 18 basis points over the period 2003-2012. That was less than one-fifth of the 100 basis point underperformance the April 2016 RIA had assumed in constructing its benefits estimates. *See*, Jonathan Reuter, "Revisiting the Performance of Broker-sold Mutual Funds," working paper Boston College and NBER, November 2, 2015. The Department fails to cite Reuter's updated paper in this Proposal.

estimates totaled from $200 billion to nearly $1 trillion over 20 years,[15] but were based on data that were well and truly obsolete because the retirement and advice markets had changed so much in the 15 years before 2015.[16] The Department reduced those benefit estimates in the 2016 final rule to $95 billion and $189 billion over the next 10 years and between $202 billion and $404 billion over the next 20 years.[17] All of these estimate were roundly criticized. Now, in this Proposal, the Department has cannot quantify *any* benefits.

Given that the Department acknowledges the world has changed even more since 2016, the continued reference to these earlier analyses cannot be a substitute for offering a benefit estimate for the current Proposal. The reference is all the more concerning because those earlier benefit estimates were based on obsolete data, partial analyses, and a significant math error.

For example, the Department argues — once again in this Proposal as a supposed basis of the need for a new rule — that "A substantial body of research has shown that IRA holders receiving conflicted investment advice can expect their investments to underperform by approximately 50 to 100 basis points per year."[18] As support for this idea, the Proposal cites a 2015 paper by the Council of Economic Advisers (CEA).[19] The CEA paper in turn argues that load mutual funds underperform by 100 basis points per year,[20] stating that its conclusions were "based on a careful review of the relevant academic literature."[21, 22] But their conclusions were based on a number of

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[15] See *Federal Register* 80(75): 21952.

[16] See ICI comment letter from Brian Reid and David W. Blass to EBSA Re: RIN 1210-AB32: Regulatory Impact Analysis, Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice, July 21, 2015; ICI comment letter from Brian Reid and Sean Collins to Joseph Piacentini, Chief Economist, EBSA, Re: RIN 1210-AB32: Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice/ZRIN 1210-ZA25: Proposed Best Interest Contract Exemption, December 1, 2015; ICI comment letter from Brian Reid and David W. Blass to EBSA Re: RIN 1210-AB79; Proposed Rule; Re-examination of Fiduciary Rule, April 17, 2017.

[17] See *Federal Register* 81(68): 20950.

[18] 88 Fed. Reg. at 75917.

[19] 88 Fed. Reg. at 75917, footnote 192, citing Council of Economic Advisers, 2015, *The Effects of Conflicted Investment Advice on Retirement Savings*, available at https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_coi_report_final.pdf.

[20] See Table 5 in Council of Economic Advisers, 2015, op cit. supra.

[21] See Council of Economic Advisers, 2015, op cit. supra.

[22] Remarkably, this Proposal goes even farther than CEA did in 2015. 88 Fed. Reg. at 75917, footnote 194. While the CEA estimated a roughly 100 basis point loss, the Department now argues for as much as 2 percentage points (200 basis points) of loss. The 2 percent figure is simply drawn out of thin air, representing as the Proposal argues "a scenario for an individual where the impact of conflicts of interest is more severe than average." As noted above, the 100 basis point figure is based on highly obsolete studies, so any of these figures —whether 50, 100 or 200 basis points—are devoid of support.

academic papers that were arguably obsolete in 2015 and certainly are now.[23]

In addition, we have elsewhere pointed to a number of problems with the Department's (and the CEA's) conclusion that IRA investors underperform by 50 to 100 basis points per year.[24] For example, even taking as given the academic studies that the Department's 50 to 100 basis point estimates are based on, as we showed in our comment letters to the Department in 2015, 2016, and 2017, those estimates fail to hold if one examines the performance of all mutual funds rather than focusing narrowly on domestic equity mutual funds, which is what key academic studies the CEA cites did. In addition, we demonstrated that the supposed underperformance evaporates for all types of funds when using updated data.[25] Finally, **ICI has shown that the Department's benefit estimates in its 2016 RIA were overstated 15 to 30 times simply because of a math error.** Adjusting for these problems revealed that the Department's 2015 and 2016 benefits inline estimates were sheer hyperbole.[26] In the adopting release for Reg BI, both the SEC and

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[23] See Table 4 in Council of Economic Advisers, 2015, op cit. supra.

[24] See ICI comment letter from Brian Reid and David W. Blass to EBSA Re: RIN 1210-AB32: Regulatory Impact Analysis, Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice, July 21, 2015; ICI comment letter from Brian Reid and Sean Collins to Joseph Piacentini, Chief Economist, EBSA, Re: RIN 1210-AB32: Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice/ZRIN 1210-ZA25: Proposed Best Interest Contract Exemption, December 1, 2015; ICI comment letter from Brian Reid and David W. Blass to EBSA Re: RIN 1210-AB79; Proposed Rule; Re-examination of Fiduciary Rule, April 17, 2017.

[25] As we noted above, academic studies that have sought to replicate their previous studies with more recent data have found that their earlier results no longer hold. See Jonathan Reuter, "Revisiting the Performance of Broker-Sold Mutual Funds," working paper Boston College, November 2, 2015, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2685375.

[26] See ICI comment letter from Brian Reid and David W. Blass to EBSA Re: RIN 1210-AB32: Regulatory Impact Analysis, Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice, July 21, 2015; ICI comment letter from Brian Reid and Sean Collins to Joseph Piacentini, Chief Economist, EBSA, Re: RIN 1210-AB32: Definition of the Term "Fiduciary." In an earlier analysis of our work, an outside consultant hired by the Department argued that our analysis was incorrect and that the Department's 2015 RIA benefit estimates remained valid. See Karthik Padmanabhan, Constantijn Panis, and Timothy Tardiff, *Review of Selected Studies and Comments in Response to the Department of Labor's Conflicts of Interest 2015 Proposed Rule and Exemptions*. The consultant also was incorrect and, as was apparent from the consultant's comments, it misunderstood the Department's mistake and our critique of that mistake. Because of this, and because our point was somewhat technical, ICI filed an additional comment letter in 2017 to explain step-by-step why the DOL's analysis is incorrect. See Appendix A in ICI comment letter from Brian Reid and David W. Blass to EBSA Re: RIN 1210-AB79; Proposed Rule; Re-examination of Fiduciary Rule, April 17, 2017.

The Department's error arose because it inappropriately replaced the correct unit of measure (changes in "excess" front-end loads paid to brokers) with an incorrect unit of measure (changes in front-end loads paid to brokers). The two units of measure have very different magnitudes and, though sounding similar, represent very different concepts. A loose analogy is the following: a police officer on the freeway inadvertently sets the radar speed gun to kilometers/hour. The speed limit on the road is 60 miles/hour. The officer records a car going 100 kilometers/hour and arrests the driver for going 40 miles/hour over the limit. As we showed in our 2017 comment letter, taking as given all else in the Department's 2016 RIA — including its reliance on obsolete data — that single mistake alone led the Department to overstate its benefit estimates by 15 to 30 times.

academic experts confirmed ICI's conclusions.[27]

Moreover, as with earlier benefit estimates, the Department's current Proposal does not factor in harms from the loss of tools and advice that some retirement investors (especially those with smaller balances) will experience. When we commented on this problem in 2015 and 2016, we noted that harms from the 2016 Rule would include investors experiencing lower returns because of poor asset allocation decisions, poorly timed investment decisions, penalties for early withdrawals, or incorrectly calculating RMDs (required minimum distributions).[28] Though our earlier comment letters to the Department demonstrate that these kinds of harms can mount up to big losses for investors, the current Proposal yet again fails to consider these kinds of harms, either quantitatively or qualitatively.

In short, the Department simply cannot continue to rely on outdated and flawed benefit estimates from the earlier studies it cites. The world has changed, which means those earlier studies — even if they were flawless — are even more obsolete than they were in 2016 and, hence, do not and cannot represent regulatory impacts of the current Proposal.

Indeed, this point is underscored by a paper the Department commissioned and the Proposal cites.[29] That paper reports findings it interprets as indicating that over the period 2007 to 2016, investors in US equity load mutual funds underperformed investors in US equity no-load mutual funds by 1.12 percent per year. The study, however, finds that the world has changed dramatically. It reports evidence that investors in US equity load funds *outperformed* investors in no-load funds by 0.45 percent from January 2017 to June 2020, and from July 2020 to June 2023

[27] See Securities and Exchange Commission, "Regulation Best Interest: The Broker-Dealer Standard of Conduct," Federal Register, Vol. 84, No. 134 / Friday, July 12, 2019, page 33436, stating that "Commenters also stated that we should have incorporated the approach used by the DOL RIA and the CEA to quantify aggregate investor harm. While both of these analyses surveyed a broad literature on the relative performance of broker-sold versus direct-sold mutual funds, they both relied on a particular study to estimate aggregate investor harm, extrapolating the effect of "excess loads" on the performance of broker-sold funds to total industry-wide AUM. We disagree with this approach because, as noted by commenters, we believe these analyses misapplied the particular study's results. When the results of the study are correctly applied, the aggregate estimate of investor harm obtained using this approach is negligible." See also Craig M. Lewis, The Flawed Cost-Benefit Analysis Underlying the Department of Labor's Fiduciary Rule (White Paper, Aug. 2017), available at https:// www.sec.gov/comments/ia-bd-conduct-standards/ cll4-2268185-160965.pdf; Public Interest Comment from Mark Warshawsky & Hester Peirce, George Mason University Mercatus Center (Apr. 17, 2017), available at https://www.mercatus.org/system/files/ warshawsky-dol-fiduciary-rule-pic-v1.pdf. See also Quinn Curtis, The Fiduciary Rule Controversy and the Future of Investment Advice (Univ. of Va. Sch. of Law, Law & Econ. Research Paper Series No. 2018–04, Mar. 2018).

[28] See Figure 11, ICI comment letter from Brian Reid and David W. Blass to EBSA Re: RIN 1210-AB32: Regulatory Impact Analysis, Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice, July 21, 2015, available at https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/00749.pdf.

[29] See Panis and Padmanabhan, "Buy Low, Sell High: The Ability of Investors to Time Purchases and Sales of Mutual Funds," October 5, 2023. As noted in the body of our comment letter, the Department failed to release this study publicly until about 30 days into the comment period and only after ICI filed a request that the Department release the study.

investors in US equity load and no-load funds had roughly similar performance. Thus, the Department's own commissioned study suggests a lack of need for the Proposal.

The world has also changed because improved disclosures have combined with market forces to reduce costs retirement investors incur to save through funds. For example, when funds grow — as they have over the past two decades — economies of scale work to push their expense ratios down.[30] Competitive pressures have also worked to lower investors' costs. On the supply side, fund providers have competed intensely for investors' assets. This competition has been fostered by the development of products such as index funds, ETFs, and target date funds. In addition, collective investment trusts (CITs) compete with mutual funds in the employer-sponsored retirement plan market.[31] On the demand side, access to such products has increasingly led investors to concentrate their assets (including 401(k) plan and IRA assets) in lower-cost funds, which in turn has added to competitive pressures in these markets.[32]

Costs of Investing in 401(k) Plans and IRAs Have Fallen

As a result of these forces, retirement investors today benefit from much lower fees than when the Department began seeking to revise fiduciary standards in 2010. BrightScope analysis — which combines Department of Labor Form 5500 data with other market information on fees — finds that since 2009, total 401(k) plan costs[33] have decreased whether measured on a plan-, participant-, or asset-weighted basis.[34] For example, total plan costs declined from 0.65 percent to 0.51 percent on a participant-weighted basis.[35] Furthermore, smaller plans saw the largest reductions. In addition, analysis of fees paid on mutual funds held in 401(k) plans shows that plan participants have over time concentrated their assets in lower-cost funds, thus pushing down average fees incurred.[36]

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[30] See Duvall and Rybak, 2023, op cit. supra.

[31] Indeed, tabulations of the Department's Form 5500 data for large 401(k) plans show that 30 percent of large 401(k) plan assets were invested in CITs in 2021, compared with 19 percent in 2016 and 12 percent in 2010. See Figure 3.12 in Investment Company Institute, 2023, *2023 Investment Company Fact Book: A Review of Trends and Activities in the Investment Company Industry*, available at https://www.icifactbook.org/.

[32] See Holden, Rybak, and Chism, 2023, op cit. supra, and Investment Company Institute, 2023, *IRA Mutual Fund Investors Reap the Benefits of Declining Fund Expense Ratios*, op cit. infra, and discussion below.

[33] Total plan cost includes asset-based investment management fees, asset-based administrative and advice fees, and other fees (including insurance charges) from the Form 5500 and audited financial statements of 401(k) plans covered by ERISA. When plans use products registered under the Investment Company Act of 1940, such as mutual funds, expense data from Lipper are used to calculate fees. When plans use non–1940 Act products, such as CITs and pooled separate accounts, BrightScope uses an algorithm to estimate investment management fees.

[34] See Exhibit 4.1 in *The BrightScope/ICI Defined Contribution Plan Profile: A Close Look at 401(k) Plans, 2020* (September 2023), available at https://www.ici.org/system/files/2023-09/23-rpt-dcplan-profile-401k.pdf.

[35] Ibid.

[36] See Holden, Rybak, and Chism, 2023, op cit. supra.

Fees that IRA mutual fund investors pay have similarly fallen steadily for at least two decades. For example, asset-weighted average expense ratios IRA investors incurred for investing in equity, hybrid, and bond funds fell from 0.85, 0.80, and 0.63 percent in 2010 to 0.51, 0.53, and 0.37 percent in 2022.[37]

These declines, reflecting longer-term trends in a competitive industry, have continued over the past several years. For example, the Fifth Circuit vacated the Department's 2016 Rule in early 2018.[38] Over the period 2019 to 2022, expense ratios incurred by IRA investors on average fell nearly 10 percent.[39] Given that the trend toward lower fund fees was evident as early as 2000, and has continued more or less steadily year-by-year since then, it seems likely that it will continue quite independently of this Proposal. This, in turn, must reduce any potential benefit of the rule, now and even more so than was the case in 2010 when the Department embarked on these efforts.[40]

A.2 The Proposal Fails to Consider Harm to Retirement Investors

As was true of the RIA in the Department's 2015 Proposal, this Proposal's RIA does not consider or discuss the likelihood that the Proposal might harm retirement investors. ICI member firms have indicated that they are concerned that educational materials on their websites, information provided by call center reps, and "nudges" currently used to promote retirement saving could trip the fiduciary wire, and therefore, would need to be curtailed.

Financial services firms provide educational materials and information in a wide array of settings, such as for when: individuals change jobs or retire and roll over accumulations in their workplace plans into IRAs and when an employee first enrolls or gets enrolled in their employer-sponsored retirement plan. Financial services firms also provide "nudges" as participants age and

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[37] See Figure 1 in Investment Company Institute, 2023, *IRA Mutual Fund Investors Reap the Benefits of Declining Fund Expense Ratios*, available at https://www.ici.org/system/files/2023-10/23-ira-fees.pdf.

[38] On March 15, 2018, the Fifth Circuit Court of Appeals issued a decision in *Chamber of Commerce v. United States Department of Labor*, vacating the 2016 Rule in its entirety. See *Chamber of Commerce*, 885 F.3d 360 (5th Cir. 2018).

[39] See tab "figs 2, 3, 4" in *IRA fee data*, available at https://www.ici.org/system/files/2023-10/23-ira-fees.pdf.

[40] 88 Fed. Reg. at 75927, footnote 272, which writes "Sethi, Spiegel, and Szapiro (2019) found that the Department's 2016 Final Rule reduced flows into funds with excess loads." The Department misrepresents the authors' findings, and gives the now vacated rule more credit than the authors did. The authors in fact report continued changes "*around the time the DOL proposed the fiduciary rule*" (underlining for emphasis added). Importantly, the authors do not identify a causal link stemming from the Final Rule, and note that changes began earlier, "*after the passage of Dodd–Frank.*" Further, the data analyzed by these authors extend only through 2017 and cannot account for impacts of adoption of the Final Rule before it was vacated, nor for impacts from Reg BI, nor from PTE 2020-02, nor from the NAIC Model Regulation.

In another place, other authors cite a benefit of the 2016 Rule tied to a 2022 paper by Egan, Ge, and Tang (88 Fed. Reg. at 75943, footnote 416, citing: Egan, Ge, and Tang, "Conflicting Interests and the Effect of Fiduciary Duty—Evidence from Variable Annuities" 35(12) *The Review of Financial Studies* (December 2022)). Though published recently, this paper also depends on the prior regulatory baseline and older market data (88 Fed. Reg. at 75944).

have longer tenure in the retirement plan. This information flows through plan/investor websites, tools and calculators, call centers, or "nudges" including through automatic plan features, emails reminding participants to consider taking advantage of employer matches, catch-up contributions, or automatic increases; or reminders to IRA investors that the April 15 deadline for making contributions is approaching. The loss of these prompts will harm retirement investors.

Potential Harm to IRA Investors at the Time of Rollover from an Employer Plan

Retirement investors will be harmed if financial services and plan sponsor educational materials and information fall into the scope of covered advice and are therefore curtailed, as ICI's members fear. Retirement savers looking to roll over assets would face reduced call center availability and website materials to assist them in their decision-making. US households with rollovers in their traditional IRAs indicate that these materials are important factors in their rollover decision. These households research the rollover decision, relying on materials provided by financial professionals, employers (i.e., the plan), and financial services firms' materials (Figure A.2).

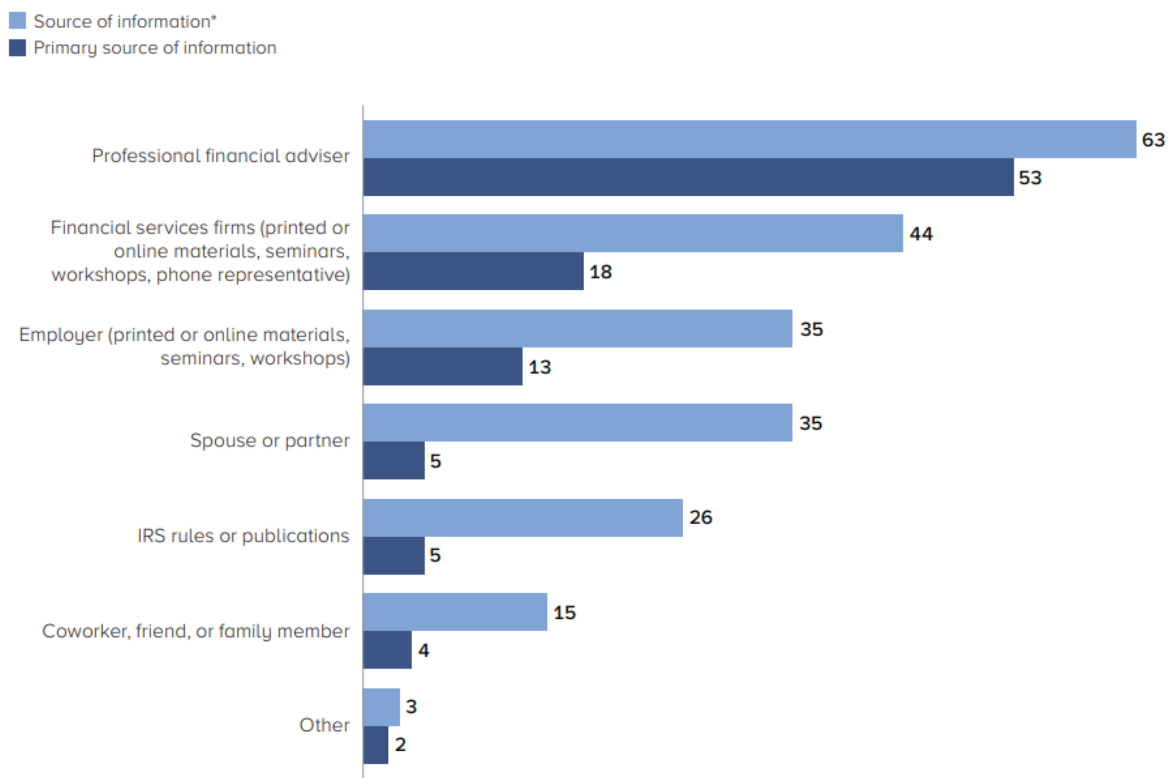
Taking away the tools that these retirement investors rely on to help them make decisions will make their decisions more difficult and will not enhance investors' trust in their ability to meet their retirement goals.

The Proposal seems to describe retirement investors as almost prostrate before investment choices and market forces. In a section entitled "Inexpert Customers," the Department implies that its Proposal is needed because retirement investors "fail to grasp essential aspects of risk diversification, asset valuation, portfolio choice, and investment fees" and that "such customers appear to be particularly vulnerable to receiving harmful advice."[41]

It is certainly true that not all retirement investors have a deep understanding of financial markets. Nor should they – they rely on financial professionals for that. **But contrary to the Department's depiction, the data show that retirement investors respond to market forces, make asset allocations that follow basic principles of investment, and are engaged in the decision-making process around IRA investing.**

[41] 88 Fed. Reg. at 75916.

Figure A.2
US Households Research Rollover Decisions Relying on Educational Information from Plan Sponsors and Financial Services Firms
Percentage of households owning traditional IRAs that include rollovers, 2022



* Multiple responses are included; 63 percent of traditional IRA–owning households with rollovers consulted multiple sources of information when making their rollover decision.
Note: Other responses given included myself, other online information, and banks.
Source: Investment Company Institute IRA Owners Survey

For example, ICI research shows that IRA investors respond to lower fees by concentrating their assets in lower-cost funds.[42] IRA investors also often invest in ETFs,[43] which offer cost-effective diversified portfolios.

Data indicate that IRA investors also understand and follow basic rules of risk diversification, portfolio choice, and investment returns. For example, IRA assets in mutual funds are diversified, across domestic equity (43 percent), world equity (12 percent), hybrid (18 percent),

[42] See Figures 2 and 3 in Investment Company Institute, 2023, *IRA Mutual Fund Investors Reap the Benefits of Declining Fund Expense Ratios*, available at https://www.ici.org/system/files/2023-10/23-ira-fees.pdf.

[43] About one-third of households owning traditional or Roth IRAs in 2022 held ETFs in their IRAs. See Figure A23 in Holden and Schrass, 2023, appendix file, available at http://www.ici.org/files/per29-01-data.xls.

bond (16 percent), and money market funds (10 percent).[44] Research into the asset allocation of individual IRA accounts finds that retirement investors hold age-appropriate diversified portfolios.[45] Retirement investors also understand that investing involves tradeoffs between risk and reward. For example, survey data indicate that individual investors are willing to accept the risk-reward tradeoff of the stock market in exchange for the chance to earn higher long-run returns.[46]

In addition, retirement investors are actively engaged in asset allocation decisions made during the rollover process. A majority of traditional IRA–owning households with rollovers indicate they are actively involved with the asset allocation decisions. When asked about the selection of the initial asset allocation of rollover assets in traditional IRAs, 22 percent of traditional IRA–owning households with rollovers indicated that their professional financial adviser selected the investments; 44 percent indicated that they worked together with a professional financial adviser to select the investments; and 34 percent reported that the household selected the investments without outside help.[47]

IRA Investors May Revisit Their Financial Services Firm Choices

There is additional evidence that IRA investors are actively engaged in decision-making around IRA investing, especially as they edge closer to retirement. Notably, they often revisit their choices of financial services firms as they age toward or into retirement. Rollovers are an important introduction to IRA investing. More than half (53 percent) of the traditional IRA accounts that were opened in 2020 represent rollovers from employer-sponsored retirement plans (Figure A.3).[48]

However, one-third of new traditional IRAs were opened because IRA investors moved from one financial services provider to another (Figure A.3). Because transfers can only occur after an initial account was opened, and because people continue to learn about the IRA market and their needs as they age, transfers increase as a proportion of new account openings as people age.

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[44] See data for 2023:Q3 in Table 19 in Investment Company Institute, *Quarterly Retirement Market Data*, available at https://www.ici.org/research/stats/retirement.

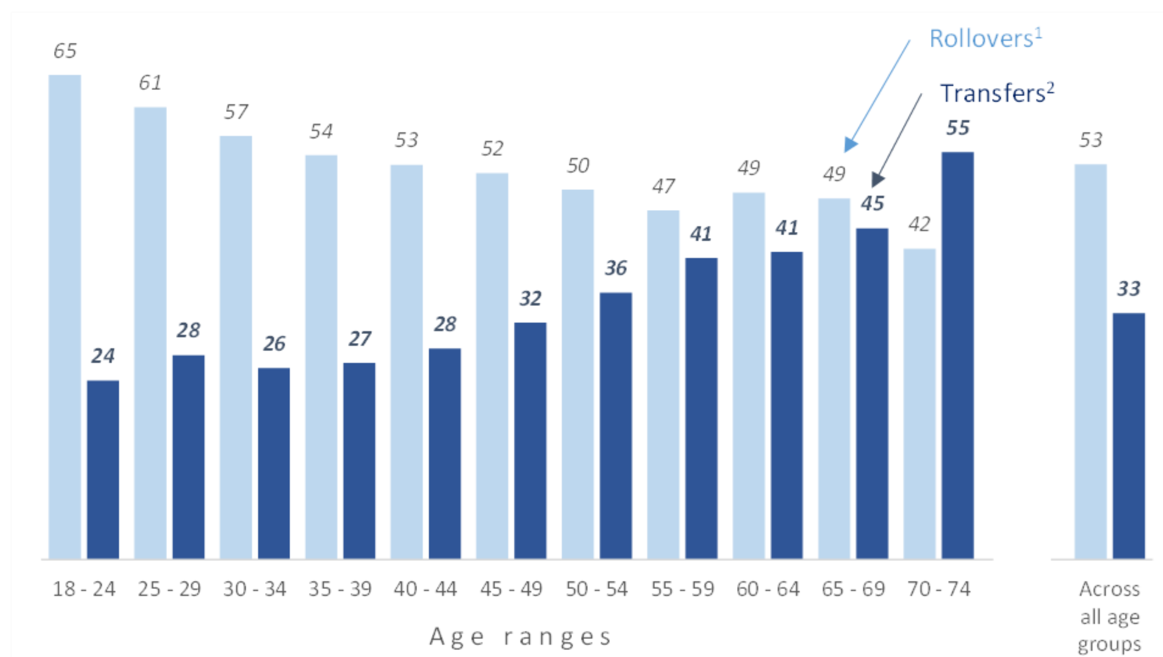
[45] See The IRA Investor Database, available at https://www.ici.org/research/retirement/ira-investor-database.

[46] See Holden, Schrass, and Bogdan, 2023, "Ownership of Mutual Funds and Shareholder Sentiment, 2023," *ICI Research Perspective* 29(10), available at https://www.ici.org/system/files/2023-10/per29-10.pdf.

[47] See Holden and Schrass, 2023, "The Role of IRAs in US Households' Saving for Retirement, 2022," *ICI Research Perspective* 29(1), available at https://www.ici.org/system/files/2023-02/per29-01_0.pdf.

[48] For more information on the IRA Investor Database, see https://www.ici.org/research/retirement/ira-investor-database.

Figure A.3
One-Third of New Traditional IRAs Result from Switching Financial Services Firms
Percentage of new traditional IRAs opened in 2020 by age of IRA investor



[1] Includes new traditional IRAs opened with rollovers only (the bulk of the activity), and with rollovers and contributions.
[2] Transfers are new accounts resulting from traditional IRA assets being moved from another financial services firm.
Note: New traditional IRAs are accounts that did not exist in the IRA Investor Database in 2019. The sample is 0.5 million new traditional IRA investors aged 18 to 74 in The IRA Investor Database in 2020.
Source: The IRA Investor Database™

Rule Change Could Harm IRA Investors by Reducing Portability and Preservation of Retirement Accumulations

The Proposal does not consider the most obvious benefit of rollovers from employer-sponsored retirement plans to IRAs: the preservation of the preferential tax treatment afforded to employer-sponsored retirement plans by Congress.[49]

ICI members, along with other commenters,[50] have noted that the Proposal will increase burdens associated with IRA rollovers, likely resulting in fewer rollovers. The principal risk we see is with respect to rollovers from employer-sponsored retirement plans to IRAs, which offer retirement investors the opportunity to consolidate and keep track of their retirement

[49] The Department is aware of these provisions. 88 Fed. Reg. at 75918, "Congress provided special protections for tax-advantaged retirement savings that don't apply more broadly." Nevertheless, the Proposal fails to consider that it may prevent retirement savers from realizing the full benefits Congress intended.

[50] See Warshawsky, 2023, Comment Letter, AEI, available at https://www.aei.org/wp-content/uploads/2023/11/Comment-Letter-DOL-EBSA-November-2023-MJW.pdf?x91208.

accumulations as they move from job to job over their careers.[51] If individuals take a distribution from the plan and fail to roll it over within a 60-day window, they must pay income tax on the full balance they failed to rollover, and possibly an additional early distribution penalty. While one can move from one IRA to another IRA at any later date, one cannot remedy the loss stemming from a failure to transact a rollover in a timely manner,[52] nor the beneficial compounding of investment returns on the amount lost. To the extent that retirement savers find it harder or more costly to access advice if the Rule is adopted, they will be harmed by these kinds of tax effects.

Employer-Sponsored Retirement Plan Participants Face Harm If Educational Materials, Information, and "Nudges" Become Covered Advice

Depending on the final formulation of the test for investment advice, fund providers and 401(k) plan recordkeepers have voiced concerns that they may have to stop providing certain helpful services to retirement investors, simply because these activities might now (inappropriately) imply fiduciary status. For example, ICI member firms sometimes provide educational and information tools for use on retirement plan participants' websites. If these activities were to fall within the investment advice definition, or if there were ambiguity about whether they fall within the definition, member firms indicate they would have no choice but to curtail offering such tools in order to avoid that outcome.

Additionally, ICI members have voiced concerns that call center employees may not be able to continue to explain plan investment options and help participants understand their choices because that could be viewed as covered advice. Prompts to "nudge" 401(k) participants also may become covered advice. Alerting plan participants if their contribution levels fall short of the level needed for a full employer match, informing participants if they are eligible for catch-up contributions, and automatic increases in employee contribution rates, could be construed as covered advice, under the Department's language offered in the preamble. These kinds of interactions benefit retirement investors and promote saving and investing for retirement[53] and could be lost depending on how any final rule defines covered advice.

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[51] Rollovers to traditional IRAs often are primarily used to consolidate retirement assets. When traditional IRA–owning households that chose to roll over assets were asked to identify the reasons for the rollover, 64 percent indicated they did not want to leave the assets with their former employer, with 22 percent indicating that was their primary reason; and 61 percent indicated they wanted to consolidate assets, with 22 percent indicating that was of their primary reason. See Figure 5 in Holden and Schrass 2023, op cit. supra.

[52] The Department should not fail to consider the risk of a loss of 1,000 to 4,700 basis points if the proposed rule results in increased transactional burdens for IRA rollovers. Marginal US tax rates vary from 10 to 37 percent (1,000 to 3,700 basis points). Additionally, a penalty rate of an additional 10 percent (1,000 basis points) typically applies for those who fail to complete a timely IRA rollover if they are under the age of 59½ years old.

[53] See Swire and Kennedy-Mayo, 2018, *2018 Update to Delivering ERISA Disclosure for Defined Contribution Plans: Why the Time Has Come to Prefer Electronic Delivery*, available at https://peterswire.net/wp-content/uploads/2018-Update-to-Delivering-ERISA-Disclosure-for-DC-Plans-002.pdf.

This seems contrary to the Department's stated goal (as indicated in the Proposal) of increasing trust in financial professionals. Taking away tools that help investors evaluate retirement- or investment-related decisions is unlikely to increase investors' trust in financial professionals and their products. Removing nudges that assist retirement savers on their path to retirement also jeopardizes trust and confidence in the retirement system.

A.3 Benefits of the Proposal Are Doubtful

To determine whether the Proposal would result in net benefits to society, the Department must quantify both costs and benefits, and the Proposal does not do this. It is incumbent on the Department to fully evaluate the Proposal's costs, including compliance costs, and compare them to the benefits that the Proposal would engender.[54] As discussed in this section, the RIA explicitly declines to quantify any benefits. Nevertheless, the Proposal continues to hark back to pre-2017 benefit estimates that are large, but as discussed earlier, are based on very obsolete data and embody fundamental flaws. The RIA does offer some "non-quantified" benefits, but as discussed here, these are highly speculative.

In sum, the Department offers no evidence that this Proposal would be beneficial.

The Department Does Not Quantify Any Benefits

The RIA declines to quantify any benefits of the Proposal.[55] The Proposal does not explain why the Department will no longer provide benefit estimates. This is striking and surprising, given that the Department had no difficulty providing benefit estimates for its 2015 Proposal and, even more significantly, that the Department continues to cite those previous benefit estimates, though (1) they were shown to be flawed, (2) the market has changed (much to investors' benefit), and (3) the regulatory base line has changed.[56]

The Department cannot have its cake and eat it too. It cannot both claim to be unable to produce benefit estimates for this Proposal and yet cite benefits estimates from the 2015 Proposal and 2016 Rule, which rely on obsolete data and embody fundamental errors. The Department cannot both fail to quantify any benefits of this Proposal but be willing to state unequivocally that "there is compelling evidence that retirement investors remain vulnerable to harm from conflicts of interest in the investment advice they receive."[57]

[54] See *Michigan v. EPA*, 576 U.S. 743, 752-53, 759 (2015).

[55] 88 Fed. Reg. at 75929, stating that "The Department is unable to quantify all benefits, costs, and transfers of the proposal but has sought, where possible, to describe these non-quantified impacts. The effects in the RIA's Table 2 reflect non-quantified impacts and estimated direct monetary costs resulting from the provisions of the proposal." Table 2 summarizes the Department's total cost estimates but leaves blank a space for benefit estimates.

[56] The Department notes that the fiduciary duty of investment advisers, as codified under the Investment Advisers Act of 1940, Reg BI, and PTE 2020–02 (20-02) form the regulatory baseline for this proposal. See 88 Fed. Reg. at 75922–75923. Only the first of these three existed at the time the vacated final rule was offered, thus citing prior RIA estimates of benefits is further misleading.

[57] 88 Fed. Reg. at 75914.

The Department's Non-Quantified Benefits Are Highly Speculative

The Department was previously able to provide benefit estimates for its 2015 Proposal, which begs the question of why the Department has now changed its mind about its ability to produce benefit estimates. Nevertheless, the Department argues that the Proposal would generate "non-quantified" gains for retirement investors by:

- Increasing uniformity in the regulation of financial advice for retirement investors, across different market segments and market participants;
- Protecting consumers from losses that can result from advisory conflicts of interest (without unduly limiting consumer choice or adviser flexibility);
- Giving retirement investors increased trust and confidence in their advisers and in the reliability of their advice; and
- Facilitating more efficient capital allocation.[58]

These four putative benefits are highly speculative. We discuss each in turn.

First, the Department suggests a non-quantified benefit "increasing uniformity in the regulation of financial advice for retirement investors, across different market segments and market participants"

The Department states that the Proposal would "harmonize" regulations across all markets used by retirement investors, promoting "clarity and efficiency."[59] **It is unclear why this new Proposal would ameliorate the current patchwork of federal and state regulations rather than adding to it.**

Although the Proposal cites the SEC's Regulation Best Interest rule (Reg BI) 131 different times, it fails to note that the final Reg BI rule explicitly ruled out a uniform fiduciary standard of conduct because of the harms posed to investors. As the SEC stated in Reg BI's adopting release, "a 'one size fits all' approach would risk reducing investor choice and access to existing products, services, service providers, and payment options, and would increase costs for firms and for retail investors in both broker-dealer and investment adviser relationships."[60] The SEC went on to say that their "concerns about the ramifications [of a uniform standard] for investor access, choice, and cost[s] … are not theoretical." In particular, the SEC stated that "With the adoption of the … Department of Labor (''DOL'') Fiduciary Rule, there was a significant

[58] 88 Fed. Reg. at 75937.

[59] 88 Fed. Reg. at 75938.

[60] See Federal Register 84(134) at 33322.

reduction in retail investor access to brokerage services, and we believe that the available alternative services were higher priced in many circumstances."[61]

Second, the Department suggests a non-quantified benefit of "protecting consumers from losses that can result from advisory conflicts of interest (without unduly limiting consumer choice or adviser flexibility)"

The Proposal states that it will "generate benefits for, and transfers to, savers by reducing conflicts related to one-time advice concerning rollovers."[62]

As an initial matter, the Department seems to invite readers to assume that "transfers" should be counted as "benefits" in the RIA's cost benefit analysis. For example, the Proposal offers the statement that "transfers represent a beneficial gain to retirement investors and are a *primary objective of the proposed rule and PTE*" [emphasis added].[63] This is a remarkable statement because transfers (relating to cost-benefit analyses and not to be confused with retirement savers transferring their IRA balances from one financial firm to another) are a zero-sum game where one party benefits to the detriment of another, leaving no net benefit to society. Thus, in a cost-benefit analysis, any transfer that results in a benefit to one party must be offset somewhere in the cost-benefit analysis as a reduced benefit or increased cost to another party. As the OMB has clearly indicated, this means that transfers cannot, in and of themselves, generate net benefits in a cost-benefit analysis.[64] Nevertheless, the Proposal suggests that transfers are effectively equivalent to benefits.

Moreover, the Proposal does not even appropriately identify transfers. According to the OMB's guidance to agencies on how to conduct cost-benefit analyses, a transfer is appropriate to consider *only if it results from a benefit that is offset dollar-for-dollar by costs identified elsewhere in the cost-benefit analysis.* The RIA does not appear to do this. Based on OMB guidance, the Department could get around the problem of the lack of a matched transfer benefit and transfer cost if the Department could prove that a transfer somehow reduces an economic "externality." The RIA does not appear to do this, either. The RIA states that "[t]he available data do not allow the Department to quantify the gains to investors or the component social welfare 'benefits' and 'transfers'."[65] In other words, all of the putative benefits the RIA cites

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[61] See Federal Register 84(134) at 33322, where the SEC writes, "Our concerns about the ramifications for investor access, choice, and cost … are not theoretical. With the adoption of the now vacated Department of Labor ("DOL") Fiduciary Rule, there was a significant reduction in retail investor access to brokerage services, and we believe that the available alternative services were higher priced in many circumstances. Moreover … we do not believe that applying the existing fiduciary standard under the Advisers Act to broker-dealers or adopting a new uniform fiduciary standard of conduct … would provide any greater investor protection (or, in any case, that any benefits would justify the costs imposed on retail investors in terms of reduced access to services, products, and payment options, and increased costs for such services and products)."

[62] 88 Fed. Reg. at 75938.

[63] 88 Fed. Reg. at 75937.

[64] See OMB Circular No. A-4, November 9, 2023, at 57–60.

[65] 88 Fed. Reg. at 75937.

could simply be transfers that result in no net benefit to society, thus being inconsistent with OMB guidance.

As to supposed benefits from potentially reducing conflicts, investors, including retirement investors, are already protected from conflicts of interest by the SEC and FINRA rules. It is an active area for the SEC. For example, the SEC has a dedicated page on its website identifying a range of relevant information and SEC activities related to Reg BI for brokers, advisers, investors and others.[66] A piecemeal or a "silo" approach means an analysis would fail to meaningfully or fairly take account of the protections resulting from existing regulations and ongoing agency actions. The Department has acknowledged the interconnections among the regulatory regimes and thus should be analyzing those benefits.

Related to the claim that the Proposal would not "unduly" limit consumer choice, it is not made clear by what metric the Department would measure the net benefits or costs of any limit to consumer choice, such that they were not "undue."

The Department attempts to find a benefit by generalizing: "Frequently, participants are better off leaving their 401(k) account in the retirement plan rather than rolling it over to an IRA, particularly if the 401(k) plan has low fees and high-quality investment options. Large 401(k) plans often have lower fees than IRAs, though smaller 401(k) plans sometimes find it difficult to keep fees low."[67] This generalization actually underscores that there is no one-size-fits-all rollover decision by failing to recognize: (1) both the variety of fee structures paying for services in 401(k) plans and the overlap of the expense ratios charged on institutional and retail mutual fund share classes across the market;[68] (2) the possibility that IRA investors may access institutional mutual fund share classes; and (3) the full range of investment options available in IRAs,[69] including exchange-traded funds (ETFs).[70]

<u>Third, the Department suggests a non-quantified benefit of "giving retirement investors increased trust and confidence in their advisers and in the reliability of their advice"</u>

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[66] See Securities and Exchange Commission, *Regulation Best Interest, Form CRS and Related Interpretations*, available at https://www.sec.gov/regulation-best-interest.
[67] 88 Fed. Reg. at 75938.

[68] See Brief of Investment Company Institute as Amicus Curiae in Support of Respondents, Hughes v. Northwestern Univ., ___ U.S. ___, 142 S. Ct. 737 (2022) (No. 19-1401), (October 2021), available at https://www.ici.org/system/files/2021-11/33879a.pdf.

[69] More than half (54 percent) of traditional IRA–owning households (in 2022) with rollovers in their traditional IRAs indicated that one of their reasons for their most recent rollover was because they "wanted more investment options." See Figure 5 in Holden and Schrass, 2023, op cit. supra.

[70] About one-third of households owning traditional or Roth IRAs in 2022 held ETFs in their IRAs. See Figure A23 in Holden and Schrass, 2023, appendix file, available at http://www.ici.org/files/per29-01-data.xls.

The Department claims that its Proposal will increase retirement investors' trust in financial professionals. The Department does not document any current lack of trust; indeed, the Proposal is based on the idea that financial professionals are *already* trusted by investors.

In addition, our members expressed concern that investor education and information could fall under covered advice. If so, some financial firms and plan sponsors will eliminate, and others will consider eliminating, offering informational emails documenting decision points such as when an investor (1) does not save in a plan (including when that plan has an employer match that the employee is not benefitting from), (2) reaches age 50 and is eligible for additional catch-up contributions, (3) holds a portfolio that lacks an age appropriate diversification to address short-run market volatility, or (4) faces a distribution decision in retirement.

We have also heard that, because of the Proposal's language, some firms offering Title I plan services would revisit auto-enrollment, auto-escalation, and default investments such as target date funds, and will consider changes to call center scripts to avoid having to respond to investors' broad enquiries about standard portfolio information. Firms are quite concerned that these informational supports could be interpreted as if they "*would influence an investor to trade a particular security or group of securities,*"[71] imposing a fiduciary title, even when a tool is being used by an investor in a limited and self-directed investment exercise.

In lieu of these tools, prompts, and supports, investors who otherwise would have received prompts or nudges, may now discover too late that they are not participating in an employer plan, that their savings have been sitting in cash, or that they were not rebalancing out of higher-risk investments as they near retirement. This would be harmful for retirement investors and would degrade, not increase, their trust in financial professionals.

As support for this supposed benefit, the Proposal references a single study relating to individuals' reactions to different advice scenarios through on an online survey of individuals in Australia.[72] Given that retirement and fund markets differ substantially across jurisdictions, in no small part because of differences in laws and regulations, we question the relevance of this study. We again note the cost of the loss of tools from the vacated 2016 Rule documented by SEC as part of their Reg BI.[73]

<u>Fourth and finally, the Department suggests a non-quantified benefit of "facilitating more efficient capital allocation"</u>

[71] 88 Fed. Reg. at 75904.

[72] 88 Fed. Reg. at 75941–75942.

[73] See Federal Register 84(134) at 33322.

The Department suggests that the Proposal will lead to more efficient allocation of capital. This is by far and away the most speculative of the Proposal's "non-quantified" benefits.

It is far from clear what the Department means by "efficient capital allocation." Although the RIA cites this as a key non-quantified benefit (page 75937), it actually mentions this term only one other time (page 75929). In neither instance does it define the term.

It is possible the Department is suggesting that retirement investors would allocate their individual portfolios more effectively because of the Proposal. The Proposal gives a hint of this on page 75942 claiming — in the context of a discussion that "There is evidence that good advice can improve saving and investing decisions" — that "the proposal may result in a beneficial reallocation of investment capital." However, the Department offers no evidence in support of this claim. It cites two studies, both of which make the point that investors may have better investment outcomes if they use a professional financial adviser. That seems given, but it has no bearing on the need (or not) for this Proposal. The question that the Proposal must answer is not whether retirement investors can benefit from professional financial assistance (most likely so), but whether this Proposal will improve the financial assistance they receive, lower the costs they pay for equally good information/assistance, or lead them to adopt better portfolio allocations. The Proposal provides no evidence that that is the case.[74]

In addition, the RIA is confused or confusing about whether "facilitating more efficient capital allocation" is a benefit or a transfer. It claims that "this proposal would generate economic gains for retirement investors by … facilitating more efficient capital allocation."[75] But in its Table 2, the RIA classifies "Reallocation of investment capital to different asset classes, share classes, or investment products" as a *transfer*. As discussed above, according to OMB guidance, a "transfer" cannot be included as a net benefit; it must be offset elsewhere in the cost-benefit analysis by an equal fall in a benefit to another party or by an increased cost to some party. In other words,

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[74] It is possible that by "efficient capital allocation" the Department means something broader, such as in how corporations, or even the economy at large, allocate capital. One witness at the Department's December 13, 2023 hearing on the Proposal, Benjamin Edwards (professor at the William S. Boyd School of Law at the University of Nevada, Las Vegas) suggested that "conflicts of interest are absolutely critical for capital flows and for how, you know, our nation as a whole is able to allocate capital." See Department of Labor, EBSA, December 13, 2023, *Public Comment Hearing Retirement Security Rule: Definition of an Investment Advice Fiduciary,* page 97. Although the Proposal does not mention this, it is notable that Mr. Edwards submitted a comment letter to the Department in 2015 regarding the Department's proposed Conflicts of Interest Rule. In that letter, Mr. Edwards argued that the 2015 Proposal would improve "capital allocation in US financial markets." Thus, Mr. Edwards suggestion seems to relate to a much more expansive suggestion than that this Proposal might cause investors to reallocate their individual portfolios. His discussion in his 2015 comment letter to the Department — although perhaps conflating "capital allocation" at an investor level with "capital formation" at a macroeconomic level — seems to be inviting readers to infer that the Proposal would lead to more efficient IPOs and bond issuance (e.g., "*Issuers* [emphasis added] do raise more capital by offering larger commissions."). See Benjamin Edwards comment letter to EBSA, Re: RIN 1210-AB32: Conflict of Interest Rule. We would caution the Department against accepting this as a definition of "efficient capital allocation" without very compelling evidence that the Proposal would somehow increase or better allocate capital across the economy. After all, the US is generally accepted as having the world's most efficient capital markets.

[75] 88 Fed. Reg. at 75937.

irrespective of what the Department means by "facilitating more efficient capital allocation," the Department cannot count that as a benefit because it has already classified it in the RIA's Table 2 as a transfer.

A.4 The Department Consistently Underestimates the Costs of the Proposal

The Department, although failing to quantify any benefits of the Proposal, does provide cost estimates. These are high, amounting to roughly $253 million for the first year and $216 million per year thereafter.[76] Nevertheless, our analysis indicates that the RIA vastly understates the Proposal's costs.

The Department repeatedly asks for information on its estimated costs and underlying assumptions, signaling a lack of rigor in the RIA.[77] To be able to provide the kind of concrete cost data the Department has asked for, it would have been preferable to conduct a proper cost survey of industry participants. Such a survey could have helped the Department understand the importance of various cost factors, such as the number of firms affected; the variation in the impact by firm size; the number of accounts or investors at each firm; the number of contracts or disclosures that would need to be created, reviewed, updated, and distributed; the time involved in each task; wage costs; out-of-pocket costs for printing, postage, mailing; and third party service provider or outside counsel costs. This could have provided the Department with the kind of informative detail it asks for. Regrettably, this was not possible given the short comment period — which, because the Department was unwilling to extend it, ran squarely through the holiday season, effectively shortening the comment period.

The Department's cost estimates often are based on ad hoc assumptions and would benefit from actual data, which the Department frequently requests. Although we were unable to conduct an in-depth assessment of all the Department's many assumptions and their implications for costs, we conducted some sensitivity analyses using plausible alternative assumptions about some of the key factors affecting the Department's first-year cost estimates for PTE 2020-02. The Department groups the costs related to PTE 2020-02 into five categories: rule review, general disclosures, rollover disclosures, retrospective review, and policies and procedures (Figure A.4).[78]

Based on limited exercises employing modest reasonable alternative assumptions, we estimate that first-year costs of the Proposal could well-exceed $2.9 billion dollars, more than 10 times the Department's $253 million estimate (Figure A.4). This estimate is derived by assuming more plausible labor costs for legal and compliance work, more credible estimates of the number of legal professionals working on the rule, more reasonable amounts of review

[76] 88 Fed. Reg. at 75948, see Table 4.

[77] We count over 75 places in which the Department "requests" or "seeks" comments on specific aspects of the proposal, suggesting further that the Department would benefit from having issued a Request for Information, rather than a proposal that offered a Regulatory Impact Analysis of such low quality.

[78] For the Department's presentation column in Figure A.4, we use the dollar amounts reported in 88 Fed. Reg. at 75953, footnote 499, which do not always match the Department's estimates derived earlier in the RIA.

time, some exploration of scope, and a better representation of retail investor disclosure delivery costs, as will be detailed below.

Figure A.4
Summary of RIA Cost Estimates and ICI Sensitivity Analyses for First-Year Costs

	Department's presentation	**ICI corrections and sensitivity analysis**
Costs for PTE 2020-02:		
Rule review [1]	$27,663,017	$2,540,377,260
General disclosures[2]	$6,422,616	$40,831,124
Rollover disclosures[3]	$193,788,961	$247,462,554
Retrospective review[4]	$907,585	$6,584,184
Policies and procedures[5]	$2,736,095	$2,736,095
Total PTE 2020-02 Costs:	**$231,518,275**	**$2,797,160,092**
Memo: **Other PTEs' costs**[6]	$21,722,954	$21,722,954
Total Proposal first-year cost:	**$253,241,229**	**$2,859,714,170**[7]

[1] Proposal at Table 4 (and footnote 499) for Department and Figure A.8 for ICI.
[2] Proposal footnote 499 for Department and Figures A.9 and A.10 for ICI, adjusting select components.
[3] Proposal footnotes 485 and 499 for Department and Figure A.4 wage adjustment for ICI.
[4] Proposal footnotes 494 and 499 for Department and Figure A.11 for ICI.
[5] Proposal footnote 498 and 499, where costs for first-year policies and procedures are inconsistent and fail to provide sufficient detail to reconcile them. We were unable to consider costs due to a lack of adequate documentation of the sources and details of costs associated with policies and procedures.
[6] Proposal Tables 4 and 6 for Department. We were unable to assess these costs due to insufficient time.
[7] In line with table notes 5 and 6, above, costs could well exceed $2.9 billion.

Although this is a very large difference, we should emphasize that our analysis covers only first-year costs related to some cost components related to PTE 2020-02. We have had insufficient time to also review the Department's cost estimates and assumptions associated with PTE 2020-02 for ensuing years. Moreover, we have also had too little time to begin analyzing any costs, either first-year or ensuing years, associated with PTEs 84-24, 75-1, 77-4, 80-83, 83-1, and 86-128. For these, Figure A.4 simply takes as given the estimates provided by the Department. But our sensitivity analysis for first-year costs associated with PTE 2020-02 is indicative of the likelihood that the Department has also understated first-year costs for PTEs 84-24, 75-1, 77-4, 80-83, 83-1, and 86-128, as well as ongoing annual costs for all of the PTEs.

The balance of this appendix examines in more detail the Department's first-year cost estimates and assumptions associated with PTE 2020-02.

The Department's estimates rely on a wide array of assumptions. We do not attempt here to consider them all. Instead, we focus on a few key assumptions that lead the Department to substantially understate its first-year cost estimates for PTE 2020-02. These include understated:

- Unit labor costs (dollars/hour), especially for "legal professionals;"
- Number of staff and hours required to complete tasks;
- Scope of the impacts; and
- Costs of delivering disclosures.

In the remainder of this section, we use sensitivity analysis around these four areas to evaluate the Department's cost estimates. Our sensitivity analysis relies on modest reasonable alternative assumptions for unit labor costs, hours required, scope of impact, and costs of delivering disclosures, which are based on conversations with industry experts, or are taken from rulemakings that form the regulatory baseline for the Proposal. Given these (and only these) alternative assumptions, we estimate that first-year costs associated with PTE 2020-02 alone could exceed $2.9 billion, over 10 times what the Department estimated (Figure A.4).

Department Underrepresents Labor Cost Wage Rates

The Department turns to its survey data on labor costs to estimate hourly wage rates for various required personnel. **Based on conversations with industry experts and comparison to labor costs used by another regulator, it is safe to conclude that the RIA's wage rates are too low.**

Evidence supporting our members' concerns about the wage rates can be found by comparing the Department's assumed wage rates with those the SEC recently used in Reg BI (Figure A.5).[79] Job titles from the RIA and the SEC do not line up perfectly, but they give a strong sense that RIA's assumed wage rates are too low. For each category we could match, the Department's assumed wage rates are significantly below those used by the SEC.[80]

Legal costs figure importantly in the Department's cost estimates. For example, as seen in Figure A.5, the RIA assumes an hourly cost for a "legal professional" of $159.34/hour. In contrast, the SEC quoted four estimates for four different legal job titles (e.g., in-house compliance counsel). Given that Reg BI was adopted in July 2019, we adjusted these figures for inflation. In 2023 dollars, the SEC's average cost for a legal professional would have been $517.85—over three times the rate the Department assumed. However, because conversations with members

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[79] See Securities and Exchange Commission, 17 CFR Parts 240 and 275 [Release Nos. 34–97990; IA–6353; File No. S7–12–23] RIN 3235–AN00; 3235–AN14: Conflicts of Interest Associated With the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers at 54009, available at https://www.govinfo.gov/content/pkg/FR-2023-08-09/pdf/2023-16377.pdf.

[80] The average wage rate used by the SEC across legal professionals was $517.85/hour, compared to the Department's $159.34/hour. ICI member firms focused, however, on compliance-related attorney. Consequently, in our analysis, we use the SEC's hourly rate for in-house compliance counsel of $438.98/hour as the cost for a "legal professional."

emphasized compliance professionals, we use the lowest rate offered by SEC for "legal professional" tasks as assigned by the Department, $438.98/hour for in-house compliance counsel (adjusted to 2023 dollars; Figure A.5).

Figure A.5
Comparison of Labor Wage Rates in this Proposal and SEC's Reg BI Final Rule

DOL 2023 Fiduciary Rule Proposal [1]		*SEC 2019 Regulation Best Interest - Final Rule* [2]		Adjusted to be in 2023 dollars[3]
Occupation	labor cost per hour	Occupation		labor cost per hour
Clerical personnel	$63.45	Clerical personnel	-	-
Legal professional	**$159.34**	Legal professionals:		
		-- In-house compliance counsel	$365.39	**$438.98**
		-- In-house counsel	$415.72	$499.45
		-- In-house general counsel	$446.04	$535.88
		-- Outside legal counsel	$497.00	$597.10
Top executive	$128.11	Blended certifying compliance rate		
(as stand in for "certifying officer")[4]	**$190.63**	-- *Compliance examiner*	$237.00	$284.73
		-- *Compliance manager*	$309.00	$371.24
		SEC rate as (1/2 examiner, 1/2 manager)	$273.00	**$327.98**
Insurance sales agent	$158.94	Insurance sales agent	-	-
Financial manager	$190.63	Financial manager	-	-
Financial adviser	$219.23	**Financial adviser / broker-dealer / dual**	$233.02	**$279.95**
		registrant -- as "registered representative"	-	-
Computer programmer	**$133.05**	Computer programmer functions:		
		-- Outside senior programmer or systems analyst	$284.00	$341.20
		-- Systems analyst	$263.00	$315.97
		-- Programmer	$271.00	**$325.58**
		-- Programmer analyst	$241.00	$289.54
		-- Computer operations department manager	-	**-**

[1] 88 Fed. Reg. at 75949.
[2] See Federal Register 84 at 33456, and otherwise throughout the Final Rule.
[3] Inflation adjustment of wages using CPI All Items series (CUUR0000SA0) between May 2019 (index value: 256.092), and October 2023 (index value: 307.671), United States Bureau of Labor Statistics.
[4] In several places, the Department lists a job function of "Top executive" sometimes this person is paid $128/hour as at page 75968, other times the person is paid $191/hour, as at page 75953, footnote 493. The definition at footnote 493 maps to "certifying officer" in the main text of the Proposal.
[5] The SEC used a blended rate for compliance reviews, based on two job functions for compliance. See Federal Register 84 at 33477, footnote 1489.

The overall effect of using the SEC's (inflation-adjusted) figures for labor costs is significant. The Department estimates that the first-year cost of the entire Proposal to be $253 million (Figure A.4). Most of that ($232 million) is associated with PTE 2020-02, of which $33.4 million arises from wage costs of "legal professionals" (Figure A.6). Using the inflation-adjusted SEC's $438.98/hour cost for in-house compliance, (rather than a higher blended rate), and initially holding all of the Department's other figures and assumptions fixed as in the Proposal, first-year legal costs associated with PTE 2020-02 would rise to $92 million, this alone increases first-year costs of the Proposal by $59 million, for a new total of $312 million.[81]

[81] Calculated as $253.2 million + $58.6 million = $311.8 million. This one change raises overall costs by 23 percent ($58.6 million/$253.2 million). If we had instead used a hourly cost of $517.85, which is the average of the hourly costs for in-house compliance counsel, in-house counsel, in-house general counsel, and outside counsel that the SEC

Figure A.6
PTE 2020-02 Review and Compliance Cost Adjustments
Correcting for Per-Unit Legal Costs

	Department 2023 Proposal	*SEC Reg BI Final Rule (inflation adjusted)*	*Difference*
Review and compliance activities[1]	"Legal professional"	Compliance attorney[2]	
Labor rate per hour:	*$159.34*	$438.98	$279.64
	Total costs derived from legal work		
First year:	$33,372,329	$91,940,410	$58,568,081

[1] See Proposal at footnotes: 470, 471, 473, 475, 476, 487, 490, 491, 492.
[2] The average wage rate used by the SEC across legal professionals was $517.85/hour, compared to the Department's $159.34/hour. ICI member firms focused, however, on compliance-related attorney. Consequently, in our analysis, we use the SEC's hourly rate in-house compliance counsel of $438.98/hour as the cost for a "legal professional."

In short, a plausible change to just one of the Proposal's many cost assumptions raises first-year estimated costs by nearly 25 percent. However, as we will demonstrate below, further analysis of the sensitivity of the Department's cost estimates to other plausible assumptions raises estimated first-year costs associated with PTE 2020-02 vastly more.

Department Underestimates Number of Staff and Hours for PTE 2020-02 Review and Compliance

Figure A.6 takes as given the Department's assumptions on the number of legal professionals' hours that would be associated with PTE 2020-02. According to the RIA, "The Department estimates such a review would take a legal professional, on average, nine hours."[82] In other words, at each individual firm that must review PTE 2020-02, a single legal professional at that firm could complete the review of a final rule in nine hours. Although the Department calls this an "estimate," it is not. An "estimate" would be based on data or some kind of plausible qualitative knowledge. So far as we can tell, this nine-hour figure is based neither on data nor any qualitative knowledge. Thus, it is simply an assumption.

We discussed the plausibility of the Department's nine-hour assumption with member firms. In every case, firms we spoke with had already invested far more than nine lawyer-hours in simply

assumed in Reg BI, adjusted for inflation as seen in Figure A.5, total first-year costs in Figure A.6 would rise to $108.5 million, an increase of $75.2 million relative to the Department's estimates. The impact from this compensation adjustment alone is also larger, 30 percent ($75.1 million/$253.2 million).

[82] 88 Fed. Reg. at 75949.

reading the Proposal. This is not surprising. The Proposal, in its entirety, takes up 158 pages in the Federal Register (Figure A.7) and it is not an easy read, even for those versed in the issues.

Figure A.7
Proposals Are Significant in Length, a Prudent Firm Would Review Them in Their Entirety

	Total pages in PDF	Pages with rule text	Link
Proposed Fiduciary definition	90	88 to 90	https://www.govinfo.gov/content/pkg/FR-2023-11-03/pdf/2023-23779.pdf
Proposed amendments to PTE 2020-02	25	21 to 25	https://www.govinfo.gov/content/pkg/FR-2023-11-03/pdf/2023-23780.pdf
Proposed amendments to PTE 84-24	29	22 to 29	https://www.govinfo.gov/content/pkg/FR-2023-11-03/pdf/2023-23781.pdf
Proposed amendments to other PTEs	14	11 to 14	https://www.govinfo.gov/content/pkg/FR-2023-11-03/pdf/2023-23782.pdf

ICI member firms indicated that a team of compliance attorneys (team sizes varied across firms we spoke with but were between three and eight, averaging five) would review the rule. All believed that reviewing the rule would take more than nine hours *for each attorney involved*. Most reported that they would also confer with outside counsel. A few referenced their experience with the 2016 Rule; these described the current proposal as broader than the 2016 Rule and thus noted that it could require even more time to review than the prior rule. Some firms indicated that it would take multiple lawyers one to two weeks *each* to finish the work associated with the Proposal.

Given the liability risks associated with not implementing the rules correctly and completely, a prudent firm would assign multiple attorneys. Furthermore, a prudent attorney who "reviews" the rule would want to understand the rule and read all documentation associated with the rule and associated PTEs, including any and all preambles, and RIAs. We understand that such a review would be needed to assess the costs that would be incurred and ensure understanding of implementation steps needed to comply with any final rule.

Plausible alternative assumptions about the number of legal professional hours required to review PTE 2020-02 show that the Department's cost estimates are massively understated. The Department's cost estimates assume a legal professional hourly rate of $159.34, one legal professional working nine hours, with 19,290 firms needing to review the PTE 2020-02 (Figure A.8). Given those assumptions, the Department estimates that the initial review would cost a total of $27.7 million for the first year (first column). When, as in Figures A.5 and A.6, we make the plausible alternative assumption that legal professional costs would be $438.98/hour, total first-year costs rise to $76.2 million (second column in Figure A.8). Next, allowing for the fact that a prudent firm would likely have several lawyers looking at the proposal each for several hours (five lawyers at nine hours per lawyer), first-year costs increase to $381.1 million (third column). Finally, if as some firms have suggested, it could take multiple lawyers *each* spending

one to two weeks to complete the work, the costs would be vastly higher.[83] Under this assumption (five attorneys for each firm each spending 60 hours reviewing the Proposal), we estimate that the cost of an initial legal review of PTE 2020-02 would surpass $2.5 billion (fourth column).

Figure A.8
The Department Grossly Underestimates Cost to Review the Rule PTE 2020-02
Analysis of The Department's Cost Estimate for Initial Legal Review of PTE 2020-02

	Rate or quantity			
Component:	*Department of Labor estimates in gray*			
Labor cost per hour	$159.34	**$438.98**		
			Compliance Attoney [1]	
Number of attorneys reviewing rule	1	1	**5**	
			Average of ICI member estimates [2]	
Number of hours per attorney	9	9	9	**60**
				Average of ICI member estimates [2]
REVIEW COSTS PER FIRM	$1,434	$3,951	$19,754	$131,694
Number of firms	19,290	19,290	19,290	19,290
	Impact realtive to baseline:	*2.8 times*	*13.8 times*	*91.8 times*
TOTAL ESTIMATED COSTS:	**$27,663,017**	$76,211,318	$381,056,589	**$2,540,377,260**

[1] *See* Federal Register 88 at 54009.
[2] ICI Members reported that more than one attorney would be required to review the rule, and each would take more than nine hours initially.

This $2.5 billion cost estimate, though over 90 times higher than the Department's estimate, would be still higher if other factors were considered. For example, the Proposal estimates that it would take a legal professional 30 to 60 minutes per firm to prepare statements in compliance with PTE 2020-02.[84] It estimates that it would take another 30 to 60 minutes per firm to write a second informational statement related to retirement investors' right to more information.[85] Once again, the Department does not provide support for these "estimates." Thus, they are just assumptions. Even supposing, extremely generously, that a seasoned attorney could be assumed to need only 30 to 60 minutes to write each of these documents, running the draft documents through all of a firm's necessary compliance checks would likely increase the total time required

[83] Among members we spoke with, the lowest time estimate offered for a compliance attorney working on initial review in a team will take is one week (40 hours). Every other member we spoke with estimated 80 or more hours, per attorney. The largest number reported to us was based on continuing initial review over the implementation period (eight weeks). Our estimate of 60 hours (1.5 weeks) reflects the minimum report, with partial accommodation for the reports of others. We stress that it is meant to be conservative.

[84] 88 Fed. Reg. at 75951, "*the Department estimates that a legal professional for broker-dealers and registered investment advisers would require, on average, 30 minutes to modify existing statements and that it would take insurers, robo-advisers, pension consultants, and investment company underwriters, on average, one hour...*"

[85] 88 Fed. Reg. at 75951, footnote 476, mirroring footnote 475.

several-fold. Moreover, these cost estimates do not include burdens for firms that were not previously relying on PTE 2020-02.

At the risk of belaboring the point that the Department's cost assumptions grossly underestimate the costs of adapting to the Proposal, we note in passing that the Department in several places assumes that a particular task should take only 10 minutes to complete.[86] Taking only 10 minutes on a task of legal consequence is imprudent as it increases the likelihood of facing further costs.

Department Underestimates of Scope of Proposal's Impact

The Department underestimates substantially the scope of the Proposal's effects. Accounting for the full scope of the Proposal's impact would require a comprehensive data collection effort to determine the entities impacted and the correct unit of analysis on which to base costs (e.g., firm versus number of employees versus number of investor accounts versus number of contracts with plan sponsors).

Nevertheless, we offer two examples that illustrate the Department understates the scope of the Proposal's impact. The first example relates to costs associated with PTE 2020–02 regarding Title I plans, and the second to populations of investors eligible for electronic delivery of disclosures. We emphasize that these are by no means the total of examples we could offer. They do, however, indicate just how significant is the Department's failure to adequately assess "scope," a failure that could have been addressed through a Request for Information.

Our first example relates to having to provide the disclosures required by PTE 2020-02 in the context of a Request for Proposal (RFP) from a Title I plan, a situation where (under existing rules) PTE 2020-02 would not need to be used today. In relevant part, the Proposal states *"The proposed amendment makes minor edits to the written acknowledgment that the financial institution and its investment professionals are fiduciaries.*"[87] While acknowledging not knowing how many firms would need to update disclosures, the Department arbitrarily presumes it to be 10 percent of those currently assumed to be using PTE 2020-02. Based on these assumptions, the Department estimates that total industry costs around this activity would be $146,035.[88]

The need to use PTE 2020-02 for activities related to Title I plans has meaningful cost impacts that are fully neglected in the Department's presentation. Some firms we spoke with who rely on PTE 2020-02 for just Title II compliance (e.g., IRA rollover advice) shared that neither offering a current disclosure nor one containing "*minor edits*" would suffice. From our discussions, we generally understand that compliance with the Department's 2016 final rule required many firms to devote a large number of people, each working fulltime over an entire six-month period. Work implementing PTE 2020-02 was similarly substantive. When considering the expanded scope of

[86] We count five places in the Proposal where the Department presents estimates of "10 minutes" to perform an annual task of legal consequence under the Proposal.

[87] 88 Fed. Reg. at 75950.

[88] 88 Fed. Reg. at 75950, footnote 471.

the Proposal, some described needing to review a large library of prior requests for proposals (RFPs) to understand what a Title I plan disclosure would require of the firm. Needless to say, any <u>one</u> firm we spoke with would need to spend several times the Department's $146,*035 total industry estimate*, before beginning to draft Title I plan disclosures. We note that when a single firm's marginal estimated burden, over a mere portion of the scope of the proposed rule, overwhelms the total industry estimate as presented in the RIA (i.e., $146,035), something is meaningfully wrong with the RIA.

The Department notes that for those currently relying on PTE 2020-02, the cost burdens associated with the Proposal are "incremental" or "not unduly burdensome," yet the Department does not estimate the number of entities that are, or are not, relying on PTE 2020-02, either for Title I or Title II. Instead the Department writes, *"The entities that the Department expects to be affected by the proposed amendments to the PTE are also affected by the existing PTE 2020–02,"* and later the Department is more explicit, *"this analysis does not reflect any change in the number of entities relying on the exemption in response to these amendments."*[89] The Department has improperly restricted the scope of burdens for its Proposal.

Department Underestimates Costs of Delivering Disclosures

The Department underestimates the costs of delivering disclosures, inappropriately assuming that a very high percentage of IRA investors receive disclosures electronically, rather than by mail. The Department assumes "*94.2 percent of the disclosures sent to retirement investors would be sent electronically, and the remaining 5.8 percent would be sent by mail."*[90] This assumption rests on ERISA-covered plan safe harbors issued in 2002 and 2020 that help promote e-delivery. However, Department safe harbors alone do not determine whether a disclosure would be sent electronically or by mail. In Title I plans, the determination is a function of the safe harbor, the preference of the plan, or the preference of the participant. Outside of employer-sponsored retirement plans, the Department's safe harbors do not apply, and in conversations with members, we have learned that roughly 60 percent of IRA retirement investors receive disclosures electronically, and the remaining 40 percent would be sent by mail. Thus, it would be necessary to mail disclosures to 40 percent of investors rather than the 5.8 percent the Proposal assumes.[91]

The Department in several instances generalizes use of this 5.8 percent assumption beyond the population of retirement investors.[92] In one instance, the 5.8 percent assumption is applied to a

[89] 88 Fed. Reg. at 75949.

[90] 88 Fed. Reg. at 75949, footnote 465.

[91] The impacted population should be increased from say, "5.8" percent to up-to 40 percent of clients based on language in 88 Fed. Reg. at 75901: "*The proposal would broaden this provision by referencing securities or other investment property of the retirement investor, not just an investment through a plan or IRA."*

[92] 88 Fed. Reg. at 75949, 75951, 75955, 75959, 75960, 75968, 75969, 75972, and 75975, often in several places on each page cited.

wholly different population (e.g., authorizing fiduciaries of IRAs), generating a total estimated industry expense of nine dollars.[93] The RIA does not explain why the same assumed rate would be applied to very different populations, nor more notably, why the Department would suggest an ability to estimate costs as small as nine dollars when it seems that it cannot offer any estimate of benefits. Charging postage and mailing fees to a smaller percentage lowers the RIAs reported costs. The Department sometimes omits postage costs for these 5.8 percent, lowering costs, as presented, further.[94, 95]

The Department estimates that the costs of printing and delivering the new disclosures are *de minimus*, $18,464 across the entire industry. (Figure A.9). This number, however, is based on some highly implausible assumptions. Replacing a few of these assumptions with more plausible ones increases first-year costs associated with the delivery of retirement investor disclosures under PTE 2020-02 from $18,464 to over $24 million—over 1,300 times the cost represented in the RIA. As discussed below, only a few reasonable alternative assumptions with respect to the costs of printing and distributing new disclosures related to PTE 2020-02 are necessary to change estimated burdens here from $18,464 to $21 million.

First, the Department assumes that 5 cents will cover the full cost of producing a printed page of disclosure. This estimate ignores several costs that would be associated with preparing the document; nonetheless we leave them as the Department has them. Second, the Department seems to assume that electronic disclosures can be delivered at no cost. That is incorrect and we address this below. Third, the Department assumes that the relevant population is one-half of rollover investors. We are aware that changes to Title II Plans will require new disclosures to be sent, either by mail or electronically, to as many as *all* current IRA investors, depending on the financial services firm. According to Cerulli Associates, in 2022, there were 67.8 million IRA investors,[96] many of whom would receive new disclosures.

Disclosures, whether delivered by mail or electronically, are costly to provide. The vast majority of retirement investors hold fund shares through intermediaries, generally through omnibus accounts. In such cases, the fund has limited information about the underlying beneficial shareholders. Consequently, it depends on the intermediary to deliver communications to shareholders. Intermediaries virtually always outsource delivery of fund materials to a "fulfillment vendor," which then invoices the fund for expenses.[97] These expenses are tied to a fee schedule set by the New York Stock Exchange, and also documented under FINRA rule

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[93] 88 Fed. Reg. at 75959, footnote 549.

[94] Ibid.

[95] 88 Fed. Reg. at 75975, footnote 664, and surrounding text.

[96] 88 Fed. Reg. at 75931, footnote 300, citing Cerulli Associates, *U.S. Retirement End-Investor 2023: Personalizing the 401(k) Investor Experience*.

[97] The Investment Company Institute has a full processing fee resource center that it makes available to the public at no charge, available at https://www.ici.org/pfrc.

2251. Processing Unit Fees alone run 15 cents per account for mail and 25 cents per account for electronic delivery.[98] Moreover, the fulfillment vendor will charge the fund "preference management fees" of 10 to 16 cents (per unit) just to determine whether the investor prefers electronic or paper delivery.[99] The Department does not account for these fees.

Figure A.9 illustrates the effects on the Department cost estimates of more plausible assumptions about the number of IRAs that will require the new disclosures, as well as the unit costs of providing those. The second column uses the Department's assumptions (from the figure's first column) about the number of IRA investors who will receive disclosures and that 94.8 percent of those will be sent electronically. However, we then factor in the correct unit costs for delivering the disclosures, whether electronically or by mail, and costs rise from $18,464 to $1.2 million. The third column additionally corrects for the Department's faulty 94.2 percent assumption; in keeping with ICI member reports, it assumes that 60 percent of investors will receive disclosures electronically. The cost increases further to $2 million. The fourth column additionally gauges the sensitivity of the Department's estimate by assuming that 75 percent of the 6.4 million IRA rollovers will require disclosures. Overall, costs increase further, to almost $3 million.

Finally, we believe the Department's estimates of the number of disclosures that will be sent to IRA investors are too low, focusing only on rollovers as they do. In discussions with our members, we learned that that many firms will send a new document highlighting changes in their responsibilities to all IRA investors. Cerulli Associates estimates that there are 67.8 million IRA investors.[100] If a few large ICI members interpret a final rule as they have the Proposal, this will result in a one-time disclosure to roughly half of IRA owners. The final column offers an estimated cost for distributing new disclosures to these (34 million) IRA investors. On this basis, total costs related to distributing disclosures increase an additional $21 million.

In total, these changes increase estimated costs for disclosure for retirement investors rise to $24.1 million (Figure A.9; fourth and fifth columns). This total is included in the $40.8 million figure for "General disclosures" in Figure A.4.

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[98] See FINRA Rule 2251*: Processing and Forwarding of Proxy and Other Issuer-Related Materials*, available at https://www.finra.org/rules-guidance/rulebooks/finra-rules/2251.

[99] See FINRA Rule 2251, under (5) Preference Management Fees.

[100] 88 Fed. Reg. at 75931, footnote 300.

Figure A.9

Cost Estimates for Provision of Disclosure for Retirement Investors

PTE 2020–02: Corrections and Sensitivity Analysis to Presented Disclosure Distribution Costs

	Department's presentation[5]	ICI corrections and sensitivity analysis			
Percentage of retirement investors receiving documents electronically[1]	*94.2%*	*94.2%*	***60.0%***	*60.0%*	*60.0%*
Cost of provision of disclosures to retirement investors					
Number of IRA investors receiving disclosure[2]	3,183,503	3,183,503	3,183,503	**4,775,255**	**33,900,000**
Receiving paper disclosure	184,643	184,643	1,273,401	1,910,102	13,560,000
E-delivered disclosure	2,998,860	2,998,860	1,910,102	2,865,153	20,340,000
Cost of printing two-page paper disclosure ($0.05 per page)	$18,464	$18,464	$127,340	$191,010	$1,356,000
Cost of mailing paper disclosures (as presented)[3]					
Using DOL assumptions (at a postage rate of $0.66)	*Missing*	$121,864	$840,445	$1,260,667	$8,949,600
Using proper postage rate ($0.68)		**$125,557**	$865,913	$1,298,869	$9,220,800
Third Party charges for mail and for electronic delivery of disclosures:[4]					
Preference management (at $0.10 per disclosure)		$318,350	$318,350	$477,525	$3,390,000
Electronic delivery (at $0.25 per disclosure)	*Missing*	$749,715	$477,526	$716,288	$5,085,000
Postal delivery (at $0.15 per disclosure)		$27,696	$191,010	$286,515	$2,034,000
TOTAL COSTS OF PROVISION:	**$18,464**	**$1,239,783**	**$1,980,139**	**$2,970,208**	**$21,085,800**

[1] The Department assumes that safe harbors cover all but 5.8 percent of retirement investors. However, these safe harbors do not constitute a binding constraint because investors retain the right to receive paper disclosure. ICI members report that roughly 40 percent of investors receive paper disclosures.

[2] The Department assumes that half of the 6.4 million IRA rollovers constitutes the relevant population. We consider that assumption, and an intermediary assumption for sensitivity analysis that splits the difference between the Department's assumption and the full 6.4 million IRA rollover figure. Additionally, we understand that many firms will send a new plan document highlighting changes in their responsibilities to all IRA investors. Additionally, we understand that many firms will send a new document highlighting changes in their responsibilities to all IRA investors. Cerulli Associates estimates 67.8 million such investors.[101] If a few large members determine along the lines we heard, this will generate an additional one-time disclosure to roughly one half that population.

[3] The Department uses an incorrect postage rate in its presentation.

[4] The Department has failed to consider third party charges for distributing disclosures in its presented figures. See Letter to Brent J. Fields of January 17, 2019.[102]

[5] See Proposal at footnotes 478, 480, and 481.

Cost for Requested Written Descriptions of Policies and Procedures and Information Regarding Costs, Fees, and Compensation

As indicated above, our analysis is indicative of some of the problems we have spotted in the Department's cost estimates, rather than being a comprehensive review of cost estimates in the RIA. Our review suggests that the RIA relies on several arbitrary assumptions that cause the cost estimates to be greatly understated.

Another area where such understatements arise is with respect to costs for requested written descriptions of policies and procedures and information regarding costs, fees, and compensation.

[101] 88 Fed. Reg. at 75931, footnote 300.

[102] See Letter to Brent J. Fields of January 17, 2019, available at: https://www.sec.gov/comments/s7-13-18/s71318-4844298-177198.pdf.

Based on its assumptions, the Department estimates that these would be $1.0 million (Figure A.10, first column). However, our analysis, which uses a few plausible alternative assumptions, indicates that costs for these requested written descriptions could total at least $11.4 million (fifth column).

Beginning in the first column of Figure A.10, the Department offers $1 million in clerical costs and $8,503 in non-clerical costs. In column two, we correct for missing distribution costs, and incorrect postal rates. Non-clerical costs increase to be nine times those offered in the RIA ($77,920). In column three, we additionally correct for the Department's flawed electronic distribution assumption, and non-clerical costs increase further to $119,984.

Columns four and five of Figure A.10 introduce sensitivity analysis regarding the Department's arbitrarily small assumption that 10 retirement investors at each financial institution will request the disclosure. (Many firms have millions of retirement investors.) Increasing the number 10 to be either 50 or 100, increases the percentage of IRA investors requesting the disclosure from the RIA's less than 0.3 percent to be either 1.4 percent or 2.8 percent. These increases in demand for the disclosure envisioned by the Department increase both clerical and non-clerical costs. Across the columns of Figure A.10, clerical and non-clerical costs increase from the RIA's presented figure of $1 million to over $11 million.

In sum, correcting for errors and omissions, and restricting considered sensitivity analyses to cases where fewer than three percent of retirement investors request the written descriptions, we observe burdens that are over 11 times the Department's estimate.

Figure A.10
Cost for Requested Written Descriptions of Policies and Procedures and Information Regarding Costs, Fees, and Compensation

PTE 2020–02: Corrections and Sensitivity Analysis to Presented Disclosure Distribution Costs

	Department's presentation[4]	ICI corrections and sensitivity analysis			
Percentage of retirement investors receiving documents electronically[1]	*94.2%*	*94.2%*	***60.0%***	*60.0%*	*60.0%*
Number of financial institutions	19,290	19,290	19,290	19,290	19,290
Number of investors requesting the disclosure at each firm[2]	10	10	10	**50**	**100**
Total number of disclosures requested and sent:	192,900	192,900	192,900	964,500	1,929,000
As a percentage of IRA investors (67.8 million)	*0.3%*	*0.3%*	*0.3%*	*1.4%*	*2.8%*
Cost for 5 minutes of clerical time ($63.45 per hour) per disclosure	$5.29	$5.29	$5.29	$5.29	$5.29
Clerical costs for requested disclosures	**$1,019,959**	**$1,019,959**	**$1,019,959**	**$5,099,794**	**$10,199,588**
Cost of printing (two-pages, $0.05 per page)	$1,119	$1,119	$7,716	$38,580	$77,160
Cost of mailing:[3]					
Using DOL assumptions (at a postage rate of $0.66)	$7,384				
Using proper postage ($0.68)		**$7,608**	$52,469	$262,344	$524,688
Third party charges for mail and for electronic delivery of disclosures:[4]					
Preference management (at $0.10 per disclosure)		$19,290	$19,290	$96,450	$192,900
Electronic delivery (at $0.25 per disclosure)	*Missing*	$48,225	$28,935	$144,675	$289,350
Postal delivery (at $0.15 per disclosure)		$1,678	$11,574	$57,870	$115,740
Other distribution costs for requested disclosures	**$8,503**	**$77,920**	**$119,984**	**$599,919**	**$1,199,838**
Sum of these referenced costs	**$1,028,462**	**$1,097,879**	**$1,139,943**	**$5,699,713**	**$11,399,426**
Impact relative to baseline		*1.1 times*	*1.1 times*	*5.5 times*	*11.1 times*

[1] The Department assumes that safe harbors cover all but 5.8 percent of retirement investors, however these safe harbors are not binding, investors retain a right to receive paper disclosure. ICI members report that roughly 40 percent of investors receive paper disclosures.
[2] The Department assumes that 10 investors at each firm would request this disclosure. This yields a very low percentage of IRA investors (0.3 percent). We believe that sensitivity analysis around this percentage is warranted, and provide estimates centered around 1.4, and 2.8 percent.
[3] The Department has employed an incorrect postage rate in its presentation.
[4] The Department has failed to consider third party charges for distributing disclosures in its presented figures.[103]
[5] See Proposal at footnotes 478, 480, and 481.

In total, these changes increase estimated costs for requested written description to $11.4 million, which is included in the $40.8 million figure for "General disclosures" in Figure A.4.[104]

Costs Associated with Annual Report of Retrospective Review for Financial Institutions

As a final example of the Department understating costs, we consider costs associated with the annual report of retrospective review for financial institutions. The Department suggests that

[103] See Letter to Brent J. Fields of January 17, 2019, op cit. supra.

[104] The Department's estimated costs for "General disclosures" total $6.4 million (as seen in Figure A.4). Of this $6.4 million, the examples in figures A.9 and A.10 ICI adjusts $1 million, roughly one-sixth of the Department's total. Our estimates for these components total 35.5 million. The $40.8 million figure includes $5.4 of the Department's $6.4 million, which are not addressed through the examples ICI has provided, and so are simply carried forward. Given the magnitudes of difference in the examples we have offered (being 34 times those offered in the RIA), it should not be presumed that we in endorse the Department's work on the remaining $5.4 million.

these would total $907,585 the first year (Figure A.11, first column). This understates the true cost by at least $5 million (Figure A.11, last column, totaling $6.6 million).

The Department estimates that labor hours for small financial services will be half of those for large financial services firms (five hours for small versus 10 hours for large, regardless of where on the size distribution firms fall; Figure A.11). The Department further assumes that 10 percent of financial services firms will need to create this retrospective report, while 90 percent will update an existing reporting document. We do not address these assumptions.

Column one of Figure A.11 table offers the Department's estimate, which is $907,585 (also reported in Figure A.4). Moving to column two, adjusts wages, to be in line with wages presented in Reg BI, adjusted for inflation. We take the compliance attorney rate alone, not the blended rate for attorney. For tasks related to the Department's "Certifying officer," we take the SEC's approach of using a blended rate for compliance examiner and a compliance manager. Using these wage rates increases the overall estimated cost from $0.9 million to $1.9 million (2.1 times the Department's offered estimate).

Column three of Figure A.11 additionally adjusts numbers of personnel. For attorneys, we use our members' average estimate of five (the prudent firm scenario). For the certification work, we adjust the number of staff from one to two, to reflect the two different tasks, compliance examiner and compliance manager. Costs increase further to $6.6 million. This $6.6 million estimate is reflected in Figure A.4 under the line for "Retrospective review." In sum, holding all other assumptions constant (without agreeing to their soundness) adjustments to just these assumptions, yields estimated costs more than seven times those presented by the Department.

Figure A.11
Costs Associated with Annual Report of Retrospective Review for Financial Institutions
PTE 2020–02: Corrections and Sensitivity Analysis to Presented Disclosure Retrospective Review Costs

	Department's presentation[1]	ICI corrections and sensitivity analysis	
Total number of firms[2]	1,231	1,231	1,231
Number of large firms	271	271	271
Number of small firms	960	960	960
Legal work to produce new report (related proposing release notes: 491, 494)			
Number of lawyers	1	1	**5**
Hours to review for large firms	10	10	10
Hours to review for small firms	5	5	5
Legal wage rate	$159.34	**$438.98**	$438.98
Review cost, per firm for large firms	$1,593.40	$4,389.80	$21,949.00
Review cost, per firm for small firms	$796.70	$2,194.90	$10,974.50
Percentage doing review	10%	10%	10%
Number of affected large firms	27	27	27
Number of affected small firms	96	96	96
Subtotal	**$119,505**	**$329,235**	**$1,646,175**
Lawyer to modify existing reports (related proposing release notes: 492, 494)			
Number of lawyers	1	1	**5**
Hours to review for large firms	2	2	2
Hours to review for small firms	1	1	1
Legal wage rate	$159.34	**$438.98**	$438.98
Review cost, per firm for large firms	$318.68	$877.96	$4,389.80
Review cost, per firm for small firms	$159.34	$438.98	$2,194.90
Percentage doing review	90%	90%	90%
Number of affected large firms	244	244	244
Number of affected small firms	864	864	864
Subtotal	**$215,428**	**$593,501**	**$2,967,505**
Certifying officer to review report and certify exemption (related proposing release notes: 493, 494)			
Number of certifying officers	1	1	**2**
Hours to review for large firms	4	4	4
Hours to review for small firms	2	2	2
Certifying officer wage rate	$190.63	**$327.98**	$327.98
Review cost, per firm for large firms	$762.52	$1,311.92	$2,623.84
Review cost, per firm for small firms	$381.26	$655.96	$1,311.92
Percentage doing review	100%	100%	100%
Number of affected large firms	271	271	271
Number of affected small firms	960	960	960
Subtotal	**$572,653**	**$985,252**	**$1,970,504**
Total:	**$907,585**	**$1,907,988**	**$6,584,184**
	Impact relative to baseline	*2.1 times*	*7.3 times*

[1] 88 Fed. Reg. at 75953.
[2] Total number of firms, as offered by the Department is: 200 robo-advisers + 1,011 pension consultants + 20 underwriters.

A.5 Summary and Conclusions

It is incumbent on the Department to fully evaluate the Proposal's costs, including compliance costs, and compare them to the benefits the Proposal would engender.[105] Further, it is arbitrary for an agency to impose billions of dollars in costs—as it would here—without identifying benefits that warrant such burdens, and without explaining why less costly alternatives are not being pursued instead. Our review of the Regulatory Impact Analysis (RIA) finds that the Proposal does not meet this test.

The Department and RIA continue to view the world through the lens of a world gone by. Virtually all load funds (funds that have at least one share class that is a load share class) have one or more no-load share classes, which makes it an anachronism to try to cleanly segment "load funds" from "no-load funds." Virtually all funds, whether "load funds" or "no-load funds" (the latter defined as a fund with no load share classes) are sold through intermediaries, who can be brokers, RIAs, or both. Thus, thus concepts of "direct-sold" and "broker-sold" funds are also rather antiquated. Since 2010, a range of products — including actively-managed funds, index funds, target date funds, ETFs, CITs — have increasingly competed strenuously for retirement savers' dollars, creating robust competition and greater investor choice.

As discussed in this appendix, the RIA provides no quantified benefits relating to *this* Proposal. It does suggestively recycle benefits estimates from its 2015 Proposal and 2016 Rule, estimates that were obsolete at the time, are more obsolete now, and were marred by misimpressions about how funds work and by math errors. We can see no reason for the Department to seek to reuse these pre-2017 figures.

The Department does describe a few "non-quantified" benefits, but as we detailed in this appendix, those supposed benefits are speculative in the extreme. Moreover, one of those supposed benefits is by the Department's own admission a "transfer" that should be excluded from the analysis or offset elsewhere in the RIA because "transfers" by definition cannot provide a net benefit to society.[106]

Finally, the Department provides cost estimates that are very large, totaling about $220 million per year into the foreseeable future. However, our analysis, which assesses just a few of the assumptions the Department relies on, indicates that the costs will be vastly higher. Here, we showed that making a few modest and reasoned changes to the Department's assumptions leads to first-year cost estimates associated with PTE 2020-02 of over $2.8 billion. And, we emphasize, our analysis is limited only to first-year costs, only to PTE 2020-02, and only to <u>some</u> of the many assumptions the Department relies on.

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[105] See *Michigan v. EPA*, 576 U.S. 743, 752-53, 759 (2015).

[106] See OMB Circular No. A-4, November 9, 2023, at 57–60.